

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of)
)
Gordon Head and) Docket No. TSCA-V-C-057-93
William Spangler,)
)
Respondents)

ORDER DIRECTING RESPONDENTS TO PROVIDE INFORMATION

This matter arises under the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2601 *et seq.* In an order issued on September 19, 1995, Chief Administrative Law Judge, Jon G. Lotis, found respondents, Gordon Head and William Spangler, liable for the violations alleged in the complaint filed by the United States Environmental Protection Agency ("EPA"). Chief Judge Lotis also found, however, that the amount of the civil penalty to be assessed for the cited violations remained controverted. Accordingly, the parties were directed to confer regarding the civil penalty issue.

In a status report dated November 29, 1995, counsel for EPA indicated that the parties had not reached a settlement as to the civil penalty to be assessed. In addition, EPA counsel represented that respondents have not provided EPA with certain financial information to substantiate the respondents' claim of inability to pay the proposed penalty amount. Counsel for EPA, therefore, requests that an order be issued directing the respondents to provide the requested financial information. The respondents have been silent as to EPA's request.

It is established that when a respondent puts its ability to pay a proposed penalty at issue, complainant EPA must show as part of its *prima facie* case that it considered the appropriateness of the proposed penalty in light of the inability to pay claim. James C. Lin and Lin Cubing, Inc., EAB, FIFRA Appeal No. 94-2 (December 6, 1994), at 6. Moreover, "in any case where ability to pay is put in issue, [EPA] must be given access to the respondent's financial records before the start of such hearing." New Waterbury, Ltd., EAB, TSCA Appeal No. 93-2 (October 20, 1994), at 16.¹

¹ In New Waterbury, Ltd., *supra*, the Environmental Appeals Board also stated that where a respondent "fails to produce any evidence to support an inability to pay claim after being apprised of that obligation during the pre-hearing process, [EPA] may properly argue and the presiding officer may conclude that any objection to the penalty based upon ability to pay has been waived under the Agency's procedural rules and thus this factor does not warrant a reduction of the proposed penalty." *Id.* at 16-17.

Accordingly, as set forth in the James C. Lin and Lin Cubing, Inc. and New Waterbury, Ltd. decisions, the EPA in this case is entitled to information upon which to evaluate respondents' claim of inability to pay. Given this fact, and the respondents' failure to raise any objection to the specific information requested, respondents are directed to provide the EPA, no later than March 13, 1996, with: (1) copies of the three most recent federal tax returns filed on Forms 1120, 1120-A, 1120-S, or 1065; (2) copies of the three most recent individual tax returns for Mr. Head and Mr. Spangler; (3) certified accounting statements indicating the present assets of Mr. Head, Mr. Spangler, H&H Enterprises and any related entities; and (4) any other information the respondents deem relevant to their ability to pay a civil penalty amount. As noted earlier, failure to provide this information may be held to constitute a waiver of the inability to pay claim.

Carl C. Charneski

Carl C. Charneski
Administrative Law Judge

Issued: February 8, 1996
Washington, D.C.

IN THE MATTER OF GORDON HEAD and WILLIAM SPANGLER, Respondents
Docket No. TSCA-V-C-057-93


Certificate of Service

I certify that the foregoing Order Directing Respondents to Provide Information, dated February 8, 1996, was sent this day in the following manner to the below addressees.

Original by Regular Mail to: Ms. Jodi Swanson-Wilson
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Dated: February 8, 1996