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ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region VII
901 North 5th Street
Kansas City, Kansas 66101

In the matter of:)

DOCKET NO. CWA-07-2007-0078

Lowell Vos)

d/b/a Lowell Vos Feedlot)
Woodbury County, Iowa)

MOTION FOR DISCOVERY OR
IN THE ALTERNATIVE MOTION
IN LIMINE

Respondent.)
_____)

Pursuant to 40 C.F.R. §§ 22.16(a) and 22.19(e), Complainant, U.S. Environmental Protection Agency, Region 7 ("Complainant" or "EPA"), moves for an order compelling Lowell Vos ("Respondent") to produce documents related to Respondent's ability to pay the proposed penalty. In the alternative, Complainant moves to bar Respondent from presenting ability to pay issues at hearing.

Procedural and Factual Background

On August 14, 2007, EPA filed an administrative Complaint against Respondent for alleged violations of Sections 301, 311, and 402 of the Clean Water Act, 33 U.S.C. §§1311, 1318, and 1342, specifically, for the discharges of feedlot related pollutants to waters of the United States without an NPDES permit.

On February 7, 2008, the Presiding Officer ordered the parties to file their prehearing exchanges no later than April 7, 2008. Significantly, the order stated "if Respondent intends to take the position that it is unable to pay the proposed penalty, or that payment will have an adverse effect on Respondent's ability to continue business, Respondent shall furnish supporting documentation such as financial statements or tax returns." In its initial prehearing exchange, Respondent stated that it did not yet know the proposed penalty at that time and, in substance, reserved the right to raise this claim. As required by the February 7, 2008, order, Complainant included a detailed description of the proposed penalty and how it was determined in its initial prehearing exchange. To date, Respondent has not indicated whether it intends to raise an ability to pay claim and has not provided any documentation to support an ability to pay claim. As a result, Respondent is in violation of the Presiding Officer's prehearing order.

Complainant requests that the Presiding Officer issue an order compelling Respondent to provide documentation to support an ability to pay claim by a timely date certain or waive the claim.

Argument

I. MOTION FOR DISCOVERY.

Under 40 C.F.R. § 22.19 (e), the Presiding Officer may issue a discovery order if he or she finds that the following three elements are met: (1) the discovery will not unreasonably delay proceedings; (2) the information is not otherwise obtainable; and, (3) the information has significant probative value. See In re Doug Blossom, Docket No. CWA-10-2002-0131 (ALJ Biro November 28, 2003) (motion for discovery and motion in limine re ability to pay granted); In re City of New Bedford, Massachusetts, Docket No. CWA-01-2002-0059, 2003 EPA ALJ

LEXIS 47 at *3-4, 6 (ALJ Moran, Order on Complainant's Motion for Order Compelling Production of Inability to Pay Documents, July 2, 2003) (ordering Respondent to provide financial information to EPA and noting "where [ability to pay] has become an issue, EPA must be given access to the respondent's financial records *before* the start of hearing") (emphasis in original). EPA's discovery request in this case meets all three elements.

The issuance of a discovery order at this juncture in the case would not delay the proceedings; rather, it would avoid delays later in the proceeding. Furthermore, this information is not otherwise obtainable as it is exclusively within the control of the Respondent. Finally, such information is, by definition, probative of Respondent's ability to pay the proposed penalty according to the standards by which EPA evaluates such a claim. As the Environmental Appeals Board held in In re New Waterbury, Ltd., 5 E.A.D. 529, 542 (EAB 1994), "in 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."

The specific information requested in Attachment A will allow for a proper assessment of Respondent's financial position and its ability to pay the penalty. The Respondent has failed to indicate if he intends on raising an ability to pay claim as required by the prehearing order. Complainant will be put at a distinct disadvantage if Respondent is allowed to take the stand at hearing and proffer testimony regarding current finances without providing supporting documentation prior to hearing. Complainant cannot meaningfully rebut testimony at hearing

regarding Respondent's personal finances if it has not had the opportunity, prior to hearing, to review supporting financial documentation.

II. MOTION IN LIMINE.

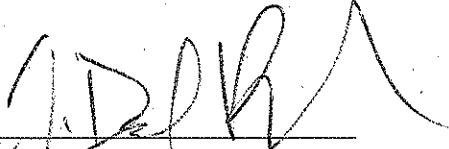
If the Respondent fails to provide the requested documentation within a reasonable period of time, EPA requests that the Presiding Officer, *in limine*, exclude such defense and documentation from the record pursuant to 40 C.F.R. § 22.19(g). As the EAB further noted, ". . . where a respondent . . . fails 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 and thus this factor does not warrant a reduction of the proposed penalty." In re New Waterbury, Ltd., 5 E.A.D. at 542.

Respondent was consistently informed that EPA intended to seek the statutory maximum penalty of \$157,500 if this matter went to hearing. Despite this information, Respondent did not raise an ability to pay defense and did not provide supporting documentation in its prehearing exchange. The Presiding Officer's prehearing order was clear that Respondent's prehearing exchange should include supporting documentation if Respondent intended to raise the issue for hearing. Nevertheless, Respondent failed to include any evidence in its initial prehearing exchange related to Respondent's ability to pay the proposed penalty. Consequently Respondent should be precluded from offering any testimony at hearing regarding its current finances should it fail to produce the requested information.

Conclusion

For the reasons stated above, Complainant requests that the Presiding Officer order Respondent to produce documents, as required by the Presiding Officer's prehearing order, supporting Respondent's inability to pay the proposed penalty. In particular, Complainant requests that Respondent be ordered to respond to the specific financial information requested in Attachment A. Should Respondent fail to provide such documentation within a reasonable period of time Complainant requests that the Presiding Officer, *in limine*, preclude Respondent from providing any testimony at hearing regarding Respondent's inability to pay the proposed penalty.

RESPECTFULLY SUBMITTED this 7 day of July, 2008.



J. Daniel Breedlove
Assistant Regional Counsel
Region VII

CERTIFICATE OF SERVICE

I certify that the foregoing "Motion for Discovery or in the Alternative Motion in Limine" was sent to the following persons, in the manner specified, on the date below:

Original and one copy, via pouch mail:

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Dated: 7/8/08


U.S. EPA Region VII