UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN THE MATTER OF:	)	
	)	**DOCKET NO. TSCA-05-2009-0004**
	)	
Kathryn Y. Lewis-Campbell	)	
Springfield, Ohio	)	
	)	
	)	
U.S. EPA ID #: OHD 106 483 522	)	
	)	
Respondent	)	
	)	

MOTION FOR PARTIAL ACCELERATED DECISION

Pursuant to 40 C.F.R. § 22.20, the Administrator's Delegated Complainant hereby moves that the Presiding Officer in this matter enter a finding that Respondent has waived any claim that she is unable to pay the penalty amount proposed for the violations she is alleged to have committed in the Complaint and Compliance Order, filed in this matter on February 9, 2009. A Memorandum in Support of a Partial Accelerated Decisions accompanies this Motion and sets forth reasons in support of the Motion.

Respectfully submitted,

Richard R. Wagner
Senior Attorney and Counsel for
The Adminsitrator's Delegated Complainant

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MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL ACCELERATED DECISION ON RESPONDENT'S ABILITY TO PAY PENALTY

Pursuant to 40 C.F.R. § 22.20, the Administrator's Delegated Complainant has moved that the Presiding Officer in this matter enter a finding that Respondent has waived any claim that it otherwise may have that it is unable to pay the penalty amount proposed for the violations it is alleged to have committed in the Complaint, filed in this matter on February 9, 2009. Given the pleadings in the Complaint and the Answer filed by Respondent, entry of such a finding in an accelerated decision order in this matter is warranted under governing law.

As alleged in the Complaint, this matter is brought pursuant to Section 16(a) of the Toxics Substances Control Act (TSCA), 15 U.S.C. § 2615(a), and 42 U.S.C. § 4852d(b)(5), by which Congress exclusively authorizes the Administrator to assess a civil penalty of up to $11,000 per day against [a]ny person who violates a provision of section 2689 of [TSCA].[1] Section 409 of TSCA, 15 U.S.C. § 2689, provides that "it shall be unlawful for any person to fail or refuse to

[1]Complaint, at 10-11.

comply with a provision of [Subchapter IV (Lead Exposure Reduction) of TSCA, 15 U.S.C. § 2681 et al.], or with any rule or order issued under this subchapter."

GOVERNING LAW

In Section 16(a)(2)(B) of TSCA, 15 U.S.C. § 2615(a)(2)(B), Congress provides that

> in determining the amount of a civil penalty, the Administrator shall take into account the nature, circumstances, extent, and gravity of the violations or violations and, with respect to the violator, ability to pay, effect on ability to continue to do business, any history or prior such violations, the degree of culpability, and such other matters as justice may require.

In reversing an initial decision of a Presiding Officer, the Environmental Appeals Board ("the Board") addressed the issue of "ability to pay" in the Administrator's civil penalty assessment process. In the published decision of the Administrator, the Board held that, to fulfill the Administrator's obligation to "take into account" the statutory penalty criteria "ability to pay" in a specific case, when her enforcement staff issues a complaint under her authority, "a respondent's ability to pay may be *presumed*[,]" and that that presumption can continue until the respondent's "ability to pay" the proposed penalty "is put at issue by a respondent."[2] As under the Administrator's Rules a respondent is required in his answer to include his "basis for opposing any proposed relief," and any hearing requested is to be "upon the issues raised by the complaint and answer,"[3] if the respondent would claim he has an "inability to pay" the proposed penalty, he must raise the issue in his answer.[4] The Board further held that, where the respondent does raise such a claim, the Administrator's delegated complainant "must be given access to the

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[2]In Re New Waterbury, 5 E.A.D. 529, at 541 (1994) (emphasis in original).

[3]40 C.F.R. § 22.15.

[4]In Re New Waterbury, 5 E.A.D. at 542.

respondent's financial records before the start of [any] hearing."[5] If the respondent does not "raise its ability to pay as an issue in its answer," or if, after having raised the claim, it "fails to produce any evidence to support an inability to pay claim after being apprised of that obligation during the pre-hearing process," it may be concluded that "any objection to the penalty based upon ability to pay has been waived under the Agency's procedural rules."[6]

As the New Waterbury decision is a published decision of the Administrator, the holding of that decision regarding the issue of a respondent's "ability to pay" the penalty amount proposed is the law governing this matter.[7]

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[5]Id.

[6]Id.

[7]In Section 556(c) of the Administrative Procedure Act (the APA), Congress provides that, in the federal administrative process, decisionmaking of presiding officers is "[s]ubject to the published rules of the agency and within its powers[.]" 5 U.S.C. § 556(c). Addressing Section 556(c) of the APA, and citing legislative history, the Attorney General of the United States has stated that "[t]he phrase 'subject to the published rules of the agency' is intended to make clear the authority of the agency to lay down policies and procedural rules which will govern the exercise of such powers by presiding officers." Tom C. Clark, Attorney General, U.S. Department of Justice, Attorney General's Manual on the Administrative Procedure Act, at 75 (1947). The Attorney General's Manual is "the Government's own most authoritative interpretation of the APA" and one which the U.S. Supreme Court "[has] repeatedly given great weight[,]" [citations omitted], as it "was prepared by the same Office of the Assistant Solicitor General that had advised Congress in the latter stages of enacting the APA, and was originally issued 'as a guide to the agencies in adjusting their procedures to the requirements of the Act.' AG's Manual 6." Bowen v. Georgetown Univ. Hospitals, et al., 488 U.S. 204, at 218, J. Scalia concurring (1988). See also Pacific Gas & Elec. Co. v. Fed. Power Comm'n, 506 F.2d 33, 38 n. 17 (D.C. Cir. 1974) ("THE ATTORNEY GENERAL'S MANUAL is entitled to considerable weight because of the very active role that the Attorney General played in the formulation and enactment of the APA."). In Iran Air v. Kugleman, 996 F.2d 1253, at 1260 (D.C. Cir. 1993), Judge Ruth Bader Ginsburg, writing for the Circuit Court of Appeals for the District of Columbia, found that ("[i]t is commonly recognized that ALJs 'are entirely subject to the agency on matters of law'"). She went on to explain that, while an ALJ must "conduct the cases over which he presides with complete objectivity and independence[,]" at the same time "he is governed, as in the case of any trial court, by the applicable and controlling precedents[,]" and

ANALYSIS

By rule, the Administrator provides that:

> The Presiding Officer may at any time render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of matrial fact exists and a party is entitled to judgment as a matter of law.[8]

Complainant contends that, on the pleadings in this matter, Respondent has failed to raise an issue for hearing as required by the Administrator's Rules and published decisions, and, consequently, Complainant is entitled to an accelerated decision in her favorite on the issue.

To preserve as an issue for hearing a claim that a respondent does not have an "ability to pay" the penalty amount proposed in a complaint, a respondent is required by the Administrator's Rules and published decision in New Waterbury to raise the issue in its Answer. If a respondent declines or fails to do so, under the Administrator's rules and published decisions, and the Section 556(c) of the APA, 5 U.S.C. § 556(c), the Administrator's Delegated Complainant is entitled to a ruling that the respondent has waived any claim that he is unable to pay the penalty amount proposed.

In an effort to apprise Respondent in this matter of her obligations in answering the Complaint, Complainant provided explicit notice to Respondent regarding the issue of "ability to pay."[9] In bold type Respondent was informed of the following:

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these precedents include ". . . agency regulations [and] the agency's policies as laid down in its *published* decisions. . . ." Id., at 1260, quoting Joseph Zwerdling, Reflections on the Role of an Administrative Law Judge, 25 Admin.L.R. 9, 12-13 (1973) (emphasis in original).

[8]40 C.F.R. § 22.20.

[9]In preparing the Complaint, Complainant was guided by the need to provide to Respondent adequate notice of Respondent's obligations in answering the Complaint. Where an

Consistent with the Administrator's published decisions, see *In Re New Waterbury, Ltd.*, 5 E.A.D. 529, at 541 (1994), Complainant presumes that Respondent has an ability to pay the amounts of penalty proposed. However, should Respondent raise as a claim in any Answer that it files its inability to pay the amount of penalty proposed, and make available to the Administrator's Delegated Complainant relevant and credible financial records which demonstrate that it does not have an ability to pay the amounts of penalty proposed, Complainant will set aside the presumption and reduce the amounts of penalty proposed consistent with what is revealed in Respondent's financial records. Likewise, should Respondent provide Complainant credible information relevant to any other issue regarding the appropriate amount of penalty, on review of that information, Complainant will amend the amounts of penalty proposed if, and as, warranted.[10]

Complainant further informed Respondent of her general obligations in answering the Complaint under the Administrator's Rules, in bold type, as follows:

By rule, 40 C.F.R. § 22.15(b), the Administrator provides that your Answer must clearly and directly admit, deny or explain each of the factual allegations contained in the Administrative Complaint with respect to which you have any knowledge, or, where you have no knowledge of a particular factual allegation, so state. In 40 C.F.R. § 22.15(b), the Administrator provides that your Answer also must state:

1. **The circumstances or arguments that you allege constitute the grounds of defense;**

2. **The facts that you dispute;**

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agency's rules allow for the resolution of issues on pleadings:

> the contents of the response are of critical importance, and the need for and importance of the response in turn enhances the significance of the notice given the adverse party. In order to be adequate, such notice given by the agency to an adverse party must contain enough information to provide the respondent a genuine opportunity to identify material issues of fact. This is needful to provide the 'due notice and opportunity for hearing' required by the [APA].

Hess & Clark, Division of Rhodia, Inc. v. Food & Drug Administration, 495 F.2d 975, 983 (D.C. Cir. 1974).

[10]Complaint, at 11-12.

3. **The basis on which you dispute the proposed relief, that being the amount of penalty proposed; and**

4. **Whether you request a hearing.**

Your failure to admit, deny or explain any material factual allegation in the Compliant will constitute an admission of the allegation. See 40 C.F.R. § 22.15(d).

You should further note that the Administrator provides that any hearing that shall be held will be a "hearing upon the issues raised by the complaint and answer." See 40 C.F.R. § 22.15(c). Consequently, your failure to raise an issue in your answer may preclude you from addressing the issue at hearing.[11]

Notwithstanding this direct notice, Respondent has raised no issue whatsoever with regard to her ability to pay the amount of penalty proposed. Rather, in responding to the proposed penalty amount, Respondent states the following:

> Respondent affirmatively states that Complainant's Complaint fails to state violations upon which relief may be granted, and must, therefore, be dismissed, and no penalties shall be assessed to Respondent.[12]

No challenge is made to the proposed penalty amount elsewhere in the Answer.

As Respondent has the burden to raise in its Answer any "ability to pay" claim that she may wish to raise,[13] and she has failed or declined to so, as a matter of law,[14] Complainant is entitled to a finding that Respondent does have an ability to pay the penalty amount proposed.

There is more involved here than simply making a point of law. When any respondent raises an "ability to pay" issue regarding the proposed penalty amount, for the Administrator to

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[11]Complaint, at 14.

[12]Answer, at 8.

[13]See 40 C.F.R. § 22.15(b) and New Waterbury, 5 E.A.D. at 541.

[14]40 C.F.R. 22.20.

have any reasonable expectation of having a final decision which addresses the issue with any integrity, her enforcement staff, as well as the Presiding Officer and the Board, must have before them relevant, probative and complete financial data of the respondent. This data includes copies of income tax returns for the several most recent years, annual reports, audited financial statements, declarations of assets and other financial data. After it is submitted to enforcement staff, this financial data must be reviewed by a certified financial analyst, who will examine that data and render an opinion regarding the respondent's ability to pay the penalty amount proposed.

Often, the initial submission of financial data by respondent may not be adequate to make such a determination, or may raise issues that only can be resolved by the respondent's submission of additional documentation. Should a respondent's financial data support the respondent's claim that it is unable to pay the penalty amount proposed, the Complaint must be amended and the enforcement action may very well be settled on that basis, without further resources being spent on litigation. Or, once enforcement staff's financial analyst has rendered an opinion adverse to that claim, and makes it available to the respondent, the respondent may wish to retain its own expert, if it has not already done so, to secure a different opinion on the claim.

These are steps the parties must take to professionally and competently evaluate their respective cases, and prepare for hearing, if necessary. Time is needed to take these steps. When respondents are informed in administrative complaints that the Administrator, by rule, requires that they raise issues such as "ability to pay" in their answers, and are held accountable for complying with that rule, enforcement staff will have notice with the filing of an answer that "ability to pay" will be at issue. It can then immediately make a written demand of respondent for the financial data necessary to address such an issue, and, on receipt of that data, submit it to a

financial analyst retained by the Administrator to initiate the "ability to pay" determination process.

The enforcement of the Administrator's pleading rules can do no harm to the Respondent in this matter, as, should she experience a change in her financial circumstances over the course of this proceeding, she can file a motion to amend her answer at any time, setting forth her reasons for the motion being made at the time that it is made, and the ALJ can rule on the appropriateness and timeliness of the motion. On the other hand, nothing can be gained by delaying notice to Complainant of a genuine "ability to pay" claim that Respondent may have. Should Respondent be allowed to ignore the Administrator's pleading rules and withhold a claim of "ability to pay" the proposed penalty until sometime later in the proceeding, either by design or a lack of attention to the applicable rules, time will unnecessarily be lost in addressing the issue, which may result is delaying a hearing, or going forward to hearing with an inadequate evaluation of the "ability to pay" claim.

CONCLUSION

Adherence to the rules and published decisions of the Administrator governing the issue of a respondent's "ability to pay" is vital to assure that a sound, fair and timely decisions will be made as to an appropriate penalty amount for the violations Respondent is alleged to have committed in the Complaint. Consequently, the Administrator's Delegated Complainant respectfully requests that an Order for Partial Accelerated Decision be entered, with a finding that Respondent has failed or declined to raise in its Answer any issue as to its ability to pay the

penalty amount proposed in this matter, and with a ruling that, under the law governing these proceedings, that issue is not material at any hearing to be conducted.[15]

Respectfully submitted,

Richard R. Wagner
Senior Attorney and Counsel for
the Administrator's Delegated Complainant

[15]Given that this matter is in its initial stages, should Respondent, in lieu of filing an objection to this motion within the time allowed by rule, see 40 C.F.R. § 22.16(b), file a motion to amend the Answer for the purpose of raising a claim that she does not have an "ability to pay" the penalty amount proposed, Complainant would not object to the motion being granted, and Respondent being allowed an appropriate period of time within which to file an amended answer.

In Re Kathryn Y. Lewis-Campbell
No. TSCA-05-2009-0004

CERTIFICATE OF SERVICE

I hereby certify that today I filed the original of the **Motion for Partial Accelerated Decision on Ability to Pay Penalty, and Memorandum in Support of Motion for Partial Accelerated Decision on Respondent's Ability to Pay Penalty,** in the office of the Regional Hearing Clerk (R-19J), United States Environmental Protection Agency, Region 5, 77 W. Jackson Boulevard, Chicago, IL 60604, with this Certificate of Service.

I further certify that I then caused true and correct copies of the filed documents to be mailed to the following:

Honorable William B. Moran
Office of the Administrative Law Judges
U.S. Environmental Protection Agency
Ariel Rios Building, Mailcode: 1900L
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

I further certify that I then caused true and correct copies of the filed document to be sent to the following, by mail:

Cassandra Collier-Williams, Esq.
P.O. Box 94062
Cleveland, Ohio 44101

April 8, 2009

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