UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
BITUMA-STOR, INC. d/b/a	)	**DOCKET NO. EPCRA-7-99-0045**
BITUMA CORPORATION AND GENCOR	)	
INDUSTRIES, INC.,	)	
	)	
RESPONDENT	)	

ORDER ON COMPLAINANT'S MOTION FOR A COMPLETE PREHEARING EXCHANGE

ORDER GRANTING RESPONDENT'S MOTION FOR CONTINUANCE

ORDER RESCHEDULING HEARING

This proceeding arises under the authority of Section 325 of Title III of the Superfund Amendments and Reauthorization Act, 42 U.S.C. § 11045 (Supp. IV 1986), also known as the Emergency Planning and Community Right-To-Know Act of 1986 ("EPCRA"), and is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits (the "Rules of Practice"), 40 C.F.R. §§ 22.1-32.[1/] The Complaint issued in the above-cited matter charges the Respondent with violating Sections 312(a) and 313 of EPCRA and proposes a total civil administrative penalty in the amount of $59,576.

Following the parties' submission of their prehearing exchange in this matter, an Order Scheduling Hearing was entered on January 28, 2000.[2/] Pursuant to that Order, the parties were

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[1/] The Rules of Practice were revised effective August 23, 1999. Proceedings commenced before August 23, 1999, are subject to the revised rules unless to do so would result in substantial injustice.

[2/] In addition to its Motion for a Complete Prehearing (continued...)

directed to hold another settlement conference on this matter on or before February 18, 2000, and the Complainant was directed to file a status report regarding such conference and the status of settlement on or before February 29, 2000. Also, the parties were directed to file a joint set of stipulated facts, exhibits, and testimony by March 17, 2000. The hearing was scheduled for March 28 through 30, 2000, in Kansas City , Kansas.

Complainant's Motion for a Complete Prehearing Exchange

On January 24, 2000, the Complainant filed a Motion for a Complete Prehearing Exchange seeking an order that directs the Respondent to submit documentation supporting its assertion that it is unable to pay the proposed penalty. Specifically, the Complainant moves for an order requiring the Respondent to submit certified copies of financial statements or tax returns to support its assertion of inability to pay. The motion is opposed by the Respondent.

The Complainant contends that the Respondent's prehearing exchange is not in compliance with the Prehearing Order of September 21, 1999, because the Respondent failed to provide supporting documentation such as certified copies of financial statements or tax returns in support of its position that it is unable to pay the proposed penalty or that payment of the penalty will have an adverse effect on its ability to continue to do business as directed in the Prehearing Order. The Complainant asserts that any claim by the Respondent that this supporting documentation contains confidential information does not excuse the Respondent from providing this information nor does such claim bar the admission of this information into evidence. Section 22.22(a)(2) of the Rules of Practice, 40 C.F.R. § 22.22(a)(2).

The Complainant further argues that the Rules of Practice, case law, and Environmental Protection Agency ("EPA") guidance require the Respondent to support its assertion that it is unable to pay the proposed penalty. The Complainant notes that Section 22.24(a) of the Rules of Practice, 40 C.F.R. § 22.24(a), provides

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[2/] (...continued)
Exchange, the Complainant filed a Motion for Partial Accelerated Decision as to Liability on February 4, 2000. The Respondent's response period for this motion has not expired. *See* Sections 22.7(c), 22.16(b) of the Rules of Practice, 40 C.F.R. §§ 22.7(c), 22.16(b).

as follows: "Following complainant's establishment of a prima facie case, respondent shall have the burden of presenting any defense to the allegations set forth in the complaint and any response or evidence with respect to the appropriate relief. The respondent has the burdens of presentation and persuasion for any affirmative defenses."

The Complainant argues that the Environmental Appeals Board ("EAB") has found that "in any case where ability to pay is put in issue, the Region must be given access to the respondent's financial records before the start of [any] hearing." *New Waterbury, Ltd.*, TSCA Appeal No. 93-2, 5 EAD 529, 542 (EAB, Oct. 20, 1994). The Complainant further argues that applicable EPA penalty policy provides that an alleged violator who raises the issue of ability to pay has the burden of providing information to demonstrate extreme financial hardship. Office of Enforcement and Compliance Monitoring, U.S. Environmental Protection Agency, Guidance on Determining a Violator's Ability to Pay a Civil Penalty, at 2 (1986); Office of Regulatory Enforcement, U.S. Environmental Protection Agency, Final Enforcement Response Policy for Sections 304, 311 and 312 of the Emergency Planning and Community Right-To-Know Act and Section 103 of the Comprehensive Environmental Response, Compensation and Liability Act, at 22-23 (1999); Office of Compliance Monitoring, U.S. Environmental Protection Agency, Enforcement Response Policy for Section 313 of the Emergency Planning and Community Right-To-Know Act (1986) and Section 6607 of the Pollution Prevention Act (1990), at 19-20 (1992). The Complainant submits that pursuant to the above-cited Penalty Policies when the violator fails to submit such financial information to the Complainant, the Complainant may presume that the violator has the ability to pay the full penalty. *Id.*

In response to the Motion for a Complete Prehearing Exchange, the Respondent contends that it has asked the Complainant, prior to producing any financial information, that such information be provided under "seal" but the Complainant has repeatedly ignored this request for privacy. The Respondent states that it remains ready, willing, and able to supply financial information to the Complainant, provided such information can be provided in confidence and under seal. The Respondent contends that information regarding its financial condition has been publicly available to the Complainant in both the national media and in the filings before the Securities and Exchange Commission but the Complainant has failed to take advantage of this readily available information. Further, the Respondent notes that numerous lawsuits are pending against the Respondent in New York and Florida. The Respondent argues that given the Complainant's unwillingness or reluctance to maintain the confidentiality of the financial

information and lackadaisical attitude towards publicly available information, an order should not be issued compelling the production of the requested documentation.

Sections 22.19(a)-(f) of the Rules of Practice, 40 C.F.R. §§ 22.19(a)-(f), provide for the prehearing exchange of witness lists, documents, and information between the parties. Essentially, this exchange consists of discovery for the parties. "Additional discovery" is permitted under Section 22.19(e) of the Rules of Practice only after motion therefor is filed and the Administrative Law Judge determines that the requested further discovery meets the specific criteria set forth in that subsection. In pertinent part, subsection (e)(1) provides for other discovery only if it:

> (i) Will neither unreasonably delay the proceeding nor unreasonably burden the non-moving party;
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> (ii) Seeks information that is most reasonably obtained from the non-moving party, and which the non-moving party has refused to provide voluntarily; and
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> (iii) Seeks information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought.

The Complainant's arguments for its Motion for a Complete Prehearing Exchange are persuasive. As pointed out by the Complainant, the Prehearing Order entered on September 21, 1999, directed the Respondent to submit a statement explaining why the proposed penalty should be reduced or eliminated. If the Respondent took the position that it was unable to pay the proposed penalty or that payment would have an adverse effect on its ability to continue to do business, the Respondent was directed to furnish supporting documentation such as certified copies of financial statements or tax returns. In its prehearing exchange, the Respondent asserts that it is unable to pay the proposed penalty and that the expected testimony of Mr. Elliott will support such assertion. However, no supporting financial documents were submitted. Thus, the Respondent has failed to comply with the Prehearing Order of September 21, 1999.

The Complainant correctly notes that the governing regulations found in the Rules of Practice, the administrative case law, and the EPA Penalty Policy provide that the Respondent must submit evidence to support its claim that it is unable to pay the proposed

penalty. Specifically, I agree with the Complainant's position that the Respondent must produce evidence to support its claim of inability to pay as part of its prehearing exchange. The EAB has found that in any case where a respondent's ability to pay a proposed penalty is put in issue, the EPA must be given access to the respondent's financial records before the start of the penalty hearing. *New Waterbury, supra,* at 542. Specifically, the EAB found that "[t]he 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.[f/n] 23 *See* 40 C.F.R. § 22.19(b)[(1995)]". *Id.*

The Complainant's implication, however, that the claim of "inability to pay" is an affirmative defense for which the Respondent bears the burden of proof is rejected even though the instant matter arises under the authority of Section 325(c) of EPCRA. The EAB has consistently held that the Complainant, pursuant to Section 22.24 of the Rules of Practice, 40 C.F.R. § 22.24, bears the burden of proving that the proposed penalty is appropriate after considering all the applicable statutory penalty factors. *B. J. Carney Industries, Inc., CWA Appeal No. 96-2, 7 EAD 171, 217 (EAB, June 9, 1997); Employers Insurance of Wausau and Group Eight Technology, Inc., TSCA Appeal No. 95-6, 6 EAD 735, 756 (EAB, Feb 11, 1997); James C. Lin and Lin Cubing, Inc., FIFRA Appeal No. 94-2, 5 EAD 595, 599 (EAB, Dec. 6, 1994); New Waterbury, supra*, at 538. Consideration of the statutory factors "does not mean that there is any specific burden of proof with respect to any individual factor." *New Waterbury, supra*, at 538. Thus, the "complainant's burden focuses on the overall appropriateness of the proposed penalty in light of all the statutory factors, rather than any particular quantum of proof for individual statutory factors." *Woodcrest Manufacturing, Inc.*, EPCRA Appeal No. 97-2, 7 EAD 757, 773 (EAB, July 23, 1998).

The instant matter, however, arises under the authority of Section 325(c) of EPCRA, and Section 325(c) does not specify penalty factors to be considered in assessing a civil administrative penalty. Under such circumstances, the EAB has found that the Complainant, nevertheless, must still prove that the proposed "penalty is appropriate in light of the particular facts and circumstances of the case." *Id.* at 773-774. In *Woodcrest*, *supra*, the EAB then went on to find that proof of the complainant's adherence to the 1992 Enforcement Response Policy for Section 313 of EPCRA can legitimately form a part of the complainant's prima facie penalty case and ultimately can be considered in assessing the appropriateness of the penalty. *Woodcrest*, *supra*, at 774.

Although the Respondent argues that information concerning its financial condition is available publicly, the requested financial information in the instant matter is most reasonably obtained from the Respondent. The fact that some financial information concerning the Respondent's financial and legal difficulties could be pieced together from various sources does not relieve the Respondent from producing the requested documents as directed. Any valid confidentiality concerns on the part of the Respondent should be covered by the provisions of Section 22.22(a) of the Rules of Practice, 40 C.F.R. § 22.22(a), concerning a business confidentiality claim. I observe that although the Respondent alleges that information concerning its financial condition is available publicly, it now requires confidentiality for the requested financial records.

Moreover, even if the Motion for a Complete Prehearing Exchange is treated as a motion for additional discovery, the regulatory requirements for such other discovery, set forth above, are met. As discussed above, the requested information is most reasonably obtained from the Respondent. There is no indication that the requested information will unreasonably delay the proceeding or unreasonably burden the Respondent. To the contrary, the production of the requested financial records should expedite the proceeding.

For the reasons discussed above, the Complainant's Motion for a Complete Prehearing Exchange is **Granted.** Accordingly, the Respondent is directed to submit documentation such as certified copies of financial statements or tax returns in support of its claim of inability to pay the proposed penalty.

Respondent's Motion for Continuance

On February 8, 2000, the Respondent mailed a Motion for Continuance wherein it requests that the hearing date be postponed until April 2000 because counsel for the Respondent has pre-paid vacation plans from March 23, to March 28, 2000. For good cause shown, the Respondent's motion for a continuance is **Granted.** Accordingly, the new hearing schedule is as follows.

On or before **April 7, 2000**, the parties shall file a joint set of stipulated facts, exhibits, and testimony. *See* Section 22.19(b)(2) of the Rules of Practice, 40 C.F.R. § 22.19(b)(2). The time allotted for the hearing is limited. Therefore, the parties must make a good faith effort to stipulate, as much as possible, to

matters which cannot reasonably be contested so that the hearing can be concise and focused solely on those matters which can only be resolved after a hearing.

The Hearing in this matter will be held beginning at 9:30 a.m. on Tuesday, **April 18, 2000**, in Kansas City, Kansas, continuing if necessary on April 19, and 20, 2000.[3/] The Regional Hearing Clerk will make appropriate arrangements for a courtroom and retain a stenographic reporter. The parties will be notified of the exact location and of other procedures pertinent to the hearing when those arrangements are complete.

IF EITHER PARTY DOES NOT INTEND TO ATTEND THE HEARING OR HAS GOOD CAUSE FOR NOT BEING ABLE TO ATTEND THE HEARING AS SCHEDULED, IT SHALL NOTIFY THE UNDERSIGNED AT THE EARLIEST POSSIBLE MOMENT.

Original signed by undersigned

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Barbara A. Gunning
Administrative Law Judge

Dated: 2-18-00
Washington, DC

[3/] Counsel for the Complainant has indicated that she is available for hearing the week of April 17, 2000.