

U.S. ENVIRONMENTAL PROTECTION AGENCY

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## UNITED STATES ENVIRONMENTAL PROTECTION AGENCY BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)		
	)		
MCKINNEY SMELTING, INC.,	)	TSCA Docket No.	VI -
556C(P)			
	)		
Respondents	)		

## ORDER GRANTING THIRD MOTION FOR PERMISSION TO CONDUCT FURTHER DISCOVERY

By motion dated April 9, 1998, Complainant seeks to withdraw its Second Set of Interrogatories and Requests for Production and to conduct further discovery. Grounds for the motion are that on March 26, 1998, Ferex Corporation purchased Respondent's assets, changing Respondent's financial status, and the information Complainant previously requested is no longer relevant, and Complainant now seeks new information as to Respondent's financial condition.

Complainant asserts that the discovery will not unreasonably delay the proceeding, because the information should be readily available to Respondent or its accountant, that the information is not otherwise obtainable, and that it is of significant probative value of the central issue of the case, namely the appropriate penalty.

Complainant seeks several items of information, including a Schedule of Indebtedness, copies of agreements and exhibits referenced in the Asset Purchase Agreement with Ferex, Respondent's most recent financial and operating statements, depreciation schedule, Respondent's sole shareholder's financial information, copies of a factoring advances agreement and agreements regarding a Notes Payable balance.

To date, Respondent has not responded to the motion. The Rules of Practice, 40 C.F.R. Part 22, provide at Section 22.16(b), that a written response to a motion must be filed within ten days after service of the motion. Five days is added to that period where the motion is served by mail. 40 C.F.R. § 22.07(c). Thus, a response to Complainant's motion was due on April 24, 1998.

Section 22.16(b) provides further, "If no response is filed within the designated period, the parties may be deemed to have waived any objection to the granting of the motion." Respondent is deemed to have waived any objection to the granting of Complainant's motion, and Complainant's discovery request was supported by a memorandum of law and appears reasonable in the circumstances of this case. This proceeding concerns alleged violations of the Toxic Substances Control Act (TSCA), under which factors to be considered in determining the amount of a civil penalty include the respondent's ability to pay and the effect of the penalty on the respondent's ability to do business. TSCA § 16(a)(2)(B), 15 U.S.C. § 2615(a)(2)(B). For those reasons, the Complainant's motion to conduct further discovery will be granted.

Accordingly, IT IS ORDERED THAT:

- 1. Complainant's Motion to Withdraw its Second Set of Interrogatories is **GRANTED**.
- 2. Complainant's motion for permission to conduct further discovery is **GRANTED**.

  Respondent shall provide answers to the interrogatories and copies of the documents requested within twenty (20) days from the date of this Order.

Susan L. Biro Chief Administrative Law Judge

Dated: May 5,1998 Washington D.C.

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Last updated on March 24, 2014