UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF

SPITZER GREAT LAKES LTD., COMPANY, DOCKET NO. TSCA-V-C-082-92

Respondent

MEMORANDUM OPINION AND ORDER

Under consideration is the motion for partial accelerated decision on the issue of penalty, filed October 21, 1996 by the complainant. The complainant requests a ruling before the hearing scheduled for November 19, 1996 that the respondent has waived any right to mitigation of any penalty assessed in this proceeding. The complainant premises its claim on the failure of the respondent to supply documents it was ordered to produce by September 3, 1996 and respondent's failure to provide information about its financial status in its prehearing exchange. Complainant argues that leaving this matter for an oral hearing "would be to provide an opportunity for Respondent to yet furnish this information at, or shortly before, trial." Complainant's Motion for Partial Accelerated Decision on the Issue of Penalty, October 21, 1996, at 4. This would, complainant urges, be contrary to the "interests of justice and efficient agency administration ...." Id.

The respondent has filed in answer to the motion a document entitled "Response to the Proposed Penalty," dated October 22, 1996. In its filing, the respondent does not address its failure to supply to the complainant the documents that it was ordered to produce by September 3, 1996, nor does it address the issue about whether it has waived its right to mitigation of any penalty because of it has not provided access to its financial records. Respondent instead argues that any penalty that might be assessed should be lowered because of the circumstances surrounding the violations. It does, however, continue to argue, without evidentiary support, that it does not have sufficient earnings to pay the penalty. It urges that its culpability is at level three and that it acted responsibly and timely with regard to its obligations under the Toxic Substances Control Act, under the circumstances.

On May 25, 1995, in an accelerated decision, it was found that the respondent violated 40 C.F.R. § 761.180 (a) and Section 15 of the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2614, because it failed to develop and maintain records on the disposition of the PCB items, identified in Finding 16; that it failed to have annual PCB documents for the calendar years 1989, 1988, 1987 in violation of 40 C.F.R. § 761.180 (a) and Section 15 of TSCA, 15 U.S.C. § 2614; that it failed to maintain records of visual inspections and maintenance history of any transformer, identified in Finding No. 6, for the time periods identified in Findings 19 and 20, in violation of 40 C.F.R. § 761.30 (a) (1) (xii) and Section 15 of TSCA, 15 U.S.C. § 2614; that its storage of PCB items, identified in Finding No. 8 and in the manner described in Findings No. 14 and 15, violates 40 C.F.R. § 761.65 (b) and Section 15 of TSCA, 15 U.S.C. § 2614; that it failed to date its PCB articles and PCB containers, identified in Finding 8, when they were placed in storage for disposal in violation of 40 C.F.R. § 761.65 (c) (8) and Section 15 of TSCA, 15 U.S.C. § 2614; that it failed to mark its 55 gallon oil-filled drums, and capacitors, identified in Finding No. 8, with the M_L label in violation of 40 C.F.R. § 761.40 (a) and Section 15 of TSCA, 15 U.S.C. § 2614; that it failed to mark its PCB item storage area with the M_L label in violation of 40 C.F.R. § 761.40 (a) and Section 15 of TSCA, 15 U.S.C. § 2614; that it disposed of PCB transformers in violation of 40 C.F.R. § 761.70 or § 761.75 and Section 15 of TSCA, 15 U.S.C. § 2614; and that as a result of these rule violations it violated the PCB rule, 40 C.F.R. Part 761, and Section 16 (a) of TSCA, 15 U.S.C. § 2615. In re Spitzer Great Lakes, Ltd., Company, Docket No. TSCA-V-C-082-92, Order Granting Motion for Accelerated Decision (May 25, 1995).

The foregoing conclusions were made with regard to all the allegations of violations in the complaint and were based on specific findings. The respondent did not oppose the findings and conclusions proposed by the complainant. At first it did not even respond to the complainant's request for an accelerated decision but after an order to show cause was issued, the respondent stated in a filing made August 9, 1994 that complainant's motion for an accelerated decision should be granted. On April 2, 1996, the complainant moved for discovery on the remaining issue involving the penalty. The complainant seeks a total penalty on the seven counts of $184,000. In its answer the respondent stated that it wanted a hearing and, with regard to the penalty, it stated that it would offer the following "affirmative defense":

17. The civil penalties sought by the Complaint are far in excess of a reasonable amount in view of any technical deficiencies which may have occurred

and considering that no PCB's contaminated the ground or water or posed any hazard to any person or wildlife.

Answer, October 8, 1992, at ¶ 17.

Respondent in its prehearing exchange stated that it is its "position that under the circumstances the proposed penalties are too high and that, in any event, Respondent cannot afford to pay the proposed penalties." Pre-Hearing Statement of Respondent, January 11, 1993, at 2. Respondent stated that it was enclosing a copy of its last Federal tax return.

The complainant interpreted this to mean that the respondent now intended to claim that it was unable to pay the penalty sought. The complainant then sought, through discovery, verification of the respondent's claim that it was unable to pay the penalty. In its motion for discovery, the complainant stated that the respondent voluntarily produced its Federal tax returns for 1991, 1993, and 1994 and some financial statement summaries. Complainant urged that the financial material respondent had supplied was not probative. Respondent did not dispute that contention or oppose the request for discovery, although it has not provided the documents sought through the order to produce. Respondent does not address its non-performance in its most recent filing and it does not dispute the complainant's earlier made contention that the claim of inability to pay is unsupported because no documents are attached to the prehearing exchange, the financial documents that have been provided are incomplete and, therefore, not probative, and no documents have been supplied in response to the order of the presiding officer which would have permitted the complainant to assess respondent's claim that it could not afford to pay the proposed penalty.

Section 16 (a) (2) (B) of TSCA provides that in determining the amount of civil penalty:

[T]he Administrator shall take into account the nature, circumstances, extent, and gravity of the violation or violations, and, with respect to the violator, ability to pay, effect on ability to continue to do business, and any history of prior such violations, and such other matters as justice may require.

In an administrative hearing the complainant bears the burden of proof "as to the appropriateness of the penalty." In re New Waterbury, Ltd., 5 E.A.D. 529, 538 (1994). The complainant in order to meet its burden must come forward with evidence to show that it considered each factor identified in Section 16 and

that its recommended penalty is supported by its analysis of those factors. Id. So long as each factor is touched upon and the penalty is supported by the analysis a prima facie case is made. To rebut the complainant's case, the respondent is required to show "(1) through the introduction of evidence that the penalty is not appropriate because the [complainant] ... failed to consider all the statutory factors or (2) through the introduction of additional evidence that despite consideration of all of the factors the recommended penalty calculation is not supported and thus is not 'appropriate'." Id. at 538-39.

The rules of practice, if followed, will permit the complainant to know after an answer has been filed and well before any hearing whether ability to pay will be in issue. "The rules governing penalty assessment proceedings require a respondent to indicate whether it intends to make an issue of its ability to pay, and if so, to submit evidence to support its claim as part of the pre-hearing exchange.... [W]here a respondent does not raise its ability to pay as an issue in its answer, or fails to produce any evidence to support an inability to pay claim after being apprised of that obligation during the pre-hearing process, the [complainant] 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 542. When the ability to pay has been put in issue, the complainant must be given access to the respondent's financial records, particularly if it is ordered to do so.

The respondent did not give notice to the complainant in its answer that it intended to assert that it was unable to pay the proposed penalty. When it did state in its prehearing exchange that it would make such a claim, respondent did not submit probative evidence to support its claim. Respondent has refused to provide complainant access to its financial records, even though it was ordered to grant the complainant access by September 3, 1996 and it stated on the record that it would do so.1/ Under the procedural rules of this agency, the respondent has waived its right to dispute any assessment of the ability to pay factor which the complainant makes in seeking a penalty at the hearing. Because the respondent has refused to provide such access, inability tb pay will not be a potential mitigating factor in assessing the civil penalty in this proceeding.

At the hearing the complainant will have to establish that it gave full consideration to all the factors in TSCA Section 16. The respondent may introduce those documents and witnesses on the penalty issue which it noticed

in it prehearing exchange. The respondent's claim that it is unable to pay will not be considered in mitigation of any penalty sought by the complainant.

ACCORDINGLY, IT IS ORDERED that the motion for partial accelerated decision on the issue of penalty, dated October 21, 1996 IS GRANTED to the extent indicated.

Edward J. Kuhlmann
Administrative Law Judge

October 31, 1996
Washington, D.C.

CERTIFICATE OF SERVICE

I hereby certify that the original of this MEMORANDUM OPINION AND ORDER was sent to the Regional Hearing Clerk and copies were sent to the counsel for the complainant and counsel for the respondent on October 31, 1996.

Shirley Smith
Lega1 Staff Assistant
For Judge Edward J. Kuhlmann

NAME OF RESPONDENT: SPITZER GREAT LAKES LTD., COMPANY

DOCKET NUMBER: TSCA-V-C-082-92

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1/ Respondent did supply additional financial documents after the prehearing exchange but when the complainant argued that these too were not probative, respondent did not dispute that claim, instead it stated that it would supply the documents sought. Respondent did dispute any liability that its management company, Spitzer Management Company, might have for its own liability. Nevertheless, respondent did not object to providing financial information about Spitzer Management Company, although it did not provide the information. This agency has held with regard to this issue that where "there are several interrelated business entities all involved in the business of the liable party, the Agency may properly look into the assets of those other entities to determine whether a penalty is appropriate when the liable party claims that it does not have the resources to pay the penalty on it own." Id. at 549 n. 32. This does not mean that the management company is liable, it relates to the respondent's ability to pay the penalty for which it is liable. Id.