

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of)
Catalina Yachts, Inc.,) Docket No. EPCRA-09-94-0015
Respondent)

ORDER RESCINDING DISCOVERY ORDER

Under date of February 29, 1996, Complainant filed a motion for discovery requesting that Catalina be directed to provide copies of its income tax returns for the most recent five-year period. The information was assertedly sought for the purpose of assisting Complainant to meet its burden of proof as to the appropriateness of the penalty in accordance with In re: New Waterbury, Ltd., TSCA Appeal No. 93-2 (EAB, October 20, 1994). Under Rule 22.16(b) of the Consolidated Rules of Practice (40 CFR Part 22), a party's response to a motion is to be filed within ten days of service of the motion. Rule 22.07(c) provides, however, that where service is by mail, five days shall be added to the time allowed for serving a responsive pleading. Catalina's response to the motion was therefore due to be filed [with the Regional Hearing Clerk] on or before March 15, 1996.

On March 15, 1996, I issued an order directing Catalina to provide Complainant copies of its income tax returns for the most recent five-year period on or before April 12, 1996. On March 19, 1996, my office received a copy of Catalina's memorandum, dated March 15, 1996, in opposition to the motion. Information

from the Regional Hearing Clerk's office reveals that the memorandum was filed on the day it was dated. Therefore, the opposition was timely and the order granting Complainant's motion should not have been issued without considering Catalina's objections. For the reasons set forth below, the order directing Catalina to produce its income tax returns will be rescinded.

DISCUSSION

By way of background, Catalina asserts that Complainant has previously been supplied a sworn declaration from its accountant detailing Catalina's financial status for the relevant years. Moreover, Catalina points out that Complainant has obtained a Dun & Bradstreet report which reflects Catalina's financial condition.^{1/} Accordingly, Catalina argues that the motion should be denied as burdensome and duplicative. In accordance with Rule 22.24 (40 CFR Part 22), the burden of proving that a proposed penalty is "appropriate" is on Complainant. This includes a prima facie showing of respondent's financial status from which it can be

^{1/} A Dun & Bradstreet report, dated January 31, 1995, is proposed exhibit 5 in Complainant's prehearing exchange. The report indicates, inter alia, that Catalina has estimated sales of over \$38 million and 410 employees.

inferred that "ability to pay" should not affect the proposed penalty.^{2/}

Next, Catalina argues that In re New Waterbury, supra, cited by Complainant, is inapposite, because it does not address alleged violations of EPCRA, because EPCRA § 325(c), the penalty provision applicable here, does not require consideration of "ability to pay", and lastly, because Catalina has not asserted "ability to pay" as a defense to the proposed penalty. Rather, Catalina says that it has submitted evidence of its financial condition as one of several allegedly compelling factors arguing for no penalty or a de minimus penalty. The fact that New Waterbury involved the Toxic Substances Control Act rather than EPCRA is not controlling, because the principles of that case are for application whenever the relevant statute requires consideration of ability to pay in determining a penalty. In this regard, while Catalina is correct that EPCRA § 325(c) does not expressly incorporate the factors to be considered in determining

^{2/} New Waterbury, supra (slip opinion at 15). Although EPCRA § 325(c) (42 U.S.C. § 11045(c)), the applicable penalty provision for the violation of EPCRA § 313 at issue here, does not expressly incorporate the factors specified in EPCRA § 325(b)(1)(C), which are to be considered in determining Class I penalties, or EPCRA § 325(b)(2), which incorporates the penalty provision from section 16 of the Toxic Substances Control Act for determining Class II penalties, the Agency has quite reasonably taken the position that these factors were intended to be applied for violations of § 313. See the Enforcement Response Policy (ERP) for Section 313 of EPCRA (December 2, 1988) and the ERP for EPCRA § 313 and Section 6607 of the Pollution Prevention Act (August 10, 1992). "Ability to pay" and "affect [of the penalty]" on Catalina's "ability to continue to do business", which are sometimes treated as one factor, must, therefore, be considered in assessing any penalty herein.

a penalty provided by EPCRA §§ 325(b)(1)(C) or (b)(2), the Agency's conclusion that Congress intended the same factors to be applied in assessing penalties for violations of EPCRA § 313 is considered to be reasonable.^{3/}

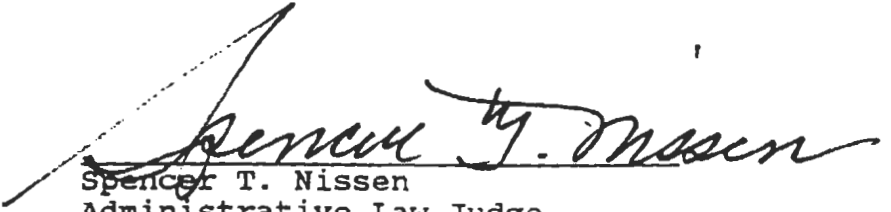
More telling is Catalina's assertion that it is not raising ability to pay as a defense to the proposed penalty. Although this may not eliminate Complainant's duty to consider such factor, if the statute, as we have seen, is interpreted as requiring such consideration, it reduces to the vanishing point the likelihood that Catalina can contest the proposed penalty upon the ground that insufficient consideration was given to its financial condition. There is no doubt that as an objection to a proposed penalty "ability to pay" may be waived. See, e.g., New Waterbury, supra (slip opinion at 12-16). Inasmuch as the only reasonable interpretation of Catalina's assertion is that it is a waiver of "ability to pay/inability to pay" as a defense to the penalty sought by Complainant, the order directing Catalina to provide Complainant with copies of its income tax returns for the most recent five-year period will be rescinded.

^{3/} Supra note 2. Acceptance of Catalina's argument that ability to pay is not for consideration in determining the penalty would also seemingly mean that it is inappropriate to consider "other factors as justice may require." Upon reflection, Catalina may wish to reconsider this position. See In re Spang & Company, EPCRA Appeal Nos. 94-3 & 94-4 (EAB, October 20, 1995).

ORDER

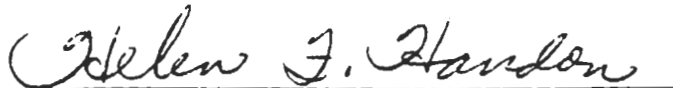
The order directing Catalina to provide Complainant with copies of its income tax returns for the most recent five-year period is rescinded.

Dated this 1st day of April 1996


Spencer T. Nissen
Administrative Law Judge

CERTIFICATE OF SERVICE

This is to certify that the original of this ORDER RESCINDING DISCOVERY ORDER, dated April 1, 1996, in re: Catalina Yachts, Inc., Dkt. No. EPCRA-09-94-0015, was mailed to the Regional Hearing Clerk, Reg. IX, and a copy was mailed to Respondent and Complainant (see list of addressees).



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DATE: April 1, 1996

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