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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)	

ORDER

Respondents, by Motion dated July 6, 1998, have requested leave to amend their prehearing exchange to add Respondent Mark Fastow as a witness and to add additional documents relating to the financial condition of Respondent Fiberglass Specialties. Complainant, in a response dated July 9, 1998, opposed Respondents' Motion. For the reasons described below, Respondents' Motion is hereby, **GRANTED**.

Respondents state that the testimony of Mr. Fastow will be addressed to the harshness of the proposed penalty, Respondents' inability to pay, and other matters bearing on the appropriate penalty to be assessed in this proceeding. The financial documents Respondents' seek to add are the financial statement and Federal tax return of Respondent Fiberglass Specialties for the fiscal year ending June 30, 1998. Respondents assert that these documents are essential to their inability to pay argument and that they expect to be able to provide them to Complainant by July 24, 1998. [\(1\)](#)

Complainant opposes Respondents' Motion on the ground that Respondent Mark Fastow has, to date, failed to comply the Order previously issued in this case on June 24, 1998, directing Respondent Mr. Fastow to produce his personal Federal income tax returns for a period of five years preceding the last year he filed a Federal tax return. Complainant adds that it has contacted Respondent Mr. Fastow by telephone regarding production of his tax returns and that Mr. Fastow responded that he had not decided whether or not he would produce them.

Respondents have provided sufficient grounds for granting their Motion to Amend the Prehearing Exchange, and Complainant has not contended that it will have insufficient time to review the additional documents if they are provided to it by

July 24th. Accordingly, Respondents' Motion is granted. Respondents are directed to make every effort to make their new documents available to Complainant by July 24, 1998, as any later date may not provide Complainant sufficient time to review them and therefore may preclude them from being introduced into evidence at the hearing.

In addition, Respondent Mr. Fastow should be aware of the potential negative consequences of failing, without good reason, to abide by the prior Order granting Complainant's discovery request. It is well established that where a Respondent has been given the opportunity to provide independent, corroborating evidence and has failed to produce such evidence, a Presiding Officer may draw a negative inference as to what such evidence would show. See, *In the Matter of Paul Durham d/b/a Windmill Hill Estates Water System*, Docket No. SDWA-C930036 (ALJ April 14, 1997), 1997 SDWA LEXIS 1 and *In the Matter of Great Lakes Div. of Nat'l Steel Corp.*, EPCRA Appeal No. 93-3, 5 E.A.D. 355 (Final Decision, June 29, 1994); 1994 EPCRA LEXIS 7. See also, *In the Matter of Ocean State Asbestos Removal Inc./Ocean State Building Wrecking and Asbestos Removal Co.*, Docket No. CAA-I-93-1054 (Initial Decision, January 24, 1997); 1997 CAA LEXIS 1 (The failure of a party to present exculpatory evidence in these circumstances provides a basis to draw an inference that the facts do not support its position). Thus, in the event that Respondent Mr. Fastow does not produce his personal Federal tax returns as directed in the prior Order, it may be assumed for purposes of determining the penalty in this matter that the missing tax returns would show that he is able to pay the proposed penalty.

____Susan L. Biro
Administrative Law Judge

Dated:
Washington, D.C.

1. Respondents' Motion states that the additional documents will be provided to Complainant by approximately June 24, 1998. This appears to be a scrivener's error on the part of Respondents in light of the other dates noted in the motion and the date of the motion itself. It is assumed that the correct date is July 24, 1998.

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