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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
MARK FASTOW AND	)	Docket No. EPCRA-09-97-0013
FIBERGLASS SPECIALTIES, INC.,	)	
	)	
Respondents	)	

INITIAL DECISION

I. Procedural History

This proceeding was initiated by the Environmental Protection Agency, Region 9 (EPA) on September 26, 1997, pursuant to Section 325(c) of the Emergency Planning and Community Right-to-Know Act of 1986 ("EPCRA"), 42 U.S.C. § 11001 *et seq*. The Complaint, in three counts, charged Respondents Mark Fastow and Fiberglass Specialties, Inc., with failing to file a Toxic Chemical Release Inventory Reporting Form ("Form R") for the chemical styrene by the applicable due date for the years 1993, 1994, and 1995. Failure to file a Form R is a violation of EPCRA § 313, 42 U.S.C. § 11023. The Complaint proposed a total penalty of $15,000 for the three violations. In February of 1998, this proposed penalty was reduced pursuant to a stipulation by 22.5% ($3,375) to $11,625 in consideration of Respondents' "attitude." Complainant's Exhibit ("CX") 6 (Stipulation).

Mr. Fastow, appearing *pro se* on behalf of himself and Fiberglass Specialties, Inc., of which he is the president, answered the Complaint, admitting the violations charged and offering several arguments in mitigation of the proposed penalty.

On June 9, 1998, Complainant filed a Motion For Accelerated Decision on Liability for each of the violations charged in the Complaint. In response, Respondents did not deny the truth of Complainant's arguments regarding liability, but argued that Complainant, because it failed to specifically make these Respondents personally aware of the filing requirement, bore at least some of the responsibility for Respondents' failure to file the required Form Rs. On June 29, 1998, the undersigned granted Complainant's Motion and entered judgment in favor of Complainant on the issue of liability as to each of the three counts in the Complaint.

A hearing was held in this matter before the undersigned on July 28, 1998 in Las Vegas, Nevada, to resolve the remaining issue in this case, that of the appropriate penalty to be assessed against Respondents. Complainant presented two witnesses, Greg Gholson and Paul Jalbert. Respondents also presented two witnesses, Kathy Keener and Mark Fastow. Complainant introduced eleven exhibits, nine of which were admitted into evidence; Respondents introduced ten exhibits, six of which were admitted into evidence.

The parties waived the opportunity to submit post-hearing briefs and the record was closed on July 28, 1998. The transcript of the hearing was received by the undersigned on September 3, 1998.(1)

II. EPCRA Section 313 Penalty Criteria

Section 22.27(b) of the Consolidated Rules of Practice that govern this proceeding provides in pertinent part that:

> . . . the Presiding Officer shall determine the dollar amount of the recommended civil penalty to be assessed in the initial decision in accordance with any criteria set forth in the Act relating to the proper amount of a civil penalty, and must consider any civil penalty guidelines issued under the Act.

40 C.F.R. § 22.27(b).

A. Statutory Civil Penalty Criteria

EPCRA § 325(c)(1), 42 U.S.C. § 11025(c)(1), provides that any person violating EPCRA § 313 "shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation." Although EPCRA provides criteria to guide the assessment of civil penalties for violations of other of its provisions, it fails to provide such guidance for section 313 violations.

As a result, the criteria set forth in EPCRA § 325(b), 42 U.S.C. § 11045(b), have been relied upon to guide administrative penalty assessment for section 313 violations. *See e.g., Catalina Yachts, Inc.*, Docket No. EPCRA-09-94-0015 (Initial Decision, Feb. 2, 1998); *TRI Industries, Inc.*, Docket No. EPCRA-1093-11-05-325 (Initial Decision, Oct. 11, 1996); *GEC Precision Corp.*, Docket No. EPCRA-7-94-T-3 (Initial Decision, Aug. 28, 1996). Section 325(b), which governs assessment of penalties for violations of EPCRA § 304, establishes two classes of administrative penalties for violations of EPCRA § 304. Class I violations carry a maximum penalty of $25,000 per violation, and class II violations carry a maximum penalty of $25,000 for each day the violation continues.

EPCRA § 325(b)(1)(C), 42 U.S.C. § 11045(b)(1)(C), directs consideration of the "nature, circumstances, extent and gravity of the violation or violations and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require" in determining the appropriate penalty for a class I violation of section 304.

EPCRA § 325(b)(2), which guides assessment of class II violations, directs the use of the factors enumerated in Section 16 of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 1615. The factors listed under TSCA § 16 are identical to those found under EPCRA § 325(b)(1)(C) except that the former includes consideration of the effect on the violator's ability to continue to do business and omits an inquiry into the violator's economic savings or benefit.(2)

B. EPA's Civil Penalty Guidelines

In August of 1992, EPA issued an Enforcement Response Policy ("ERP") for EPCRA § 313. The stated purpose of the ERP is to "ensure that enforcement actions for violations of EPCRA § 313 . . . are arrived at in a fair, uniform and consistent manner; that the enforcement response is appropriate for the violation committed; and that persons will be deterred from committing EPCRA § 313 violations . . . ."

ERP at 1.

The ERP utilizes a matrix and/or a per-day formula to determine a "gravity-based" penalty accounting for the extent level and circumstance level of a particular violation. Under the ERP the "extent" level of a violation is determined by looking at the size of the violator's business, as evidenced by total sales and number of employees, and the quantity of the subject chemical used. *Id.* at 8-10.

The circumstance level for a failure to timely file a Form R violation is determined by the category of the violation. A category I Form R violation, one in which the Form R is not submitted until one year or more after the due date, is classified as a circumstance level 1 violation. Category I, circumstance level 1 gravity-based penalties are calculated by plotting the circumstance and extent levels on a matrix provided in the ERP. *Id.* at 11. A category II violation is one in which the Form R is submitted less than 1 year after the due date and is classified as a circumstance level 4 violation. Category II, circumstance level 4 gravity-based penalties are calculated following a per-day formula provided in the ERP. *Id.* at 13-14.

After a gravity-based penalty amount is determined, the ERP provides for upward or downward adjustments to the penalty based on other factors such as voluntary disclosure, history of prior violations, delisted chemicals, attitude, other factors as justice may require, supplemental environmental projects and the violator's ability to pay. *Id.* at 14-20.

III. Findings of Fact

Respondent Fiberglass Specialties Inc., manufactures fiberglass automobile parts which are sold to automotive parts distributors and retailers. As part of its manufacturing process Fiberglass Specialties uses gel-coat and polyester resins, both of which contain styrene (CAS No. 100-42-5), which is listed under 40 C.F.R. § 372.65 as a toxic chemical subject to the Toxic Chemical Release Reporting requirements of EPCRA § 313 and 40 C.F.R. Part 372.

The TRI-Listed Chemical Usage table for Fiberglass Specialties, prepared by Complainant from information provided by Fiberglass Specialties, shows that during the years 1993, 1994, and 1995 Respondents used 46,123, 50,543, and 51,599 pounds of styrene respectively. CX-2. These amounts exceeded the 25,000 pound threshold reporting limit for styrene for the years in question. *See* EPCRA § 313(f)(1)(B), 40 C.F.R. § 372.25(a) (specifying threshold reporting amounts).

As found in the Order granting Complainant's Motion for Accelerated Decision on Liability, Respondents admitted exceeding the reporting threshold for styrene in each of the three years specified in the Complaint. Respondents' failure to file Form Rs by the applicable due date for the years 1993 through 1995 constitutes three violations of EPCRA § 313.

At the hearing, Complainant proposed a total combined penalty of $11,625, based on Complainant's application of the EPCRA ERP to Respondents' violations. Complainant classified all three of Respondents' violations as failure to report in a timely manner, category I, which places them in circumstance level 1. Complainant placed Respondents in extent level C based on its determination that Fiberglass Specialties processed less than 10 times the threshold amount of styrene, had less than $10 million in total sales and had fewer than 50 employees in the years at issue. A circumstance level 1 violation by a company in extent level C yields a gravity-based penalty of $5,000 per violation for a total of $15,000 for all 3 violations. The penalty proposed at hearing reflects a 22.5% downward adjustment for "attitude" under the ERP. CX 6.

At the hearing, Respondents countered that their deteriorating financial situation makes them unable to pay such a penalty and requested that the proposed penalty be significantly reduced or eliminated altogether.

A. Testimony of Complainant's Witnesses

Complainant's first witness, Greg Gholson, is a toxics officer in EPA Region 9. He testified to his inspection of Respondents' facility and his use of the ERP to calculate the penalty initially proposed by Complainant. Mr. Gholson testified that he based his extent level determination on information provided by a Dun and Bradstreet report on Fiberglass Specialties, Inc. and by Mr. Fastow concerning the number of employees, annual sales and total usage of styrene at the Fiberglass Specialties facility. Tr. 22, 34; CX 4. Mr. Gholson classified Respondents' violations as failure to report in a timely manner, category I, which equates to circumstance level 1. Applying the extent and circumstance levels to the penalty policy matrix yields a gravity based penalty amount of $5,000, the amount listed for each count on Mr. Gholson's penalty calculation worksheet. CX 5. Based on the information available to him at the time he drafted the Complaint, Mr. Gholson's consideration of the adjustment factors resulted in no upward or downward adjustments to the gravity based penalty amount. Tr. 23-26.

Mr. Gholson also testified that, although he is not a toxicologist, his review of several chemical fact sheets on styrene showed that it is classified as a possible human carcinogen and is an acute respiratory toxin. Tr. 28; CX 8.

Complainant's second witness, Paul Jalbert, is an auditor with the Office of the Inspector General, Western Audit Division. He testified to his analysis of Respondents' financial situation as it relates to Respondents' asserted inability to pay. He explained that he considers ability to pay in terms of available liquid and non-liquid assets, available equity which could be used as collateral for a loan, accounts receivable, significant trends in the business, loans and expenses. Tr. 86-90.

Mr. Jalbert's analysis of the financial condition of Respondent Mr. Fastow was limited somewhat due to the short interval of time between Mr. Fastow's submission of his personal financial information and the hearing date. However, Mr. Jalbert did note that Respondent Mr. Fastow's Federal income tax return for 1997 showed that, in addition to his salary from Fiberglass Specialties, Mr. Fastow received rental income in the amount of $22,614. Tr. 76; CX 9. Further research showed that Mr. Fastow's rental income comes from his ownership of two commercial buildings; one of the buildings is leased to Fiberglass Specialties, the other is leased to other entities. Tr. 75-77. He also noted that the bank account interest income of $1,231 reported on Mr. Fastow's 1997 tax return was consonant, based on a 5% rate of return, with cash savings of somewhere between $20,000 and $24,000 during 1997. Tr. 78, 84.[(3)]

As for Fiberglass Specialties, Inc., Mr. Jalbert noted that it appears to be experiencing currently some financial difficulties. Specifically, he testified that his examination of the corporation's financial information showed a downward trend in sales in recent years, while its cost of sales has risen above 70%. Tr. 90, 94-96. Despite these difficulties, Mr. Jalbert pointed out, Fiberglass Specialties still showed a retained earnings balance. Tr. 90, 94-95. Without more detailed information concerning the assets and liabilities of Mr. Fastow and Fiberglass Specialties, Mr. Jalbert could not project a specific amount or range of liquid assets that Respondents would have available to pay a penalty. However, Mr. Jalbert testified that, in his opinion, taking into consideration corporate and individual assets, Respondents have sufficient resources to cover a penalty in the range of $12,000 to $14,000 which, Mr. Jalbert observed, is a small percentage of Fiberglass Specialties' gross sales which in 1997 totalled $658,000. Tr. 78-79, 93

B. Testimony of Respondents' Witnesses

Kathy Keener, Respondents' first witness, testified that she has been employed at Fiberglass Specialties since December of 1993. She manages the day to day office operations at Fiberglass Specialties, including taking orders and phone calls and paying bills. According to Ms. Keener, Fiberglass Specialties, Inc. has had an increasingly hard time paying its vendors on time, taking on average about sixty days, and in some instances vendors have refused to ship materials to Fiberglass Specialties because of their failure to make payments. Tr. 114-15. She further testified that things are getting "worse and worse," that beginning about seven

months ago the business' decline seemed to accelerate, apparently due to increased foreign competition, and that the company often has a hard time meeting payroll. Tr. 115, 117-18.

Mr. Fastow, testifying on behalf of himself and Fiberglass Specialties, echoed Ms. Keener's evaluation Fiberglass Specialties' current situation. He noted that although sales have declined, he has had to raise his foreman's salary in order to keep him, and that his costs for such things as equipment, fire insurance, utilities, rent, and accounting services, are fixed. Consequently, costs of manufacturing its products for sale are consuming an increasing proportion of the business' sales revenue, causing a reduction in profits. Tr. 126-27. Mr. Fastow stated that as a result, Fiberglass Specialties has exhausted a $50,000 line of credit with Bank of America and is currently able to pay only the interest on this amount. Tr. 127, 154-55. To cut the corporation's losses, Mr. Fastow testified that he has cut his weekly pay received from the corporation from $1500 to $700 and has taken a loan of $30,000 from his accountant. Tr. 144, 168; RX 9, 10 (quarterly wage reports). Mr. Fastow also testified concerning his personal expenses, that he must provide for his family and help defray the costs of his daughter's college education. Tr. 169. All of this shows, Mr. Fastow asserted, that Respondents are unable to pay the proposed penalty.

In addition to his testimony relating to Respondents' inability to pay, Mr. Fastow also expressed frustration at being "slapped with a complaint" before having a chance to discuss the matter with Agency personnel. Tr. 128. Further, while acknowledging that his failure to file the Form Rs at issue was an oversight on his part, he added that neither EPA nor any state or local officials ever informed told him of the Form R requirement. Tr. 174-75.

IV. Discussion

A. Gravity-based Penalty

Although Respondents' testimony and arguments at hearing were not directed at Complainant's calculation of the gravity based penalty for their violations, the testimony of Complainant's witness Mr. Gholson brought to light an error in the calculation of the gravity-based penalty for count III. Specifically, Complainant failed to take into account the deadline extension for filing 1995 Form Rs from July 1, 1996 to August 1, 1996. *See,* 61 Fed. Reg. 2722 (Jan. 29, 1996) (time extension for submission of reports). Complainant's exhibit 7 establishes that Fiberglass Specialties' 1995 Form R for styrene was filed on July 1, 1997, less than 12 months after its original due date. CX 7 (certified statement of A. Abrams, Director, Information Management Division). A Form R filed less than twelve months after its due date is a failure to report in a timely manner, category II violation and classified as circumstance level 4.

The ERP provides a per day penalty formula for calculating failure to report in a timely manner, circumstance level 4 violations. The formula is as follows:

$$\text{Level 4 Penalty} + \frac{(\text{\# of days late} - 1) \times (\text{Level 1} - \text{Level 4 Penalty})}{365}$$

In the instant case, Respondents' submitted their Form R for the year 1995 on July 1, 1997. With the due date for 1995 extended to August 1, 1996, Respondents' filing was 335 days late. Plugging this number into the formula provided above yields a gravity-based penalty of $4660. Reducing that amount by 22.5% per the parties' stipulation yields a corrected penalty amount of $3,612 for count III. Adding this amount to the proposed penalty for the other two counts yields a corrected total proposed penalty of $11,352.

B. Adjustment Factors

Voluntary disclosure

Under the ERP, a respondent is eligible for a reduction of up to 50% if it discloses its violations to the Agency before the Agency contacts a respondent for the purpose of determining compliance with EPCRA § 313. The evidence shows that in the instant case there was no voluntary disclosure and Respondents are due no downward adjustment under this factor.

History of prior violations

A respondent with a history of prior violations may be subject to an upward adjustment of up to 100%. Respondents have no history of prior violations, therefore no upward adjustment is warranted.

Delisted chemicals

A respondent may be entitled to a reduction of 25% if a chemical is delisted before or during the pendency of the enforcement action. Styrene, the chemical at issue in this proceeding, has never been delisted.

Attitude

Based upon its "attitude," which according to the ERP consists of cooperation and compliance, a respondent may receive a downward adjustment of up to 30%, with 15% allotted to each attitude component. In February 1998, subsequent to settlement negotiations with Mr. Fastow and pursuant to a stipulation, Complainant adjusted its proposed penalty downward by 22.5%, allocated as 15% for compliance and 7.5% for cooperation. Only Mr. Gholson, who did not take part in the settlement discussions or the decision to reduce the penalty, testified concerning the reduction. He offered two explanations, one on cross examination and examination by the Court, the other on redirect examination, as to why Respondents' did not receive the full 30% reduction.

On cross examination, Mr. Gholson indicated that the full 30% reduction was not applied because Respondents declined several settlement offers. Tr. 32-33, 49. After prompting by Complainant's counsel, Mr. Gholson testified on redirect examination that Respondents were not denied the full 30% reduction because they refused to settle. Rather, he stated that Respondents were deemed uncooperative during subsequent discussions because they did not provide financial documents requested by Complainant. Tr. 54. Thus, they received a 7.5% reduction based on their cooperation before and during the inspection, but were denied the remaining 7.5% because they did provide Complainant with documentation of their financial condition.

The first explanation, if true, amounts to punishment for failing to accept settlement terms and is not an acceptable reason to deny a reduction for cooperation. The second explanation, although prompted, was credible and better fits the course of this proceeding. While continually asserting the defense as to an inability to pay the proposed penalty, Respondent provided financial information requested by Complainant in order to evaluate this claim *only after* Complainant's motion for discovery was granted, and did not provide some of the requested information until less than a week before the hearing date. Thus, the reduction granted appears fair and reasonable in light of the history of this case and Respondent is due no further reduction under the attitude adjustment factor.

Other matters as justice may require

The ERP provides for a reduction of up to 25% for other matters that, based on the particular facts and circumstances of a case, may merit a further reduction not available under other adjustment factors. For example, a reduction under this factor may be applied where a violation falls within a higher penalty category by a small margin or where the violation was one over which a respondent had no control. Respondents' argument that Complainant bears at least some of the responsibility for their failure to timely file their Form Rs can be viewed as an effort to show special circumstances meriting a further penalty reduction in this case. The statutory factors to consider for penalty assessment under section 325(b) of EPCRA

include a respondent's "degree of culpability." In some situations, a person's lack of actual knowledge of a regulatory requirement may be considered in mitigation of a penalty. However, the EPCRA ERP (at 14) states, "Lack of knowledge does not reduce culpability since the Agency has no intention of encouraging ignorance of EPCRA and its requirements and because the statute only requires facilities to report information which is readily available." The EPCRA ERP states further that if a violation is knowing or willful, the Agency may assess per day penalties, under section 325(c) of EPCRA, or take other enforcement action as appropriate. Thus, it appears that penalty assessment under the EPCRA ERP is based on an assumption that a respondent may not have had actual knowledge of the requirements of EPCRA § 313. Therefore, the penalty will not be reduced on the basis that EPA did not provide individual actual notice to Respondent of the Form R requirements.

Ability to pay

Most of the testimony and evidence presented at the hearing addressed the issue of Respondents' asserted inability to pay the proposed penalty. Fiberglass Specialties' Federal corporate tax returns and financial statements show that sales have declined noticeably in each of the past three fiscal years, from $870,000 in 1995 to $658,000 in 1997, while concomitantly its cost of sales has risen. CX 9; RX 6, 7, 8. The corporation's financial records also show that the corporation has outstanding debts of $42,771 to Mr. Fastow and $50,000 to Bank of America. RX 8. These circumstances have forced Mr. Fastow to cut his own weekly salary from $1500 to $700 a week. Tr. 143-44. However, despite Fiberglass Specialties' difficulties, it had a retained earned balance on its fiscal year 1997 federal corporate tax return, and its gross sales figures, although lower than previous years, are not insignificant.

Turning now to Respondent Mr. Fastow, the evidence shows that he individually possesses significant assets. He owns commercial real estate upon which is sited two commercial buildings, one of which was built in March of 1997. Mr. Fastow testified that this is, property currently worth approximately $1 million, subject only to an outstanding mortgage of approximately $567,000, leaving over $400,000 in equity. Tr 160. Mr. Fastow's gross rents from the commmercial buildings in 1997, amounted to $96,900. CX 9; Tr. 76.[(4)] He also owns a home which he values at between $220,000 and $225,000, subject only to a mortgage of $165,000, leaving $60,000 in equity. Tr. 171, 153.

Moreover, while Fiberglass Specialties' corporate tax return showed net operating losses of $33,006 in fiscal year 1996 and $55,278 in 1997, officer compensation (all of which goes to Mr. Fastow as the corporation's sole officer) in those years was $80,000 and $47,300. CX 9. In addition to other benefits provided to its employees, Fiberglass Specialties also makes Mr. Fastow's car payments. Tr. 163.

The burden of proof with regard to the ability to pay a penalty is discussed by the Environmental Appeals Board (EAB) in *New Waterbury Ltd.,* 5 E.A.D. 529 (EAB 1994). The EAB stated therein as follows:

Where ability to pay is at issue going into a hearing, the Region will need to present some evidence to show that it considered the respondent's ability to pay a penalty. The Region need not present any *specific* evidence to show that the respondent *can pay* or obtain funds to pay the assessed penalty, but can simply rely on some *general* financial information regarding the respondent's financial status which can support the *inference* that the penalty assessment need not be reduced. Once the respondent has presented *specific* evidence to show that despite its sales volume or apparent solvency it cannot pay any penalty, the Region as part of its burden of proof in demonstrating the "appropriateness" of the penalty must respond either with the introduction of additional evidence to rebut the respondent's claim or through cross-examination it must discredit the respondent's contentions.

5 E.A.D. 542-3. If Respondent proves inability to pay, it is a mitigating consideration in determining the penalty, and does not preclude assessment of any penalty. "A successful demonstration of inability to pay a proposed penalty would not automatically justify the non-assessment of a penalty." 5 E.A.D. at 540. Thus,

a reduction in the penalty may be warranted.[(5)] For example, in *Commercial Cartage Company,* CAA App. 97-9, 1998 EPA App. LEXIS 87 (EAB July 30, 1998), the EAB reduced by 75 percent the penalty for two violations of the Clean Air Act, on the basis that although the violations were "serious," respondent's unrebutted evidence showed that it was no longer in business and had debts of approximately $500,000 at the time of the hearing. Noting that the respondent did not establish that it cannot pay any penalty, and that it may have residual funds to pay a penalty or may decide to resume operations in the future, the EAB reduced the $10,500 penalty to $2,625.

In this case, Fiberglass Specialties is showing a loss on its corporate tax returns, and Mr. Fastow has taken the measure of cutting his salary in half. Respondents' testimony and evidence as to Respondents' finances is credible, and has not been rebutted or discredited by Complainant. Nevertheless, the evidence shows that Mr. Fastow individually has the capacity to pay some monetary penalty, and that in any event, between the two Respondents, there appears to be a capacity to pay a substantial penalty. Based upon the evidence and testimony presented at hearing, a reduction in the proposed penalty of 20% based on Respondents' ability to pay is warranted. This strikes an appropriate balance between the uncertainty of the future of Fiberglass Specialties, Inc., the business upon which Mr. Fastow depends for the majority of his income and Mr. Fastow's personal assets. Accordingly, the penalty assessed against Respondents is $9,082.00.

V. Conclusion

In light of all of the factors of this case, I find appropriate the imposition of a civil penalty in the amount of $9,082.00 for Respondents, Mark Fastow and Fiberglass Specialties, Inc., failure to file Toxic Chemical Release forms as to styrene for calendar years 1993, 1994 and 1995, in violation of Section 313 of the Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. §11023.

ORDER

1. Respondents are jointly and severally assessed a civil penalty of $9,082.00.

2. Payment of the full amount of this civil penalty shall be made within 60 days of the service date of this Order by submitting a certified or cashier's check in the amount of $9,082.00, payable to the Treasurer, United States of America, and mailed to:

EPA - Region 9
P.O. Box 360863M
Pittsburgh, PA 15251

3. A transmittal letter identifying the subject case and the EPA docket number, as well as Respondents' names and addresses must accompany the check.

4. If Respondents fail to pay the penalties within the prescribed statutory period after entry of this Order, interest on the penalty may be assessed.

5. Pursuant to 40 C.F.R. §22.27(c), this Initial Decision shall become the Final Order of the Agency, unless an appeal is taken within twenty (20) days from the service date of this Order or the Environmental Appeals Board elects, *sua sponte*, to review this decision, pursuant to 40 C.F.R. §22.30.

_____
Susan L. Biro
Chief Administrative Law Judge

Date: October 28, 1998
Washington, D.C.

1. Citation to the transcript of the hearing will be in the following form: "Tr."

2. "Inability to pay" and "ability to continue in business" are analyzed as one factor in EPA's Enforcement Response Policies (ERPs), created to guide penalty assessment under TSCA § 16 and FIFRA § 14, statutory provisions which include both factors. *See,* 45 Fed. Reg. 59,770, 59,775 (Sept. 10, 1980) (TSCA ERP); FIFRA ERP at 23; *see also In re: James C. Lin and Lin Cubing Inc.*, FIFRA Appeal No. 94-2, 5 E.A.D. 595, 599 (Final Order, EAB, Dec. 6, 1994) (acknowledging equivalence of "ability to pay" and "ability to continue in business"); *Commercial Cartage Co.*, CAA Appeal No. 97-9, slip op. at 30 (Final Decision, EAB, July 30, 1998) (characterizing the two as analogous concepts, and applying the same evidentiary burdens to "ability to continue in business" as to "ability to pay"). This is the approach that will be employed in the case at bar. Therefore, Respondents' arguments at hearing, which can be understood as relating both to Respondents' inability to pay, and to the ability of Respondent Fiberglass Specialties to continue in business, will be analyzed under the rubric of "ability to pay" as delineated in the EPCRA ERP.

3. On cross examination, Mr. Fastow showed Mr. Jalbert bank statements from May 1997 and May 1998 which showed balances of $2,655 and $3,624 respectively. Mr. Jalbert did not question the balances shown as of those dates but stated such limited balances could not be reconciled with the total interest income reported on Mr. Fastow's 1997 Federal tax return. Tr. 80-85. Exactly how the interest income reported was generated was not affirmatively established.

4. The rental income of $22,614 reported on his federal tax return is the net of mortgage, depreciation and other deductions listed on schedule E of his tax return.

5. If a penalty cannot be paid in a lump sum, a respondent may request a penalty payment schedule. *See, New Waterbury, Ltd.,* 5 E.A.D. at 549; *Leonard Strandley,* TSCA Appeal No. 89-4, at 10 (CJO, Nov. 25, 1991). When asked at the hearing about that option, Mr. Fastow responded that he would "consider" installment payments, but as to feasibility, he viewed it as "another negative" in attempting to maintain his cash flow, and testified that he "can't state what future incomes would look like," and that installments would "add an additional burden, one that [he] would try [his] best to participate in but awful hard thing to guarantee." Tr. 156-157. Thus, Mr. Fastow appears not to be requesting installment payments.