

Background

As noted, on July 31, 2008, U.S. EPA filed an administrative complaint against the Respondents alleging 47 violations of TSCA. Following service of the complaint, Respondent Vinnie Wilson had 30 days to file an answer. 40 C.F.R. §22.15(a). No answer was received by U.S. EPA or filed with the Regional Hearing Clerk. As a result, U.S. EPA filed a motion for default, first against Respondent Vinnie Wilson and then against the other Respondents. The Respondents then filed their answer which was forwarded on for assignment on August 31, 2009.

On October 8, 2009, Judge Biro issued a prehearing order for this matter. In the order, Judge Biro directed, inter alias, the U.S. EPA to file its initial prehearing exchange by November 20, 2009, the Respondents to file their prehearing exchange by December 11, 2009 and the U.S. EPA to file its rebuttal prehearing exchange by December 28, 2009. After receiving the Judge's October 8th order, U.S. EPA sent a letter on October 13, 2009 by Federal Express to the Respondent Vinnie Wilson, asking her to contact U.S. EPA by mail or to provide a telephone number to contact her. Complainant Exhibit 32¹. The letter also contained forms for the Respondent to fill out if she was claiming an inability to pay, an issue that had been raised in some of her filings. Respondent Vinnie Wilson had previously provided some financial information to U.S. EPA, but the information was incomplete for the Agency to make a determination as to her ability to pay a civil penalty.

On October 21, 2009, Respondent Vinnie Wilson telephoned and spoke with Estrella Calvo, the U.S. EPA Environmental Scientist assigned to this matter. Respondent Wilson faxed

¹ . Exhibits that have been previously provided in Complainant's Prehearing Exchange

to Ms. Calvo several documents regarding her ability to pay. Complainant Exhibits 37 and 38. Upon reviewing this information, U.S. EPA had several questions that needed clarification and sent a letter on November 3, 2009, and again on December 15, 2009, to Respondent Vinnie Wilson requesting she respond to the questions set forth in the letters. Complainant Exhibits 33 and 40. No response was received.

On November 20, 2009, U.S. EPA filed its prehearing exchange with exhibits. On December 8, 2009, Respondent Vinnie Wilson filed a request for a 60 day extension of time to file her prehearing exchange. The request was granted and the Respondents were directed to file their prehearing exchange by February 10, 2010 and the U.S. EPA to file its rebuttal prehearing exchange by February 24, 2010. On February 5, 2010, Respondent Vinnie Wilson filed a second request for a sixty day extension to file her prehearing exchange. The request was granted in part and the Respondents were directed to file their prehearing exchange by March 16, 2010 and the U.S. EPA to file its rebuttal prehearing exchange by March 30, 2010.

Respondents failed to file the prehearing exchange by March 16, 2010. On March 25, 2010, Judge Biro issued an Order to Show Cause to the Respondents to show good cause why they failed to file a prehearing exchange and why default should not be entered against them. The Respondents failed to respond to the March 25th order, though on April 2, 2010, U.S. EPA received a packet of documents from Respondent Vinnie Wilson regarding the Respondent's ability to pay. U.S. EPA did not receive Respondents' prehearing exchange or any response to the March 25, 2010 Order to Show Cause.

will be referenced but additional copies will not be attached to this document.

On April 15, 2010, Judge Biro found the Respondents in default and deemed them to have admitted all the facts in the Complaint. The Respondents were therefore found liable for the violations noted in the Complaint. In the April 15th Default Order, Judge Biro stated that the issue of penalties for the violations was reserved for further proceedings. The U.S. EPA was ordered to file by April 30, 2010, a statement as to any revision to the proposed penalty based upon the information it received from the Respondent Vinnie Wilson, along with a copy of any documents in support of the revised penalty that had not previously been submitted. The Respondents were given until May 14, 2010 to file a response and U.S. EPA was given until May 21, 2010 to file a reply.

On April 19, 2010, U.S. EPA wrote to Respondent Wilson stating that the Agency had reviewed her financial information and believed that she had an ability to pay a reduced penalty. Complainant Exhibit 41. U.S. EPA asked the Respondent to contact them if she was interested in resolving this matter. U.S. EPA did not receive a response to its letter.

Prior Penalty

Upon a motion for default, a party can “request the assessment of a penalty . . . against the defaulting party” and if done, “the movant must specify the penalty or other relief sought and state the legal and factual grounds for the relief requested.” 40 C.F.R. § 22.17(b). In accessing the appropriate penalty, it is required that “the amount of the recommended civil penalty [be] based on the evidence in the record and in accordance with any penalty criteria set forth in the Act” and one must also “consider any civil penalty guidelines issued under the Act.” 40 C.F.R.

§ 22.27(b) and *In the Matter of Frank J. Davis*, Docket No. TSCA-05-2007-0002, 2008 EPA ALJ Lexis 12 (March 31, 2008).

In calculating the original penalty, U.S. EPA looked to the statutory requirements at Section 16 of TSCA, 15 U.S.C. § 2615, and existing guidance -Section 1018 Disclosure Rule Enforcement Response Policy - December 2007 (Penalty Policy). See Complainant Exhibit 27. Under the Penalty Policy, the penalty is determined in two stages: (1) the determination of a “gravity-based penalty” and (2) adjustments to the gravity-based penalty. The gravity-based penalty is calculated by considering: (1) the nature of the violation; (2) the circumstance of the violation; and (3) the extent of harm that may result from the violation. Once the gravity-based penalty has been determined, upward or downward adjustments may be made to the penalty amount by considering other factors, including: (1) ability to pay/continue in business; (2) history of prior violations; (3) degree of culpability; and (4) such other factors as justice may require, which include, no known risk of exposure, the violator’s attitude, consideration of supplemental environmental projects, audit policy, voluntary disclosure, size of business, adjustment for small independent owners and lessors, and the economic benefit of noncompliance. See also *In the Matter of Frank J. Davis*, Docket No. TSCA-05-2007-0002, 2008 EPA ALJ Lexis 12 (March 31, 2008).

With regard to the nature of the violations, violations of the Disclosure Rule are considered hazard assessment in nature since the information is important to allow lessees to make informed decisions. Complainant Exhibit 27 at page 11 to 12.

The next step in calculating the penalty is the circumstance of the violation. “Circumstances reflect the probability of harm resulting from a particular type of violation.”

Complainant Exhibit 27 at page 12. The Penalty Policy established a ranking system for potential violations using six levels. A level 1 or 2 circumstance is for violations that have a high probability of impairing the lessee's ability to consider the information required to be disclosed. A level 3 or 4 circumstance is considered to have a medium probability of impairing the lessees while a level 5 or 6 circumstance has a low probability of impairing the lessee's ability.

Next, the extent of the level of violation must be determined. A major violation occurs if there is a child under the age of 6 in the target housing. *Id.* - Appendix B at page 29. A significant violation occurs if there is a child between the ages of 6 and 18 years old living at the target housing. *Id.* A minor violation occurs if everyone at the target housing is over 18 years of age. *Id.* According to the lease or rental application, at two properties, 2636 Fenton Avenue and 8750 Venus Drive, there were children under the age of 6 living in the rental units. See Complainant Exhibits 9 and 17. At the Venus Drive address, there was a 1 year old child, a 4 year old child, and a 13 year old child living in the rental unit. See Complainant Exhibit 17. At the Fenton Avenue address, there were children ages 3, 8, 13 and 15 years old living in the rental unit. See Complainant Exhibit 9. At two properties, 1815 Clarion Avenue and 3341 McHenry Avenue, there were children between the ages of 6 and 18 years old living in the rental unit. See Complainant Exhibits 11 and 26. At the Clarion Avenue address, there was a 14 year old child living in the rental unit. See Complainant Exhibit 11. At the McHenry Avenue address, there were 2 children living in the rental unit, ages 15 and 16 years old. See Complainant Exhibit 26. The remaining addresses did not identify any individual under the age of 18. Thus, there were two major, two significant and six minor violations. Pursuant to Appendix B of the Penalty

Policy, U.S. EPA calculated a penalty for each violation. Using the nature, circumstance, and extent of each violation, U.S. EPA was able to calculate a penalty for each count. See Complainant Exhibit 28- Penalty Calculation Memo. The penalty calculated for Respondent Wilson was \$91,090.

Revised Penalty

Over the course of more than a year, U. S EPA received information from Respondent Vinnie Wilson as to her ability to pay a civil penalty. See Complainant Exhibits 37 and 38. On April 2, 2010, U.S. EPA finally received the last documents it had requested. See Complainant Exhibit 39. A review of all submitted documents was performed by Cynthia Mack-Smeltzer, an Accountant with U.S. EPA's Resource Management Division, Budget and Finance Section in Region 5. Based on her review, Ms. Smeltzer concluded that Respondent Vinnie Wilson had a zero ability to pay a civil penalty. See Memorandum on Ability to Pay Analysis, attached as Complainant Exhibit 42.

However, U.S. EPA believes that a penalty is still warranted in this matter for several reasons. In April 2007, Respondent Vinnie Wilson was sent an order to control lead hazards at one of her rental units because "lead hazards were found which are contributing, in whole or in part, to a child's lead poisoning." Complainant Exhibit 29. Thus, the Cincinnati Department of Health concluded that the conditions at the rental unit contributed to a test result that showed a child with an elevated blood-lead level. As previously noted, several of the other rental units that were rented out had children under the age of 18 in them. Thus, these buildings have conditions

that need to be addressed or, at a minimum, have the appropriate information as required by statute provided to lessees before they signed the leases.

As evident from the history of this case, it has been extremely difficult to contact the Respondent Vinnie Wilson to discuss this matter and the seriousness of the violations. She has not responded to phone calls, letters, even court orders. If no penalty is assessed in this matter, Respondent may fail to understand the seriousness of the violations and perhaps not be concerned with correcting her actions in the future. A penalty would reinforce that this is a serious matter that requires her attention and must be addressed.

In calculating the revised penalty and keeping in mind Respondent's financial condition, the U.S. EPA looked at the September 10, 1980, Guidelines for Assessment of Civil Penalty under Section 16 of the Toxic Substances Control Act; PCB Penalty Policy (1980 Policy). See Complainant Exhibit 43. Though the 1980 Policy addresses PCB, it does cite to Section 16 of TSCA, which is the controlling statutory provision for the assessment of penalties and which is cited in the December 2007 Penalty Policy, Complainant Exhibit 27. As noted on page 8 of the December 2007 Penalty Policy, the 1980 Policy "provides the general framework for civil penalty assessment under TSCA." The 1980 Policy contemplates circumstances where there is a determination of an inability to pay. The 1980 Policy states that "(e)ven where the net income is negative, four percent of gross sales should still be used as the "ability to pay" guideline, since companies with high sales will be presumed to have sufficient cash to pay penalties even where there have been net losses." Complainant Exhibit 43 at page 59775. Furthermore, the 1980 Policy states, "(f)or purposes of calculating the ability to pay, figures for the current year and the

prior three years should be averaged. Four percent of the average sales will serve as the guideline for whether the company has the ability to pay.” *Id.*

Respondent Vinnie Wilson is the president of Mardaph II, LLC and Mardaph III, LLC. As noted in the ability to pay memorandum, both as an individual and as the president of these companies, Respondent Vinnie Wilson receives rental income from the lease of the rental units that she owns and operates. Complainant Exhibit 42. She also has equity in the buildings of around \$350,000. *Id.* The operation of these rental units is a business, for which Respondent Vinnie Wilson can and does take deductions and losses allowed to businesses. Complainant Exhibits 37 and 38. Though Respondent Wilson reported losses, she did receive rental income as follows: 2006- \$92,682; 2007- \$94,198 and 2008- \$97,911. *Id.* Additional information submitted in the form of a Financial Statement for Individuals identified that Respondent Vinnie Wilson received rental income of \$5,945 a month in 2009 for a yearly total of \$71,340. Complainant Exhibit 38. The average rents received over the four year period from 2006 to 2009 is \$89,032 per year. Not including any other income that Respondent receives or the equity in the buildings, U.S. EPA used the average rental income figure as a gross sale figure. U.S. EPA then used the 1980 policy of using four percent of average gross sales as a method to calculate a revised penalty. The revised penalty for Respondent Vinnie Wilson based on her rental income for the past four years is \$3,561 (89,302 times .04). If the same test is applied to the equity that Respondent Wilson has, that would add \$14,000 to the penalty (\$350,000 times .04). This would lead to a total penalty of \$17,561. While this amount of a penalty is not insignificant to a person of Respondent's means, given her monthly rental income, her other monthly income, and the equity in the rental units, it is not beyond her ability to pay. Further,

U.S. EPA would be willing to have the penalty paid in installments if this would help Respondent's cash flow. Based on these factors, U.S. EPA believes that \$17,561 is an appropriate penalty in this matter, or in the alternative, a minimum penalty of \$3,561.

Conclusion

Respondents have been found to be in default and in violation of TSCA. In reviewing the previously assessed penalty, based on financial information received and the facts of this matter, a penalty of \$17,561 is appropriate and U.S. EPA therefore requests that the Judge enter an order of a default judgment in the amount of \$17,561 against Respondent Vinnie Wilson. In the alternative, U.S. EPA would seek \$3,561 as a minimum penalty.

Submitted this 29th day of April 2010.



Peter Felitti
Assistant Regional Counsel
U.S. Environmental Protection Agency

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EXHIBITS

Complainant's Exhibit 39 – April 2, 2010 documents received by U.S. EPA from Vinnie Wilson

Complainant's Exhibit 40 – December 15, 2009 letter from U.S. EPA to Vinnie Wilson

Complainant's Exhibit 41 – April 19, 2010 letter from U.S. EPA to Vinnie Wilson

Complainant's Exhibit 42 – April 19, 2010 Memorandum on Ability to Pay analysis for Vinnie Wilson

Complainant's Exhibit 43 - September 10, 1980, Guidelines for Assessment of Civil Penalty under Section 16 of the Toxic Substances Control Act; PCB Penalty Policy

CERTIFICATE OF SERVICE

I hereby certify that the original of the foregoing was served on the Regional Hearing Clerk, U.S. EPA Region 5, and that true and correct copy was served on the Administrative Law Judge by first class mail on April 29, 2010 and Respondents Vinnie Wilson, Mardaph II, LLC and Mardaph III, LLC with delivery by first class mail on April 29, 2010 to:

The Honorable Susan L. Biro, Chief Administrative Law Judge
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Mail Code 1900L
1200 Pennsylvania Avenue, NW.
Washington, D.C. 20460-2001

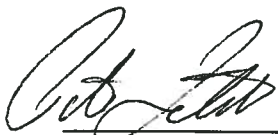
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REGION 5**

Dated this 29th day of April 2010.



Peter Felitti
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U.S. EPA, Region 5