



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of)
)
CAS EQUITY INC.,) DOCKET NO. TSCA-3-2000-0019
)
)
RESPONDENT)

**ORDER DENYING COMPLAINANT'S MOTION REGARDING DEADLINE
FOR COMPLAINANT'S REBUTTAL PREHEARING EXCHANGE**

This proceeding arises under the authority of Section 16(a) of the Toxic Substances Control Act, as amended, 15 U.S.C. § 2615(a), and is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (the "Rules of Practice"), 40 C.F.R. §§ 22.1-32.

The parties filed their initial prehearing exchange in this matter pursuant to the undersigned's Prehearing Order entered on March 20, 2001. Complainant's rebuttal prehearing exchange, if any, is due August 10, 2001. Both parties state that they reserve the right to supplement their prehearing exchange.

On August 1, 2001, Complainant filed a Motion Regarding Deadline for Complainant's Rebuttal Prehearing Exchange. In this motion, Complainant requests that the presiding Administrative Law Judge ("ALJ") set a new deadline for Respondent to submit additional witness summaries with regard to its claim of inability to pay and written documentation of its financial condition. Complainant also requests that a new deadline be set for Complainant to submit its rebuttal prehearing exchange responding to Respondent's financial information.

In connection with its motion for an extension of time, Complainant points out that Respondent failed to include in its prehearing exchange relevant information and exhibits to support its claim that Respondent is unable to pay the penalty proposed by Complainant. As such, Complainant indicates that it may file a motion *in limine* seeking to bar Respondent from introducing at hearing any evidence concerning Respondent's alleged inability to pay.

If Respondent fails to timely provide prehearing information concerning its alleged inability to pay, as claimed by Complainant, Respondent may well be precluded from introducing such evidence into the record. In this regard, I note that Sections 22.19(a) and 22.22(a) of the Rules of Practice, 40 C.F.R. §§ 22.19(a), 22.22(a), provide that documents or exhibits that have not been exchanged and witnesses whose names have not been exchanged at least fifteen (15) days before the hearing date shall not be admitted into evidence or allowed to testify unless good cause is shown for failing to exchange the required information.

The issue of inability to pay and the attendant burdens of proof and persuasion have been examined by the Environmental Appeals Board ("EAB") and the undersigned ALJ. See, e.g., *In re B.J. Carney Industries, Inc.*, CWA Appeal No. 96-2, 7 E.A.D. 171, 217 (EAB, June 9, 1997); *In re Employers Insurance of Wausau and Group Eight Technology, Inc.*, TSCA Appeal No. 95-6, 6 E.A.D. 735, 756 (EAB, Feb. 11, 1997); *In re James C. Lin and Lin Cubing, Inc.*, FIFRA Appeal No. 94-2, 5 E.A.D. 595, 599 (EAB, Dec. 6, 1994); *In re New Waterbury, Ltd.*, TSCA Appeal No. 93-2, 5 E.A.D. 529, 538 (EAB, Oct. 20, 1994); *Bituma-Stor, Inc. d/b/a Bituma Corporation and Gencor Industries, Inc.*, 2001 WL 66547, EPA Docket No. EPCRA-7-99-0045 (ALJ, Jan. 22, 2001). The EPA has the burden of showing that the proposed penalty is appropriate and such showing must be made by a preponderance of the evidence.^{1/}

Although the complainant, pursuant to Section 22.24 of the Rules of Practice, 40 C.F.R. § 22.24, bears the burden of proving that the proposed penalty is appropriate after considering all the applicable statutory penalty factors, the required consideration of the statutory factors "does not mean that there is any specific burden of proof with respect to any individual factor." New

^{1/} The federal regulations governing the burdens of presentation and persuasion in proceedings before an Administrative Law Judge state as follows:

(a) The complainant has the burdens of presentation and persuasion that the violation occurred as set forth in the complaint and that the relief sought is appropriate. Following Complainant's establishment of a prima facie case, respondent shall have the burden of presenting any defense to the allegations set forth in the complaint and any response or evidence with respect to the appropriate relief. The respondent has the burdens of presentation and persuasion for any affirmative defenses.

(b) Each matter of controversy shall be decided by the Presiding Officer upon a preponderance of the evidence.

Waterbury, supra, at 539. Rather, the "complainant's burden focuses on the overall appropriateness of the proposed penalty in light of all the statutory factors, rather than any particular quantum of proof for individual statutory factors." *Woodcrest Manufacturing, Inc.*, EPCRA Appeal No. 97-2, 7 E.A.D. 757, 773 (EAB, July 23, 1998)(emphasis removed) (citation omitted).

With regard to the penalty factor of inability to pay, the EAB, in *New Waterbury, supra*, construed the complainant's burden as requiring the production of "some evidence regarding the respondent's general financial status from which it can be inferred that the respondent's ability to pay should not affect the penalty amount."^{2/} *New Waterbury, supra* at 541 (emphases removed) (citation omitted). Thus, although there is no "particular quantum of proof" for establishing a violator's ability to pay, it is incumbent upon the EPA to come forward with some evidence concerning a violator's financial status from which its ability to pay can be inferred.

Further, the EAB in *New Waterbury, supra*, found that:

[I]n any case where ability to pay is put in issue, the Region must be given access to the respondent's financial records before the start of such hearing. The rules governing penalty assessment proceedings require a respondent to indicate whether it intends to make an issue of its ability to pay, and if so, to submit evidence to support its claim as part of the pre-hearing exchange.[23] In this connection, where a respondent does not raise its ability to pay as an issue in its answer or fails to produce any evidence to support an inability to pay claim after being apprised of that obligation during the pre-hearing process, the Region may properly argue and the presiding officer may conclude that any objection to the penalty based upon ability to pay has been waived under the Agency's procedural rules[24] and thus this factor does not warrant a

^{2/} In *New Waterbury, supra*, the EAB noted that inability to pay a proposed penalty is not an affirmative defense because the statute governing that proceeding, TSCA, requires the EPA to consider this factor as one of several factors in establishing the appropriateness of the penalty. *New Waterbury, supra*, at 540. The EAB also found that inability to pay is more appropriately characterized as a "potential mitigating consideration in assessing a civil penalty" rather than as a defense which would preclude imposition of a penalty. *Id.*

reduction of the proposed penalty.^{3/}

New Waterbury, supra, at 542.

Returning now to the instant motion, Complainant is requesting extensions of time for Respondent to submit proposed testimony and exhibits concerning its claim of inability to pay and for Complainant to submit its rebuttal prehearing exchange responding to Respondent's financial information. Through its motion for an extension, Complainant essentially is seeking an order to direct Respondent to comply with the Prehearing Order. Setting new filing deadlines, however, is not the appropriate method for achieving this goal. As discussed above, if Respondent fails to timely provide prehearing information concerning its alleged inability to pay, Respondent may well be precluded from introducing such evidence into the record. Based on Complainant's stated reasons for requesting an extension of time to file its rebuttal prehearing exchange, I am compelled to find that there is insufficient cause for granting the Motion. See Section 22.7(b) of the Rules of Practice, 40 C.F.R. § 22.7(b). Accordingly, the Motion is **Denied**.

Barbara A. Gunning
Administrative Law Judge

Dated: August 6, 2001
Washington, DC

^{3/} The EAB's footnotes cite the pertinent provisions of 40 C.F.R. §§ 22.15(d), 22.19(b), and 22.19(f)(4) governing prehearing exchanges, discovery, and answers.

In the Matter of Cas Equity Inc., Respondent
Docket No. TSCA-3-2000-0019

CERTIFICATE OF SERVICE

I certify that the foregoing **Order Denying Complainant's Motion Regarding Deadline For Complainant's Rebuttal Prehearing Exchange**, dated August 6, 2001 was sent this day in the following manner to the addressees listed below.

Maria Whiting-Beale
Legal Staff Assistant

Dated: August 6, 2001

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