

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

| | | |
|----------------------|---|---------------------------|
| In the Matter of |) | |
| |) | |
| New Waterbury, Ltd., |) | Docket No. TSCA-I-88-1069 |
| A California Limited |) | |
| Partnership, |) | |
| |) | |
| Respondent |) | |

ORDER ON REMAND SETTING PAYMENT SCHEDULE

On October 20, 1994, the Environmental Appeals Board (EAB) issued a decision holding that, contrary to the initial decision which had rescinded in its entirety a penalty of \$35,750 assessed for violations of the Toxic Substances Control Act, Respondent, New Waterbury, Ltd., had the ability to pay a penalty of \$24,000, In re New Waterbury, Ltd, a California Limited Partnership, TSCA Appeal No. 93-2 (EAB, October 20, 1994). The EAB determined the amount of the penalty by applying four percent to New Waterbury's purported average annual gross rental income of \$602,000 for the years 1987 through 1989. The "four percent rule" is derived from the "Guidelines for the Assessment of Civil Penalties Under Section 16 of the Toxic Substances Control Act", 45 Fed. Reg. 59770; 59776 at 59775 (September 10, 1980). The matter was remanded for determination of an appropriate payment schedule.

By an order, dated November 23, 1994, the parties were directed to submit their views and recommendations as to an appropriate payment schedule, including the affect, if any, on the

payment schedule of the settlement in United States v. New Waterbury, et al., Civil No. 91-CV00688 (D.Conn.), 59 Fed. Reg. 13748 (March 23, 1994).^{1/} Unsurprisingly, the parties' views as to an appropriate payment schedule differ widely, Complainant contending that payment of the full amount of the \$24,000 penalty determined by the EAB should be required within 60 days of the ALJ's entry of a payment order, while Respondent contends that it does not have the ability to pay the penalty until March 1, 1997, the date it anticipates receiving the proceeds of the sale of its property to Homart Development Company.

Complainant's argument that Respondent should be required to pay the penalty within 60 days of the date of the ALJ's order is based upon the relatively easy cash flow to New Waterbury from a financially sound business, Winston Management, as determined by the EAB and the length of time since the violations were discovered and the complaint issued.^{2/} Complainant alleged that the settlement

^{1/} This action, commenced subsequent to the close of the hearing in the instant proceeding, was instituted to, inter alia, compel the removal and proper disposal of PCB equipment and PCB wastes which were located at Respondent's facility and which had allegedly been abandoned by the former owner, Century Brass Products and/or Pan Metals Corp., which had allegedly purchased the items. The hearing was reopened for the purpose of receiving evidence as to the cost of removing the PCBs at New Waterbury's facility and as to the financial condition of the general partner, Vanta, Inc. Respondent has misinterpreted the ALJ's order as requiring a statement of the affect the proposed payment schedule has on the settlement of the action in District Court rather than the affect the settlement may, or should, have in determining a final payment schedule.

^{2/} Complainant's Proposed Payment Schedule, dated December 23, 1994. Sixty days is the payment time usually specified in initial
(continued...)

of the District Court action should have no affect on Respondent's ability to comply with the proposed payment schedule, because New Waterbury's obligations under the Consent Decree were being performed by an entity unrelated to New Waterbury. Complainant averred that cleanup and removal of the PCBs at issue in the Consent Decree were being undertaken and paid for by Brass Center, Ltd. (BCL), an entity organized by a quasi-public agency, known as the Naugatuck Valley Development Corporation. An attached copy of a letter from Mr. Joseph H. Wellington, counsel for BCL, to Mr. Kevin Murphy, counsel for Respondent, dated October 27, 1994, indicates that BCL has contracted with a firm known as Transtec for the removal of PCB transformers, capacitors and debris at the New Waterbury facility and that other cleanup work, such as removal of contaminated soil and dredging and removal of sediment from a pond, would be performed by other contractors. The purpose of the cleanup was to promote the development and use of the property by Homart Development Company for a shopping mall.^{3/}

As indicated above, New Waterbury has proposed a payment schedule of March 1, 1997 (Respondent's Proposed Payment Schedule,

^{2/} (...continued)
decisions which assess a penalty, because the EAB has 45 days from the service of an initial decision in which to initiate sua sponte review, Rule 22.31(b) (40 CFR Part 22).

^{3/} Homart has elected to exercise an option to purchase the property granted under a Purchase and Sale Agreement entered into with New Waterbury and others under date of October 1, 1992 (findings 36 and 37). Unless otherwise noted, references to findings are to the Decision After Reopened Hearing.

dated December 28, 1994). Respondent stated that it anticipated that the State of Connecticut-funded cleanup would be completed by that date and the property transferred to Homart pursuant to the option-purchase agreement. New Waterbury alleged that until the proceeds of the sale were received, it did not have the financial ability to pay the \$24,000 penalty levied by the EAB. Attached as "Exhibit A" was a copy of a "Stipulation For Judgment", dated November 10, 1994, to be filed in the Superior Court of the State of Connecticut, whereby New Waterbury stipulated to the entry of a judgment for \$20,000 for failure to comply with an administrative order requiring either remedial work or the removal of a dam, known as the "East Brass Mill Dam" or the "Scovill Dam", on its property. The judgment is payable March 1, 1997.

Complainant replied to New Waterbury's proposed payment schedule under date of January 12, 1995. Citing the EAB's finding of "the relatively easy flow of cash into New Waterbury from a financially sound business, Winston Management...", Complainant asserted that, because New Waterbury made no claim to the contrary, it should be presumed to be able to raise the amount of the penalty promptly from Winston Management. New Waterbury served a document entitled "Respondent's Reply To Complainant's Proposed Payment Schedule" under date of January 17, 1995.^{4/} Respondent avers that

^{4/} The mentioned submission was actually a "surreply" which was not contemplated by the ALJ's order of November 23, 1994. Respondent has, however, moved that it be accepted, and, because it is not deemed to be prejudicial to Complainant, it will be considered.

the EAB'S statement regarding cash flow relates solely to historical events and may not serve as a basis for establishing a payment schedule today [at the present time]. Moreover, Respondent says that Complainant has elected to disregard the EAB's acknowledgment [reason for the remand], i.e., "given New Waterbury's financial status, the complicated business relationships involved here, and the amount of time that has elapsed since the reopened hearing, we recognize that a payment schedule may be appropriate.." (Remand Order at 25). Respondent notes, additionally, that the EAB emphasized certain language from the penalty guideline to the effect that, "if a respondent continues to assert an inability to pay .., the Region should make further inquiries... ." (Id. at 22). Because Complainant elected not to follow what New Waterbury characterizes as the "direction" of the EAB in the foregoing respects, it is argued that the date of March 1, 1997, should be established as the date for payment of the penalty.

DISCUSSION

Because Complainant argues that New Waterbury should be presumed to be able to promptly raise the amount of the penalty from Winston Management, there is no dispute that Respondent is presently unable to pay the penalty. The "presumption" relied upon by Complainant is based upon the practice of Winston Management and of its sole stockholder, Mr. Trevor C. Roberts, in advancing or authorizing the advance of funds sufficient to enable New Waterbury to continue a "hand-to-mouth" existence and avoid total

liquidation (findings 32 through 35). Because they were not named as parties, neither the financial condition of Winston Management nor that of Mr. Roberts has been placed at issue herein.

The record reflects that mortgages, judgments and other liens against the property far exceed the purchase price, less sums previously paid to keep the option in effect, agreed to by Homart (findings 32, 33, 37, and 40). Moreover, it seems unlikely that the State of Connecticut is financing the cleanup of the property merely to be reimbursed by tax or other revenue expected to be generated from its development. Be that as it may, Mr. Roberts testified that, if Homart exercised its option, "there would be enough funds to take care of the transformer problem" (finding 40). This apparently referred to PCB equipment and PCB waste which were the subject of the government's action against New Waterbury in Federal District Court. There is no indication that the mentioned testimony by Mr. Roberts included the extensive cleanup of the property which is apparently presently underway or the payment of penalties resulting from this or any other enforcement action. Nevertheless, by arguing that payment of the penalty should be postponed until the closing of the Homart purchase, New Waterbury could be regarded as in effect representing that payment of the penalty can and will be made from the proceeds of the sale.

As opposed to the foregoing, Complainant relies on the assertion that "it [New Waterbury] should be presumed to be able to raise the penalty amount promptly from Winston Management". The problem with this argument is that TSCA §16(a)(2)(A)(2) clearly

provides that this proceeding is subject to the Administrative Procedure Act (5 U.S.C. § 551 et seq.), Complainant is the proponent of an order within the meaning of the APA, and, as such, has the burden of persuasion. See Director, Office of Worker's Compensation Programs, Department of Labor v. Greenwich Collieries, 512 U.S. ___, 129 L.Ed. 2d 222 (1994). Suffice it to say that, on this record, I am not persuaded that Winston Management, whose financial condition was not at issue herein, will promptly advance New Waterbury the money to pay the penalty.^{5/} Moreover, if New Waterbury is ordered to pay the penalty within 60 days and if, as is likely, it fails to do so, it is highly unlikely that any judgment for the amount of the penalty secured by the Attorney General pursuant to TSCA § 16(a)(4) could, or would, be paid earlier than March 1, 1997, the scheduled date for the closing of the sale to Homart.

In view of the deteriorating financial condition of New Waterbury shown by this record, the length of time since the violations were discovered and the complaint issued is of no consequence. An order will be entered requiring that the penalty together with interest at five percent, the rate currently specified by the Treasury on obligations to the United States

^{5/} If Winston were to loan New Waterbury the money to pay the penalty on the condition that it would be repaid ahead of other creditors, the condition would be a "voidable preference" under the Bankruptcy Code (11 USCS § 547).


(EPA's Financial Management Division, Office of the Comptroller, Transmittal No. 95-11, June 6, 1995), be paid on or before March 1, 1997.

ORDER

New Waterbury is ordered to pay the penalty of \$24,000 together with interest at the rate of five percent on or before March 1, 1997.^{6/} Payment of the penalty shall be made by mailing a certified or cashier's check payable to the Treasurer of the United States to the following address:

Regional Hearing Clerk
U.S. EPA, Region I
P.O. Box 360197M
Pittsburgh, PA 15251

Dated this 8th day of August 1995.


Spencer T. Nissen
Administrative Law Judge

^{6/} This order is an initial decision appealable in accordance with Rule 22.30 (40 CFR Part 22).

Docket No. TSCA-I-88-1069
New Waterbury, Ltd.

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of August, 1995, the original of Judge Nissen's Order on Remand Setting Payment Schedule was filed with the Regional Hearing Clerk, EPA Region I, and that true and correct copies were sent to the following persons in the following manner:

CERTIFIED MAIL
RETURN RECEIPT REQUESTED:

Kevin C. Murphy
Devorsetz, Stinziano, Gilberti,
Heintz & Smith, P.C.
Bridgewater Place
500 Plum Street
Suite 600
Syracuse, NY 13204-1428

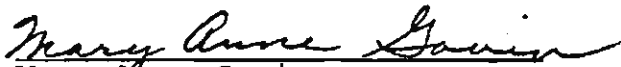
HAND DELIVERY:

Thomas Olivier, Esq. RCA
Assistant Regional Counsel
Office of Regional Counsel
U.S. EPA, Region I
J.F.K. Federal Building
Boston, MA 02203

I further certify that on this date a copy of the foregoing letter and a copy of this Certificate of Service were served on Bessie Hammiel, Hearing Clerk, U.S. Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460, by EPA Pouch Mail.

Date:

8/11/95


Mary Anne Gavin
Regional Hearing Clerk
U.S. EPA - Region I