UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
The Mayline Company	)	[RCRA] Docket No. V-W-26-93
	)	
Respondent	)	

ORDER ON MOTIONS TO DISMISS, FOR OTHER DISCOVERY, FOR PREHEARING SETTLEMENT CONFERENCE AND FOR ISSUANCE OF SUBPOENAS

Summary

In assessing a civil administrative penalty, Complainant (sometimes referred to herein as EPA) is required, under RCRA section 3008(a)(3), to take into account any good faith efforts on the part of Respondent to comply with applicable requirements. Prior to the filing of a complaint, if information becomes available to the EPA which demonstrates good faith efforts to comply, the Complainant must make the appropriate downward adjustment to the penalty level which would otherwise be sought. The Complainant's legal duty to consider good faith efforts to comply, and to make the necessary adjustment to the penalty, does not end with the filing of the complaint. If information becomes available to the EPA after the complaint is filed which demonstrates Respondent's good faith efforts to comply, the EPA must immediately disclose such knowledge and adjust the penalty sought in the complaint. Knowledge of a "good faith adjustment" may not be withheld and used as a bargaining chip in settlement negotiations. The Respondent has the statutory right to the benefit of the adjustment.

Background

On September 27, 1993, the U.S Environmental Protection Agency (EPA), Region V, filed a complaint against the Mayline Company (Respondent). The complaint is brought pursuant to the Resource Conservation and Recovery Act (RCRA), as amended by the Hazardous and Solid Waste Amendments of 1984 (HSWA). Respondent is charged with violating federal regulations that control the burning of hazardous waste in boilers and industrial furnaces, 40 C.F.R. Part 266, Subpart H ("BIF Rule").

The BIF Rule, promulgated pursuant to section 3004(q) of RCRA, became effective on August 21, 1991. Respondent had been burning used solvent, resulting from its facility operations, in

a hazardous waste boiler since 1987. On or about September 24, 1992, Respondent sent EPA a Notification of Hazardous Waste Activity and a request for an exemption from the BIF Rule as a small quantity burner (SQB) for its hazardous waste boiler. On November 10, 1992, EPA performed an inspection for compliance with the BIF Rule at Respondent's facility.

Thereafter, the complaint was issued. It alleges that Respondent does not meet the exemption criteria for a small quantity burner status, and that Respondent violated various provisions of the federal requirements for burning hazardous waste in boilers.

I. Motion to Dismiss

Respondent moved to dismiss the complaint with prejudice on grounds that Complainant failed to perform its statutory duty under section 3008(a)(3) of RCRA, 42 U.S.C. 6928(a)(3). Specifically, Respondent alleges that in assessing the penalty, Complainant failed to take into account Respondent's good faith efforts to comply with the applicable requirements. Respondent states that Complainant's refusal to comply has caused Respondent substantial prejudice for which there is no relief without dismissal of the complaint with prejudice. Sanctions are also requested including payment of costs for Respondent's defense in this proceeding.

Complainant responded to the motion, asserting that good faith efforts to comply do not constitute a defense to liability or grounds for dismissal. Complainant claims that EPA is not required to take into account any possible good faith efforts to comply at the time an administrative penalty is initially proposed. According to the Complainant, it is not expected to know at the time it issues the complaint all factors relevant to assessing the penalty. Complainant argues that the Administrative Law Judge considers those factors in the course of the hearing.

Complainant is correct that a Respondent's good faith efforts to comply does not relieve it of liability. But, the Complainant is incorrect in its conclusion that good faith efforts to comply need not be taken into consideration at the time of the filing of the complaint.

To the contrary, section 3008(a)(3) of RCRA requires the Administrator of the EPA to take into account Respondent's good

faith efforts to comply in determining the penalty to be sought in the complaint. 1/

> "Any penalty assessed in the order shall not exceed $25,000 per day of noncompliance for each violation of a requirement of this subchapter. In assessing such a penalty, the Administrator shall take into account the seriousness of the violation and any good faith efforts to comply with applicable requirements."

1/ The Administrator delegated to the Complainant (the Associate Division Director, Office of RCRA, Waste Management Division, Region 5) the authority to act under RCRA section 3008. (Complaint at 1.)

The obvious question raised by this language is--when does the Administrator assess the penalty? Is it before, or after, the filing of the complaint? If section 3008(a)(3) is read in a vacuum, it could be argued that the Administrator assesses penalties only in final orders after a hearing. However, a reading of other parts of Section 3008 makes clear that the Administrator's penalty assessment is meant to encompass the penalty amount sought by the Administrator in the original complaint. The path which leads to this conclusion is easy to follow.

RCRA section 3008(a)(1) provides that "whenever the Administrator determines that any person has violated any requirement of this subchapter the Administrator may issue an order assessing a civil penalty for any past or current violation...." Section 3008(b) goes on to confer the right to a hearing for person(s) before any order issued under section 3008 can become final.

> "Any order issued under this section shall become final unless, no later than thirty days after the order is served, the person or persons named therein request a public hearing."

Since the "order assessing a civil penalty" becomes final if no request for a hearing is made, it is obvious that the statute

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also refers to that order issued as part of the EPA's original complaint. 2/

2/ The 1990 RCRA Civil Penalty Policy (Penalty Policy) clearly acknowledges the Complainant's responsibility for considering good faith efforts to comply by requiring an adjustment to the gravity- based penalty level for those efforts. The Penalty Policy states, "In calculating the amount of proposed penalty to be included in the administrative complaint, Agency personnel

> should total (1) the gravity-based penalty amount . . . and (2) . . . subtract from this sum an amount reflecting any downward adjustments in the penalty based solely on respondent's 'good faith efforts to comply with applicable requirements' about which the Agency is aware." (Penalty Policy at 11; see also Penalty Policy at 1, 32.)

The statute therefore imposes an affirmative obligation on the EPA to make adjustments to the penalty for good faith efforts to comply. Accordingly, at the time the complaint is in the preparation stage, all information relevant to the respondent's good faith efforts to comply which is available to EPA must be reviewed and taken into account in calculating the proposed penalty. At this prefiling stage the EPA presumably would be making inquiries in this regard and would document any and all factual information that may be relevant to good faith efforts to comply and any statements made by the Respondent in that regard. (See Penalty Policy at 6-7.)

The Complainant's legal duty under the statute (remember, the Complainant is filling the legal shoes of the Administrator) to consider good faith efforts to comply in arriving at the proposed penalty level is a continuing one. It does not end once a complaint is filed. There is nothing in the statute or its legislative history which would suggest that the Administrator's obligation is lifted or discharged once EPA files its complaint. If information becomes available to the EPA after the complaint is filed which demonstrates Respondent's good faith efforts to comply, the EPA must proceed immediately to make the appropriate downward adjustment to the proposed penalty contained in the complaint. Similarly, the EPA must also make the appropriate downward adjustment to the penalty in any ongoing settlement discussions, and in its evidence if the case goes to hearing.

Unlike private parties to a dispute, the government should have no axe to grind here, other than one of faithful adherence to the statute. Knowledge of what the EPA considers to be a good faith adjustment therefore may not be withheld and used as a bargaining chip in settlement negotiations. It must be immediately acknowledged and disclosed. As a matter of law, the Respondent's originally assessed penalty must be reduced by the amount of the good faith adjustment upon its discovery. To be sure, differences, resolvable sometimes only through formal

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hearings, may arise over the amount of an adjustment or whether an adjustment is even appropriate. However, the obligation of the government to pursue only that penalty permitted by the statute remains extant.

The inquiry now turns to whether the EPA considered Respondent's alleged good faith efforts to comply.

Certain statements that the Respondent attributes to the Complainant raise concern as to whether the EPA considered Respondent's alleged good faith efforts. Counsel for Respondent asserts in an affidavit that a supervisor in the RCRA Enforcement Branch stated that no reduction in the assessed penalty would be made as a result of Mayline's voluntary disclosure because there was no policy for such a reduction. (Talbert Affidavit 3.) He asserts further that counsel for Complainant informed him in a telephone conversation in March 1994 that "USEPA-Region V was not going to take into account Mayline's good faith efforts to comply with the regulations identified in the Complaint" (Talbert Affidavit 8.) Respondent's Vice President of Operations asserts by affidavit that he pointed out that good faith efforts to comply should be considered prior to issuing the complaint, and in reply, the supervisor responded that she was unaware of any such requirement in the RCRA Civil Penalty Policy. (Hemberger Affidavit 11.) Giving further pause for concern as to whether Complainant had a full appreciation of its responsibilities in this proceeding is the manner in which it apparently handled Respondent's request for the production of penalty worksheets. Respondent states that it was informed during a meeting that there were no penalty calculation worksheets, yet they were produced later. These statements attributed to the Complainant are not contested by the Complainant.

Based on the facts that have been alleged and my review of all the pleadings and the prehearing exchanges, it is difficult to say with any reasonable degree of certainty whether the EPA considered Respondent's alleged good faith efforts to comply either before or after the complaint was issued. It may be that the EPA considered the Respondent's behavior and actions and considered them insufficient to warrant a "good faith" reduction in the penalty. But, the EPA has not said so. The EPA in its response to Respondent's motion appears to be relying on the defense that it was under no obligation to consider good faith efforts to comply when preparing the complaint. If "good faith" information became available to the EPA subsequent to the filing of the complaint that would warrant a lesser penalty, then the EPA appears to be suggesting that settlement negotiations would be the forum in which to address the matter.

Under these circumstances, I believe it appropriate to require the Complainant to file a statement addressing (1)

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whether it considered Respondent's alleged good faith efforts to comply, (2) whether an adjustment to the proposed penalty level is warranted and, if so, the amount of the adjustment and, (3) the reasons why Respondent's alleged actions do not constitute good faith efforts to comply, if it is so determined. If an adjustment is warranted the complaint should be amended to so provide. Also, Complainant's prehearing exchange should also be amended to take the adjustment into account. If the EPA determines that no adjustment is warranted or if the Respondent objects to the adjustment that EPA makes, then Respondent may pursue this matter during settlement discussions and at an evidentiary hearing, if necessary. The issue of whether the action and behavior of the Respondent constituted good faith efforts to comply cannot be decided summarily based on the facts that have been alleged.

Respondent's request for sanctions against the Complainant including the payments of Respondent costs is denied. Relief, if any, is available

to a respondent only under the procedures found at 40 C.F.R. Part 17, after a final decision has been rendered.

. Motion for Other Discovery

Respondent requests an order to permit the taking of oral depositions of certain EPA Region V personnel who are potential adverse witnesses against Respondent in this matter. Respondent asserts that relevant and probative information regarding allegations in the complaint and the proposed penalty is not otherwise obtainable by Respondent without oral deposition.

Respondent wishes to inquire about Complainant's refusal to respond to requests for information during the time between the inspection and issuance of the complaint and statements of EPA personnel regarding applicability of the SQB exemption. Respondent alleges improper application of the Penalty Policy with regard to the seriousness of the violation and to its good faith efforts to ascertain the applicability of the federal regulations.

Complainant opposes the motion on grounds that the requested depositions would be both unnecessary and unduly burdensome. Complainant states that the Respondent has already had the opportunity to discuss the case extensively with EPA personnel.

Rule 22.19(f), in relevant part, provides for the taking of oral depositions only upon a showing of good cause and upon a finding that the information sought cannot be obtained by alternative methods. In light of my prior ruling, some of the information which Respondent seeks may be forthcoming when EPA makes its required filing. With respect to the other information it seeks, Respondent has failed to demonstrate that the information cannot be obtained by alternative methods, e.g.,

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interrogatories. Accordingly, the motion for the taking of oral depositions is denied.

III. Motion for Prehearing Settlement Conference

Respondent requests an order directing the parties to appear before the Judge for purposes of settlement of the case and any other matters to expedite disposition of this proceeding. Without such a conference, it alleges it will suffer undue prejudice and will be forced to proceed to hearing without having been afforded a reasonable opportunity to reach a settlement. It asserts that it was informed by Complainant in March 1994 that no reduction in the assessed penalty will be made without a formal hearing.

Settlement conferences are generally held between the parties, not before the Presiding Judge. If the parties are having particular difficulties in attempting to settle the case, a request may be made to the undersigned for the appointment of another Judge to serve as a neutral to assist the parties in reaching settlement. 3/ The parties may make such a request if their attempts to settle do not succeed. Accordingly, the request for a prehearing settlement conference with the Presiding Judge will be denied.

3/ See Administrative Dispute Resolution Act, 5 U.S.C.A. 571-579 (1990) and In Re Geron Furniture Inc., Docket No. EPCRA-09-94-0009, Order Concerning the Use of Alternative Dispute Resolution In Enforcement Cases, dated August 30, 1994.

To the extent the Respondent's motion requests a prehearing conference to consider other matters designed to expedite the case, the motion is well taken. However, before convening such a prehearing conference, I believe it advisable to await the Complainant's filing required by this order and the subsequent settlement discussions as contemplated herein. Respondent's motion for a prehearing conference to consider other matters designed to expedite the case may be renewed at that time.

IV. Motion for Issuance of Subpoenas

In light of the requirements of this order, i.e., the required filing by the EPA and the directive for the resumption of settlement discussions, no action will be taken at this time on Respondent's motion for the issuance of subpoenas to compel testimony at the hearing. Respondent may renew its request for the subpoenas if it appears an evidentiary hearing is necessary.

ORDERED:

A. On or before January 27, 1995, Complainant shall file a statement addressing (1) whether it has considered Respondent's alleged good faith efforts to comply, (2) whether an adjustment to the proposed penalty level is warranted based on those alleged efforts and, if so, the amount of the adjustment and, (3) the reasons why Respondent's alleged actions do not constitute good faith efforts to comply, if it is so determined. If an adjustment is warranted, the complaint shall be amended to so provide. The Complainant's prehearing exchange shall also be amended to take the adjustment into account.

B. Respondent's Motion to Dismiss is denied.

C. Respondent's Motion for Other Discovery is denied.

D. Respondent's Motion for Prehearing Settlement Conference with the Presiding Judge is denied.
The parties should resume their efforts to reach a settlement in this matter. The parties shall file a joint status report on their progress on or before February 17, 1995. If those efforts are unsuccessful, the parties may request the undersigned to appoint another Judge to serve as a neutral to assist them in arriving at a settlement.

Jon G. Lotis
Chief Administrative Law Judge

Dated: December 15, 1994
Washington, D.C.

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