UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF

PRIDE SOLVENTS AND CHEMICAL COMPANY OF NEW YORK, INC.,

DKT. No.II-EPCRA-SUP-95-0203

Respondent

ORDER DENYING CERTIFICATION FOR APPEAL

By Letter dated December 26, 1996, the Respondent moved for certification for appeal to the Environmental Appeals Board the Order issued in this case on December 10, 1996, denying the Respondent's Motion for Extension of Time to File its Prehearing Exchange. To date, the Complainant has not responded to the motion for certification, however, such response is not required.

The motion is **DENIED,** for the reasons set forth below:

A. THE PRIOR HISTORY OF THIS CASE

This action was instituted over a year ago, on September 29, 1995, by the filing of the Complaint.

On October 4, 1995, the Respondent, through counsel, filed its Answer to the Complaint, wherein it admitted committing the violations alleged, but averred that the violations were committed inadvertently and the penalty sought for the violations ($75,000) was "excessive, unreasonable, arbitrary and capricious." The Respondent requested a hearing to contest the appropriateness of the penalty.

Unfortunately, due to the large caseload, a year passed before a Notice and order for Prehearing exchange was issued. [1] That Order, issued on September 27, 1996, directed both parties to make their prehearing exchange on or before November 15, 1996, and instructed that such exchange shall include the

identification of witnesses and copies of all documents and exhibits intended to be introduced into evidence.[2]

The Complainant filed its exchange in a timely manner. The Respondent, however, did not. Rather, by Letter dated November 21, 1996, that is, six (6) days after the prehearing exchange was due, the Respondent moved for an extension of time for filing its prehearing exchange. The Respondent's stated rationale for the extension was to give it an opportunity to acquire from the Complainant records related to the penalties imposed upon others in other cases, records Respondent first requested from the Complainant on November 15, 1996, the day on which the prehearing exchange had been scheduled to occur.

By Order dated December 10, 1996, the Respondent's Motion for Extension was denied. The primary basis for the denial was that the Respondent had not acted in a timely manner in filing its request either for the records or for an extension of time. It was clear from the Answer the Respondent filed in October 1995, that the only issue in this case was the amount of the penalty to be imposed. Nevertheless, the Respondent took no action to obtain from the Complainant records it now characterizes as critical to its defense until November 1996, a year after it filed its Answer and, in fact, not until the very day that its prehearing exchange was due. Moreover, Respondent did not file its request for an extension until after the deadline for filing its prehearing exchange in violation of Rule 22.07(b) of the EPA Rules of Practice (40 C.F.R. §22.07(b)).

The Order denying the Respondent's Motion for Extension also noted that the records which the Respondent sought were not documents which were material to this case nor were they likely to lead to material or admissible evidence. The Respondent requested that the Complainant provide it with copies of all consent orders and copies of fines or penalties levied against all types of respondents during 1993-96 for violations of a number of environmental statutes including, among many others, EPCRA, the one statute at issue here. In The Matter of Briggs Stratton Corp., TSCA Appeal No. 81-1, 1 E.A.D. 653, 665-66 (CJO, 1981) indicated that the fines and/or penalties imposed upon others, in other myriad factual circumstances, are generally not material to the outcome in other proceedings. [3]

By Letter dated December 26, 1996, the Respondent requested that the Order dated December 10, 1996, denying the Motion for Extension, be certified for appeal to the Environmental Appeals Board. [4]

B. STANDARDS FOR CERTIFICATION

Section 22.29 of EPA's Rules of Practice (40 C.F.R. §22.29) sets forth the standards for appeals from or review of interlocutory orders or rulings. Subsection (a) provides that, except in certain limited circumstances not relevant here, "[a]ppeals from other orders or rulings shall lie only if the Presiding Officer or Regional Administrator, as appropriate, upon motion of a party, certifies such orders or rulings to the Environmental Appeals Board on appeal."

Subsection (b) of §22.29 provides as follows:

The Presiding Officer may certify any ruling for appeal to the Environmental Appeals Board when (1) the order or ruling involves an important question of law or policy concerning which there is substantial grounds for difference of opinion, and (2) either (i) an immediate appeal from the order or ruling will materially advance the ultimate termination of the proceeding, or (ii) review after the final order is issued will be inadequate or ineffective.

40 C.F.R. §22.29(b).

C. THE ORDER AT ISSUE DOES NOT MEET THE CERTIFICATION CRITERIA

Respondent's argument as to why this matter meets the criteria for certification is not well founded. Respondent states that "the order runs contrary to the important public policy of encouraging the efficient resolution of disputes by letting adversaries cooperate among themselves, especially in matters concerning discovery." Admittedly, it is the explicit policy of the Agency to encourage settlements and for the parties to confer and cooperate towards this end. See, Rule 22.18(a). However, the rules also mandate that the Presiding Officer "shall . . . avoid delay" in proceedings. See, 22.04(c). As indicated above, the Respondent had over a year to seek and obtain from the Complainant any and all records it deemed pertinent to its defense prior to the prehearing exchange deadline. It chose not to act in an expeditious manner to obtain such records. It had time before the filing deadline for the prehearing exchange to request additional time, it also chose not to act in a timely manner to request such leave, in violation of Rule 22.07(b). Now, Respondent complains that the Order denying it further time is contrary to a policy of "efficient resolution of disputes." It is the very opposite which is obviously true, the Order is implementing the policy of efficient resolution by penalizing those who are unjustifiably dilatory in seeking out the cooperation

of opposing parties or leave from the Presiding Judge. Thus, in fact, the Order does not involve an important question of law or policy concerning which there is "substantial grounds for difference of opinion."

Further, the Respondent argues that the appeal will materially advance the ultimate termination of the proceeding, and review after the final order will be inadequate because the order will create a "strong ground" for appeal by requiring the hearing to proceed without the Respondent being adequately able to present its defense to the penalty. Notably absent from the Respondent's argument in this regard is any authority supporting the proposition that the denial of the extension would constitute an abuse of discretion or error of law and thus, create a basis for appeal. Nor does the Respondent cite any authority for the proposition that the records it seeks would be material and, in fact, so material that it would be an abuse of discretion or error of law to not allow it leave to obtain the records despite its unexplained delay in seeking them. [5] Rather, the record seems to clearly evidence that, to whatever extent the Respondent is prevented from presenting its defense, results from its own actions or lack thereof.

Thus, in sum, the issue addressed in the Order denying the Motion for Extension of Time does not constitute an "important question of law or policy concerning which there is a substantial grounds for difference of opinion." There is also no evidence that an immediate appeal from the order or ruling will materially advance the ultimate termination of the proceeding or review after the final order is issued will be inadequate or ineffective. Therefore, the motion for certification is denied.

Susan L. Biro
Administrative Law Judge

Dated: January 3, 1996
Washington, D.C.

IN THE MATTER OF PRIDE SOLVENTS AND CHEMICAL CO. OF NEWYORK, INC.

Respondent

Doctat No. II-EPCRA-SUP-95-0203

CERTIFICATE OF SERVICE

I certify that the foregoing Order Denying Certification for Appeal, dated January 3, 1997, was sent in the following manner to the addressees listed below:

Original by Pouch Mail to:

Karen Maples
Regional Hearing Clerk
U.S. EPA, Region II
290 Broadway
New York, NY 10007-1866

Copy by Certified Mail, Return Receipt Requested to:

Counsel for Complainant:

Elizabeth L. Davis, Esquire
Assistant Regional Counsel
U.S. EPA, Region II
290 Broadway
New York, NY 10007

Counsel for Respondent:

Robert G. Del Gadio, Esquire
EAB Plaza
West Tower, 12th Floor
Uniondale, NY 11556-0150

Aurora M. Jennings
Legal Staff Assistant
Office of Administrative Law Judges
Environmental Protection Agency

Dated: January 3, 1997
Washingto, D.C.

[1] In the interim, however, the Chief Judge encouraged the parties to proceed and engage in settlement discussions. See, Letter dated February 15, 1996.

[2] That Order was issued by Judge Hoya. This case was subsequently redesignated to the undersigned Presiding Officer on December 4, 1996.

[3] In The Matter of Briggs & Stratton Corp. , TSCA Appeal No. 81-1, 1 E.A.D. 653, 665-66 (CJO, 1981), was litigated prior to the final issuance of TSCA Policy Guidelines for the Assessment of Civil Penalties, one purpose of which was to implement EPA' s policy favoring uniform penalties for like violations. Therefore, the Respondent in Briggs & Stratton relied upon the penalties proposed and assessed upon others to argue that the penalty imposed upon it was inconsistent with EPA's policy of uniformity. Despite the absence of the Guidelines, the Environmental Appeals Board upheld the trial court's rejection of this argument noting, in particular, that the penalty to be assessed by a presiding officer after a hearing cannot be reasonably compared to penalties imposed pursuant to consent decrees, which involve an element of compromise. Id. at 666. The statute involved in the case at bar, EPCPA, has Policy Guidelines in effect. The EPA has alleged that it has assessed the penalty within the framework of those Guidelines. Therefore, it is unclear what use the Respondent could make of the discovery material requested from the EPA. In any event, it is noted that the Complainant was not the sole source of the information Respondent sought regarding the penalties imposed upon others. The decisions of Presiding Officers after hearings and consent decrees were quickly and easily accessible to the Respondent through other sources, for example, the electronic research aid of Lexis.

[4] Respondent alleges that its motion for certification was timely filed, although the record does not document this. Section 22.29 of EPA's Rules of Practice (40 C.F.R. §22.29) provides that requests for certification shall be filed "within six (6) days of notice of the ruling or service of the order . . . " The Order dated December 10, 1996 was served on that date. Allowing six (6) days for filing the motion for certification, plus five (5) extra days for mailing, as well as (2) two more days to account for the deadline falling on a Saturday (as provided for by §22.07(c)), would indicate that the Respondent's motion would be timely only if it were filed by December 23, 1996. The Respondent alleges that it "filed" its motion with the Regional Administrator on that date but, inadvertently, did not send the motion to the Presiding Judge until three days later. In light of the fact that the Respondent is represented by counsel, and that this case has been pending for over a year, and that the Consolidated Rules (Rule 22.05) and Notice and Order for Prehearing Exchange both make it clear that pleadings are to be sent to the Presiding Officer, and that the Respondent previously filed other pleadings with the Presiding officer including the motion for extension at issue here, the failure to send the

motion to the Presiding Judge within the time frame provided is difficult to excuse.

[5] See, Footnote 3 above. Furthermore, obviously, since the Complainant seeks in this case the maximum penalty possible for each violation, the discovery material is likely to show that in other cases, under other factual and legal circumstances, the Complainant settled the matters for less than that sought in this case. However, this fact, assuming, arguendo, that it is relevant and material, could still be offered into evidence though a stipulation or in response to a question on cross-examination put to the Complainant's witnesses who will testify regarding the proposed penalty.