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ENVIR. APPEALS BOARD

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6
7 UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
8 BEFORE THE ENVIRONMENTAL APPEALS BOARD
9

ORIGINAL

10 In the Matter of:)
11 Liston Brick Company of Corona)
3710 Temescal Canyon Road)
12 Corona, California 92882)
13 Respondent.)
14

Docket No. CAA-09-2005-0018

**RESPONDENT'S APPEAL OF THE
INITIAL DECISION OF THE
PRESIDING OFFICER**

15
16 **TO ALL PARTIES AND THEIR COUNSEL:**

17 Now comes Respondent, Liston Brick Company of Corona and submits the following
18 brief in support of his appeal of the initial decision of the presiding officer.
19

20 Respectfully Submitted,

21 
22 _____
23 Brendan W. Brandt
of VARNER & BRANDT, LLP
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1 **I. ISSUE PRESENTED FOR REVIEW**

2 Whether the Presiding Officer's factual determination that Respondent Liston Brick
3 Company of Corona's ("Respondent" or "Liston") net worth exceeds \$1,000,000.00 is supported
4 by a preponderance of the evidence.

5 **II. NATURE OF THE CASE**

6 This appeal is brought because there is insufficient evidence to support the Presiding
7 Officer's determination that Respondent's net worth exceeds \$1 million. The Initial Decision
8 makes clear that the Presiding Officer relied on sale agreements, which were never admitted into
9 evidence, in determining Respondent's net worth. This reliance is improper and in contravention
10 of long-established policy that decisions and judgments must be based on evidence admitted.
11 Without the admission of the sale agreements referenced above, the Environmental Protection
12 Agency ("EPA") cannot establish by a preponderance of the evidence that Respondent's net
13 worth exceeds \$100,000, let alone \$1,000,000.

14 The Presiding Officer found Respondent liable for violations Sections 112 and 114 of the
15 Clean Air Act ("CAA"), 42 U.S.C. §§ 7412 and 7414, and its implementing regulations found at
16 of 40 C.F.R. Part 63, Subpart RRR, §§ 63.1500-63.1520, in the amount of \$116,402.00.
17 Specifically, the Presiding Officer found that Respondent failed to: (1) submit a site-specific
18 performance test plan, (2) conduct an initial performance test, (3) submit a complete response to
19 EPA's request for information, and (4) respond to EPA's information request in violation of CAA
20 §114. Transcript ("Tr.") at 21-22. As a result of these findings, a component of Respondent's
21 penalty was assessed based on Respondent's net worth. Tr. at 46-48. This component, which is a
22 subpart of the gravity calculation of the assessed penalty, is referred to as the "size of violator".

23 Respondent contests the portion of the penalty assessed in the Presiding Officer's Initial
24 Decision issued December 18, 2007 ("Initial Decision") relating to the size of the violator. Initial
25 Decision at 37-40. The Presiding Officer assessed \$10,000 against Respondent under the size of
26 violator component, because she found that Respondent has a net worth in excess of \$1 million.
27 Tr. at 47. While an assessment of \$10,000 is appropriate when a corporation has a net worth in
28

1 excess of \$1 million according to the Stationary Source Civil Penalty Policy¹, Respondent
2 disputes the adequacy of the evidence cited to support a finding that Respondent's net worth
3 exceeds \$1 million.

4 In finding Respondent's net worth to be in excess of \$1 million, the Presiding Officer
5 relied on the following facts:

- 6 (1) Mr. Brock's \$1.2 million estimate of Respondent's net worth based on 10% of a
7 sales figure contained in a Dunn & Bradstreet report;
- 8 (2) The Riverside County Transportation Commission ("RCTC") has offered
9 Respondent \$8,240,530 for a portion of Respondent's real property;
- 10 (3) The RCTC offer is subject to a withholding for environmental remediation not to
11 exceed \$3 million;
- 12 (4) The Purchase and Sale Agreement between RCTC and Respondent "shows" that
13 the value of Respondent's property is at least several million dollars;
- 14 (5) Respondent claims that its property is subject to mortgages in the approximate
15 amount of \$4.5 million;
- 16 (6) Respondent had been given up to \$175,000.00 by RCTC to perform demolition
17 services on Respondent's property; and
- 18 (7) Respondent is defending an eminent domain action brought by the City of Corona.

19 See Initial Decision at 46-48.

20 In response, Respondent points out the following:

- 21 (1) The Presiding Officer found that Mr. Brock's \$1.2 million net worth estimate did
22 not "in itself, adequately establish Liston's net worth to exceed \$1 million." Initial
23 Decision at 46, 47.
- 24 (2) Mr. Hall asserted, on cross-examination, that RCTC's \$8,240,530 offer was
25 "nullified and void". Tr. at 551.

27 ¹In determining the appropriateness of a proposed penalty, an administrative law judge
28 is obligated to consider EPA's penalty policy and, if departing from it, to explain the reasons
for that action. *Landfill, Inc.*, RCRA Appeal No. 86-8, 3 E.A.D. 461 at 470 (EAB, Nov. 30,
1990). In this instance, the Presiding Officer does not depart from the penalty policy.

- 1 (3) Mr. Hall, the sole witness questioned about the RCTC \$3 million withholding,
2 which is purportedly contained in an amendment to the Purchase and Sale
3 Agreement, had never seen the amendment to the Purchase and Sale Agreement.
4 Tr. at 554.
- 5 (4) The Purchase and Sale Agreement between RCTC and Respondent cannot show
6 that the value of Respondent's property is at least several million dollars, because
7 the Purchase and Sale Agreement was never admitted into evidence. Tr. at 616-
8 17.
- 9 (5) The amount of any mortgages against Respondent's property reduces
10 Respondent's net worth. Mortgages are not evidence of net worth.
- 11 (6) A transfer of funds from RCTC to Respondent in the amount of \$175,000 for
12 demolition work does not add to Respondent's net worth.
- 13 (7) No evidence of the monetary value of the eminent domain action brought by the
14 City of Corona entered the evidentiary record.

15 Based on the above seven facts, EPA has failed to meet its evidentiary burden that by a
16 preponderance of the evidence Respondent has a net worth in excess of \$1 million. Rather, the
17 evidence fails to demonstrate any net worth of Respondent. Accordingly, Respondent requests
18 that the Environmental Appeals Board ("EAB") reduce the size of violator penalty to the lowest
19 permissible amount under the Penalty Policy, or \$2,000.00. Alternatively, should EAB find that
20 there is sufficient evidence to establish Respondent's net worth in excess of \$100,000 but less
21 than \$1,000,001, Respondent requests that EAB reduce the size of violator penalty to \$5,000,
22 according to the Penalty Policy. Respondent further requests that the size of violator penalty be
23 subject to the appropriate inflationary adjustment amount, as outlined in the proposed alternative
24 findings of fact and law below.

25 **III. STANDARD OF REVIEW**

26 The EAB generally reviews both the factual and legal conclusions of the Presiding Officer
27 *de novo*. 40 C.F.R. § 22.30(f) (The EAB has authority to "adopt, modify, or set aside the findings
28 of fact and conclusions of law or discretion contained in the decision or order being reviewed");

1 *In re Billy Yee*, TSCA Appeal No. 00-2, slip op. at 13 (EAB, May 29, 2001), 10 E.A.D. ___. On
2 appeal from or review of the initial decision, the agency has all the power which it would have in
3 making the initial decision except that it may limit the issues on notice or by rule. Administrative
4 Procedures Act, 5 U.S.C. § 557(b). The EAB will generally give deference to findings of fact
5 based on the testimony of witnesses. *In re Echevarria*, 5 E.A.D. 626, 638 (EAB 1994).

6 A party's right to appeal to the Environmental Appeals Board ("EAB") is "limited to those issues
7 raised during the course of the proceeding and by the Initial Decision, and to issues concerning
8 subject matter jurisdiction." 40 C.F.R. § 22.30(c). This appeal specifically addresses an issue
9 raised during the course of the proceeding and by the Initial Decision.

10 "Preponderance of the evidence" standard is established by 40 C.F.R. § 22.24(b) and is
11 applied by the EAB. See *In re The Bullen Companies, Inc.*, 9 E.A.D. 620, 632 (EAB, Feb. 1,
12 2001). The EAB has stated that the "preponderance of the evidence" standard requires that "a
13 fact finder should believe that his factual conclusion is more likely than not." *In re Ocean State
14 Asbestos Removal, Inc.*, 7 E.A.D. 522, 530 (EAB 1998).

15 **IV. ARGUMENT**

16 A. There is insufficient evidence to support the size of violator portion of the penalty 17 assessment.

18 There is insufficient evidence in the record to justify a size of violator penalty of
19 \$10,000.00. According to EPA's Stationary Source Civil Penalty Policy, a size of violator
20 penalty of \$10,000.00 is appropriate when the net worth of a corporation is at least
21 \$1,000,000.00. Stationary Source Civil Penalty Policy at 14. The Presiding Officer observed that
22 the evidence presented regarding Liston's net worth consisted of: (1) John Brock's testimony and
23 (2) a Dunn & Bradstreet Report. Initial Decision at 46. Mr. Brock testified that he derived
24 Liston's net worth by taking 10% of its sales (as indicated in the Dunn & Bradstreet report) for a
25 value of \$1.2 million. Tr. at 332-33. The Presiding Officer noted that Mr. Brock's estimate did
26 not "in itself, adequately establish Liston's net worth to exceed \$1 million." Initial Decision at
27 46, 47.

28 The only other evidence the Presiding Officer cites to support her finding of a \$10,000

1 size of violator penalty stems from the cross examination of Craig Hall. However, this testimony
2 is far from clear cut as to the value of Liston Brick. *See* Tr. at 547-555. At no point does Mr.
3 Hall state that Liston is worth over \$1 million. In fact, Mr. Hall spends much of his time
4 discussing the tenuous nature of the sale agreement he has with RCTC, and the significant
5 liabilities tied to Respondent's land and for which it is responsible. *Id.* Mr. Hall testifies that
6 Respondent's real property is subject to mortgages, a substantial environmental withholding, and
7 that the Purchase and Sale Agreement was "nullified and void." *Id.* at 547-555, 622. He never
8 provided a precise value for Respondent's real property. *Id.* at 547-555. Therefore, neither Mr.
9 Brock's testimony, the Dunn & Bradstreet Report, nor Mr. Hall's testimony supports the
10 purported net worth of Respondent.

11 By process of elimination, it appears that the Presiding Officer relied on the Purchase and
12 Sale Agreement in order to support her finding that Respondent's net worth exceeds \$1 million.
13 Since the Purchase and Sale Agreement was never admitted into evidence, the finding that
14 Respondent's net worth exceeds \$1 million lacks support in the evidentiary record.

15 The text of the Initial Decision supports the proposition that the Presiding Officer
16 improperly relied on the Purchase and Sale Agreement. Judge Gunning states:

17 Although the record before me does not reflect that the purchase of Liston's property by
18 the RCTC has been finalized, the Purchase and Sale Agreement shows that the value of
the property is at least several million dollars. Initial Decision at 47.

19 There is no citation in the Initial Decision to support the assertion that the "Purchase and
20 Sale Agreement shows" a value of at least several million dollars. On its face, the claim that the
21 agreement shows a certain value appears to be based on the language of the agreement itself.
22 However, consideration of the language of the Purchase and Sale Agreement is improper. The
23 parties expressly stipulated that the agreement never entered into evidence. *See* Tr. at 616-17.

24 The Initial Decision indicates that without consideration of the Purchase and Sale
25 Agreement, there is insufficient evidence to support a \$10,000 size of violator penalty. Because
26 consideration of the Purchase and Sale Agreement is improper, Respondent should be fined in a
27 lesser amount for the size of violator portion of the penalty calculation.

28 ///

1 B. The line of questioning pertaining to the Purchase and Sale Agreement was
2 permitted for purposes of attacking and rehabilitating Mr. Hall's credibility, not as
3 substantive evidence of the value of Respondent's property.

4 Complainant and Respondent never intended the Purchase and Sale Agreement (and its
5 amendments) to constitute substantive evidence of Liston's net worth. In fact, Judge Gunning
6 directly asked counsel for Complainant and Respondent if they would stipulate to the
7 admissibility of the agreement:

8 JUDGE GUNNING: Quite frankly, this would have been very helpful if it had been
9 introduced as an exhibit by either of the parties. But it's not in the
10 record, unless the parties want to stipulate that the document comes
11 in, and if they choose not to, it stays out.

12 MR. REICH: Your Honor, the Government won't stipulate, and the reason is we
13 have been trying to get information like this, and I had to eventually
14 go through great lengths just to be able to find this out, and I think
15 we're not – you know, at this point we have the document in, and
16 we make our objections, and next time, you know, if they're going
17 to talk about assets and things like that, they should put that on
18 their exhibit list and have witnesses.

19 MR. CURTISS: Your honor, we will not stipulate to the admissibility of this
20 evidence.

21 JUDGE GUNNING: Okay. Tr. at 616, 617.

22 At the time EPA initially introduced the Purchase and Sale Agreement at trial, EPA
23 contended that it was for purposes of attacking the credibility of Mr. Hall. Tr. at 549, 550.
24 Specifically, EPA wanted to show that Mr. Hall's assertion that he was "flat broke" was untrue,
25 thereby casting doubt on the veracity of his testimony. Tr. at 515. The Purchase and Sale
26 Agreement was used as a tool for cross-examination, but it was never admitted into evidence.

27 Mr. Reich stated for the record his intent in using the Purchase and Sale Agreement:

28 MR. CURTISS: Objection. This document was not included in the pre-hearing
exchange.

JUDGE GUNNING: Okay. EPA?

MR. REICH: Your honor, we are not seeking to introduce this exhibit into
evidence. We are seeking to use it for cross examination purposes
only, and I think that it goes to the credibility of the witness.

JUDGE GUNNING: Okay. On that basis, I will overrule Respondent's objection, and
witness, please answer the question, which, if counsel would be
kind enough to restate. Tr. at 549-550.

1 In addition, for the same reason, the Amendment to Purchase and Sale Agreement and
2 Joint Escrow Instructions was never entered into evidence.

3 MR. CURTISS: I was just reviewing the document; sorry. I was going to make the
4 same objection.

5 JUDGE GUNNING: Okay. The same objection, continuing objection is noted for the
6 record.

7 MR. REICH: And that objection was it was not on the exhibit list?
8

9 MR. CURTISS: Yes.

10 JUDGE GUNNING: Okay.

11 MR. REICH: And this is being used for cross-examination.

12 JUDGE GUNNING: Okay. And the objection is – remains overruled for the same
13 reason. Tr. at 552-53.

14 A further basis for the exclusion of the Purchase and Sale Agreement (as amended) exists:
15 EPA failed to include the agreement in their pre-hearing exchange. According to 40 C.F.R.
16 22.22(a)(1):

17 If, however, a party fails to provide any document, exhibit, witness name or summary of
18 expected testimony required to be exchanged under § 22.19 (a), (e) or (f) to all parties at
19 least 15 days before the hearing date, the Presiding Officer shall not admit the document,
20 exhibit or testimony into evidence, unless the non-exchanging party had good cause for
21 failing to exchange the required information and provided the required information to all
22 other parties as soon as it had control of the information, or had good cause for not doing
23 so.

24 Here, Respondent objected to the use of the Purchase and Sale Agreement, as amended,
25 according to 40 C.F.R. 22.22(a)(1). Tr. at 552-53. In response, EPA did not attempt to make a
26 showing of good cause as to why the Purchase and Sale Agreement (as amended) was not
27 included in the pre-hearing exchange. *Id.* Judge Gunning allowed questioning concerning the
28 agreement for purposes of attacking Mr. Hall's credibility on cross-examination. She did not,
29 however, require a showing of good cause for EPA's non-inclusion of the agreement in the pre-
30 hearing exchange. Therefore, according to 40 C.F.R. section 22.22(a)(1), and for the reasons
31 stated above, the agreement cannot be treated as evidence.

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1 C. Judge Gunning's remaining observations of Liston's net worth do not amount to
2 over \$1 million.

3 Besides John Brock's testimony and the Dunn & Bradstreet Report, the Initial Decision
4 erroneously relies on various aspects of Mr. Hall's testimony to support a \$10,000 size of violator
5 claim. First, the Initial Decision notes that RCTC transferred \$175,000 to Respondent in order to
6 pay for demolition work. Initial Decision at 46-48. A reasonable inference concerning this
7 transfer is that the great majority, if not all of it, was spent on the demolition process. Therefore,
8 Respondent would have realized little to no gain in net worth as a result of the transfer. There is
9 simply no testimony on this point. Without this testimony, it is not possible to determine the
10 financial benefit to Respondent, if any, as a result of the transfer.

11 Second, the Initial Decision notes that Respondent is defending an eminent domain action
12 brought by the City of Corona. Initial Decision at 48; Tr. at 612. However, there is no testimony
13 concerning the potential value of the eminent domain suit. Without this essential information, it
14 is not possible to assign a value to Respondent's property.

15 Third, the Initial Decision states that the Purchase and Sale Agreement has not been fully
16 performed. Indeed, Mr. Hall testified extensively about the contingent nature of the agreement,
17 and the potential for it to fail to close. Tr. 547-555; 601-622. Therefore, even if the dearth of
18 testimony on the value of Respondent's property is credited, this must be tempered by the fact
19 that no actual sale has been completed.

20 Fourth, Mr. Hall does not testify about RCTC's withholding for environmental
21 remediation. In response to a question by Mr. Reich attempting to refresh Mr. Hall's recollection
22 concerning the clean up on Respondent's property, Mr. Hall states:

23 Well, first of all, this document that you're referring to, which I don't have a problem with
24 it, but I never seen it. When I went there, the day, to the attorney's office, this wasn't
25 completed, and I was in town, so I was just explained that this was coming forth to sign.
So that's what I did. Tr. at 554.

26 Mr. Reich's question includes information about a potential \$3 million withholding, however,
27 Mr. Hall neither testifies about the existence of the withholding, nor is he familiar with the
28 document in which the withholding is purportedly contained. *Id.* Based on these facts, there is

1 an insufficient basis to use the withholding as evidence of Respondent's net worth. Furthermore,
2 even if evidence of the value of a withholding is credited, evidence of the value of that
3 withholding does not necessarily imply a given net worth.

4 Fifth, there is no testimony about the value of Respondent's property which can accurately
5 reflect its value. Mr. Hall testifies that the \$8,240,530 value is no longer good. Tr. at 551. There
6 is no other testimony which sheds light on the property's value, apart from Mr. Hall noting that
7 the property is subject to approximately \$4.5 million in encumbrances. Initial Decision at 47.
8 However, as is the case with withholdings, the value of encumbrances against a property does
9 not necessarily imply a given net worth.

10 Based on the foregoing, EPA has failed to demonstrate by a preponderance of the
11 evidence that Respondent's property value exceeds \$1 million. Accordingly, Respondent
12 requests that the assessed penalty for the size of violator component be reduced to \$2,000.00.

13 **V. CONCLUSION**

14 The Initial Decision improperly relies on a Purchase and Sale Agreement, as amended,
15 which was never admitted into evidence. The factual conclusion that Respondent's net worth
16 exceeds \$1 million cannot be derived from any other evidentiary source.

17 Respondent contends that EPA has failed to demonstrate Respondent's net worth in
18 excess of \$100,000.00, and therefore requests a size of violator penalty in the amount of \$2,000,
19 according to EPA's Penalty Policy. Alternatively, Respondent requests a size of violator penalty
20 in the amount of \$5,000, should EAB determine that Respondent's net worth is in excess of
21 \$100,000, but less than \$1,000,001.

22 The Initial Decision imposed an inflationary adjustment on the size of violator penalty in
23 the amount of \$1,121.70, for a total size of violator penalty of \$11,121.70. Initial Decision at 52-
24 53. Should EAB determine that the size of violator penalty is assessed at \$2,000, Respondent
25 requests an inflationary adjustment in the amount of \$224.34, for a total size of violator penalty
26 of \$2,224.34.² Alternatively, should EAB determine that the size of violator penalty is assessed

27 _____
28 ²According to the methodology outlined in the Initial Decision on pp. 52-53: $\$2,000 * .93578 * 10\% = \187.156 ; $\$2,000 * .06422 * 28.95\% = \37.18338 ; for a total of
 $\$2,224.34$.

1 at \$5,000, Respondent requests an inflationary adjustment in the amount of \$560.85, for a total
2 size of violator penalty of \$5,560.85.³ These inflationary adjustments are based on the
3 methodology the Presiding Officer applied in the Initial Decision. Initial Decision at 52-53.

4 **VI. ALTERNATIVE FINDINGS OF FACT**

5 In addition to those findings of fact contained in the Initial Decision:

- 6 1. Respondent's net worth is less than \$100,000.00. Therefore, Respondent's size of
7 violator penalty is \$2,000.00. With the inclusion of inflationary adjustments,
8 Respondent's size of violator penalty is \$2,224.34.

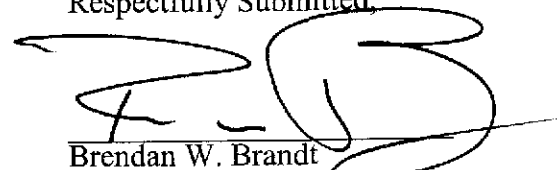
9 **VII. ALTERNATIVE CONCLUSIONS OF LAW**

10 In addition to those conclusions of law contained in the Initial Decision:

- 11 1. Respondent is assessed a civil administrative penalty in the amount of \$107,504.64.

12 Executed this 15th day of February, 2008.

Respectfully Submitted,



Brendan W. Brandt
of VARNER & BRANDT, LLP

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28 ³According to the methodology outlined in the Initial Decision on pp. 52-53: $\$5,000 * .93578 * 10\% = \467.89 ; $\$5,000 * .06422 * 28.95\% = \92.95845 ; for a total of \$5,560.85.

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CERTIFICATE OF SERVICE

I hereby certify that the original and copy of the foregoing **RESPONDENT'S APPEAL OF THE INITIAL DECISION OF THE PRESIDING OFFICER** was mailed via Federal Express Priority Mail to the Environmental Appeals Board pursuant to 40 C.F.R. § 22.30 and that copy(ies) of the same was sent via Federal Express Priority Overnight to:

Clerk of the Board, Environmental Appeals Board **ORIGINAL + 5 copies**
United States Environmental Protection Agency
1341 G. Street, N.W., Suite 600
Washington, D.C. 20005

Environmental Protection Agency **1 copy**
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Date: February 15, 2008



Olivia Banke