

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

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

ORDER GRANTING COMPLAINANT'S MOTION
FOR PERMISSION TO CONDUCT DISCOVERY

By motion dated October 3, 1997, Complainant requested permission to conduct discovery. To date, the Respondent has not responded to the motion. The time period provided in the applicable Rules of Practice, 40 C.F.R. Part 22, for responding to motions has expired. 40 C.F.R. § 22.07(c), 22.16(b). The Rules provide, in 40 C.F.R. § 22.16(b), that if no response is filed within the applicable time period, "the parties may be deemed to have waived any objection to the granting of the motion."

On that basis, and for the additional reasons set forth below, the motion is **GRANTED**.

The parties have each submitted prehearing exchange materials. Complainant asserts that, based on review of the information provided by Respondent, further information exists regarding Respondent's financial condition that is relevant to determining an appropriate penalty in this proceeding. Complainant asserts further that it meets the requirements set forth in 40 C.F.R. § 22.19(f)(1) for discovery, namely (1) that such discovery will not in any way unreasonably delay the proceeding, (2) that the information to be obtained is not otherwise obtainable, and (3) that such information has significant probative value.

In regard to the first requirement, Complainant asserts its intent to promptly amend its prehearing exchange, and points out

the fact that the hearing in this matter is set for March 10, 1998, five months after the date of the motion for discovery. As to the second requirement, Complainant states that it seeks financial information, which in the exclusive possession and control of Respondent, regarding Respondent and companies affiliated with Respondent. Complainant asserts with regard to the third requirement that the information sought is of significant probative value with regard to the \$472,500 penalty proposed in the Complaint, and that the information provided by Respondent in its prehearing exchange raise further questions regarding its financial condition. Federal income tax returns for 1992, 1994 and 1995, and a Revenue and Expense Report for August 31 through November 30, 1996, were provided in the prehearing exchange.

Complainant seeks production of documents, including monthly operating statements, balance sheets and income statements, from 1997 to the present, signed copies of 1993 and 1996 federal income tax returns, signed copies of an equipment lease agreement and agreements pertaining to transactions between Respondent and any affiliates, Respondent's depreciation schedule, and a list of each car and truck owned or leased by Respondent since 1992. In addition, Complainant seeks descriptions of certain expenses and costs referenced in prehearing exchange documents.

This proceeding concerns alleged violations of the Toxic Substances Control Act (TSCA), under which certain factors must be considered in determining the amount of a civil penalty, including 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).

Particularly in light of the significant amount of penalty proposed in this proceeding, and the factors listed in Section 16(a)(2)(B) of TSCA which must be considered in assessment of a penalty, the documents requested would appear to have significant probative value.

Accordingly, Complainant's Motion for Permission to Conduct Discovery is granted. As proposed by Complainant, Respondent shall, within thirty (30) days after service of Complainant's First Set of Interrogatories, submit responses and/or documents, as appropriate, to each of the requests listed by Complainant therein.

Susan L. Biro

Chief Administrative Law Judge

Dated: November 5, 1997

Washington D. C.