

4/3/96

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Spang & Company, Inc.,	)	Docket Nos. EPCRA-III-037 & 048
	)	
Respondent	)	

ORDER

The Environmental Appeals Board held that, although expenditures for certain environmentally beneficial projects, now referred to as supplemental environmental projects (SEPs), which Spang claimed as an offset to the proposed penalty, could not be considered as SEPs under the Agency's Enforcement Response Policies (ERPs) for EPCRA § 313 (December 2, 1988; August 10, 1990), such projects could be considered as adjustments to the proposed penalty under the rubric of "other factors as justice may require".<sup>1/</sup> The quoted statutory phrase is the justification for considering SEPs as adjustments to proposed penalties. The matter was remanded for a determination of whether the gravity-based penalty should be

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<sup>1/</sup> In re Spang & Company, EPCRA Appeal Nos. 94-3 & 94-4 (EAB, October 20, 1995). Although the penalty provision at issue here, EPCRA § 325(c) for violations of EPCRA § 313, does not expressly incorporate the factors specified in EPCRA § 325(b)(1)(C) for determining Class I penalties or EPCRA § 325(b)(2), which incorporates the provision of section 16 of the Toxic Substances Control Act for determining Class II penalties, the Agency has taken the position that Congress intended the same factors be applied in determining penalties for violations of EPCRA § 313. EPCRA § 325(b)(1)(C) and TSCA § 16(a)(2)(B) contain the phrase "such other matters as justice may require."

revised downward based on consideration of Spang's environmental projects.

By an order, dated October 31, 1995, the parties were directed to submit their views and recommendations as to further proceedings in this matter. Spang has recommended that the hearing be resumed for the purpose of hearing evidence on the exact dates the projects were performed and the extent to which the projects involved chemicals reportable under EPCRA (Views and Recommendations of Respondent, dated January 4, 1996).

Complainant has opposed any resumption of the hearing, arguing that the record affords an adequate basis to reject each of the projects which Spang has proposed as an offset against the penalty (EPA's Views and Recommendations, dated January 25, 1996). Complainant asserts that Spang should be ordered to pay the full amount of the gravity-based penalty (\$173,700). Alternatively and inconsistently, Complainant says that if the record is to be supplemented, Spang should be ordered to provide Complainant all relevant information concerning the projects so that the parties may attempt to negotiate a settlement. If the parties are unable to settle, Complainant argues that the matter should be briefed and decided on the basis of the existing record. According to Complainant, Spang had a full and fair opportunity to litigate the amount of any applicable credit for "environmentally beneficial expenditures" in the light of then applicable policies and the phrase "other factors as justice may require". Nevertheless, Complainant emphasizes that Spang has the burden of demonstrating

that any particular project is appropriate for penalty reduction and the amount thereof.

#### DISCUSSION

Complainant's objections to the taking of further evidence may readily be addressed. Although it is true that Complainant did not object to the introduction of evidence offered by Spang as to its environmentally beneficial projects, as Spang points out, neither the parties nor the ALJ have addressed the matter of whether the projects might qualify for credit against the penalty apart from their status as SEPs. Moreover, the remand necessarily means that the record remains open as to that issue, and, given Complainant's insistence that Spang has the burden of establishing that any such credit is appropriate, Spang should be afforded an opportunity to meet that burden. Complainant's objections to the taking of additional evidence are lacking in merit and are overruled.

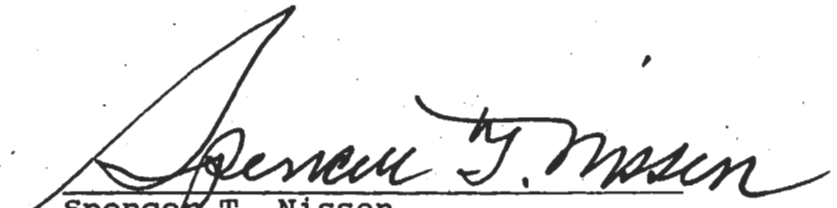
Notwithstanding its contention that the record should be regarded as complete for the purpose of Spang's environmentally beneficial projects, Complainant says that Spang should be directed to provide all relevant information concerning the projects and the parties given an opportunity to settle this matter before additional evidence is received. There is nothing to preclude Complainant from asking Spang to provide such additional information concerning the projects as Complainant deems to be relevant or desirable, and, of course, the ALJ encourages

settlement. If the parties are unable to settle this matter, the parties may wish to stipulate the additional evidence offered by Spang into the record.<sup>2/</sup>

ORDER

Spang's recommendation that additional evidence be received as to the environmental projects which it has offered as a credit against the proposed penalty is granted. On or before May 1, 1996, the parties are directed to inform the ALJ of whether this matter has been or will be settled, and failing settlement, whether the additional evidence offered by Spang may be presented by stipulation. If the answers to these questions are negative, I will be in telephonic contact with counsel for the purpose of scheduling a date for the resumed hearing which will be held in Pittsburgh, Pennsylvania.

Dated this 3rd day of April 1996.

  
Spencer T. Nissen  
Administrative Law Judge

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<sup>2/</sup> Spang would be well advised to make certain that data as to the cost of the projects and operating savings, if any, be included in the record, and that there be little or no room for argument but that the projects were not required by law or regulation.

CERTIFICATE OF SERVICE

This is to certify that the original of this ORDER, dated April 3, 1996, in re: Spang & Company, Inc., Dkt. Nos. EPCRA-III-037 & 048, was mailed to the Regional Hearing Clerk, Reg. III, and a copy was mailed to Respondent and Complainant (see list of addressees).

*Helen F. Handon*

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DATE: April 3, 1996

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