UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2

In the Matter of:

Stevenson Commons Associates, L. P.
Bronx, New York

&

Grenadier Realty Corp.
Brooklyn, New York

Respondents

In a proceeding under the Clean Air Act, 42 U.S.C. § 7401, et seq, 42 U.S.C. § 7413(d), Section 113(d)

CAA-02-2008-1220

Hon. Susan L. Biro
Chief Administrative Law Judge
Presiding Officer

COMPLAINANT'S MOTION TO COMPEL PRODUCTION, AND, FAILING RESPONDENTS' COMPLIANCE, FOR AN ORDER OF EXCLUSION AND THE DRAWING OF AN ADVERSE INFERENCE

Complainant in this proceeding, the Director of the Division of Enforcement and Compliance Assistance, EPA, Region 2, through her attorney, hereby moves this Court pursuant to 40 C.F.R. §§ 22.4(c), 22.16(a), 22.19(a), 22.19(e), 22.19(f), 22.19(g) and 22.22(a), for an order: **a)** compelling Respondents to produce and provide to Complainant by, and no later than, July 14, 2009 the following information:

1. For Stevenson and Grenadier, federal income tax returns including all schedules and attachments for the last three years;
2. For Stevenson and Grenadier, complete year-end financial statements, including the auditor's letter, balance sheet, income statement, statement of cash flows and notes for the last three fiscal years;

3. If the 2008 tax returns and audited financial statements are not yet available for Stevenson and/or Grenadier, all available financial documentation, including but not limited to, an income statement and a balance sheet for the year ending December 31, 2008;
4. For Stevenson and Grenadier, financial documentation outlining the companies' financial positions at the end of the first quarter of 2009, including but not limited to, an income statement and a balance sheet for the period ending March 31, 2009;
5. For Stevenson and Grenadier, documentation regarding the low income housing credit, including but not limited to Form 8609, Low-Income Housing Credit Allocation Certification;
6. For Stevenson and Grenadier, documentation regarding the current market value of the real estate owned by each company;
7. For Stevenson and Grenadier, a current corporate map and/or organization chart, including detailed information on corporate ownership and officers, and a list of partners and shareholders for each company;
8. For the properties located at 755 White Plains Road and 1850 Lafayette Avenue, ownership documentation. With regard to each owner, an explanation the degree of the owner's involvement in the management of the property; and
9. An explanation of the relationship between Stevenson and Grenadier and provide copies of all active contracts between the two entities.
10. Any other document that Respondents intend to rely on in support of their claim of inability to pay the penalty proposed in the Complaint in this matter.
11. A summary of Steven Sussman's expected testimony.

and b) if Respondents fail to provide Complainant with this information by said date, excluding from the record of the hearing any and/or all of these documents and inferring that the information contained in them would be adverse to Respondents. The threshold requirements under Part 22 for such other discovery clearly exist, and without such relief, EPA will be substantially prejudiced at the hearing in its ability to rebut and refute Respondents' inability to pay defense, and the hearing would consequently be a fundamentally unfair one. Under these circumstances (as further set forth below),

Complainant submits that ample good cause exists for this Court to grant the relief EPA now seeks.[1]

I. Background

Respondents are Stevenson Commons Associates, L.P. (Respondent Stevenson) and Grenadier Realty Corporation (Respondent Grenadier) (together Respondents). This is an administrative proceeding EPA, Region 2, commenced in September 26, 2008 for Respondents' violations of 40 C.F.R. Part 60, Subpart Dc "Standards of Performance for Small Industrial-Commercial-Institutional Steam Generating Units," promulgated pursuant to 42 U.S.C. §§ 7411 and 7414, Sections 111 and 114 of the Act.

II. The Inability to Pay Defense

Respondents formally introduced into this proceeding their claims of inability to pay in their Answer and Request for Hearing (Answer), dated October 30, 2008. Paragraph 14 states:

> "[c]ontrary to the assertion in the Complainant's Penalty Policy calculations, Stevenson's balance sheet has a net negative balance due to its obligation to provide below market house, amongst other factors. Ultimately, any fine assessed will burden Stevenson and be counterproductive to the objectives pursuant to which Stevenson was organized."[2]

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[1] Complainant requests that the order EPA seeks through this motion extend and apply to any other documents or records that pertain to Respondent Stevenson's and Respondent Grenadier's inability to pay/financial condition defense (and which the Respondents to date have not included in any prehearing exchange). That such extended relief sought herein by Complainant is not intended to waive any rights of EPA under the Part 22 rules to object to such documentary materials if Respondents were to attempt to admit such materials into evidence at the hearing, including on the grounds that Respondent Stevenson's and Respondent Grenadier's failure to include such materials in a prehearing exchange constitutes a failure to comply with an applicable requirement of 40 C.F.R. §§ 22.19(a)(1) and 22.22(a).

[2] Attachment 1 Respondents October 20, 2008 Answer.

Respondents' reiterate their inability to pay in their Pre-Hearing Exchange on April 9, 2009.[3] Respondents submitted what they labeled to be "Financial documents relating to Stevenson" as Exhibit C.[4] The only document included under Exhibit C is an uncertified "Independent Auditors' Report" for the year ending December 31, 2007. EPA finds that the information provided is not sufficient, either in detail or scope, to factually support an inability to pay determination, and therefore, fails to provide support of the assertion stated in either paragraph 14 of Respondents' Answer or on Page 2 of Respondents' Pre-Hearing Exchange.

Respondents' Pre-Hearing Exchange also states that Respondents may call Steven Sussman, Esq. as a witness to "testify as to the financial condition of Stevenson."[5] Respondents however fail to state what Mr. Sussman will be basing his testimony on, or to provide Complainant a summary of Mr. Sussman's expected testimony as required by 40 C.F.R. § 22.19(a)(2)(i).

Respondents' Pre-Hearing Exchange and Answer both claim Respondents' (Respondent Stevenson together with Respondent Grenadier) inability to pay, however neither document addresses Respondent Grenadier's financial status. Moreover, in their Pre-Hearing Exchange "Documents that may be Introduced by Respondent," ***Respondents only submit one document, the uncertified auditor's report, for Respondent Stevenson***. To date Respondents have provided no information on the financial status of Respondent Grenadier. Both Respondent Stevenson and Respondent Grenadier are joint and severally liable for the proposed penalty, and

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[3] *See* page 2 of Attachment 2 Respondents April 9, 2009 Pre-Hearing Exchange.
[4] *Note* in Respondents' April 9, 2009 Pre-Hearing Exchange, the 2007 Independent Auditor's Report relating to Respondent Stevenson is included under Exhibit B, not Exhibit C as labeled.
[5] *See* page 3 Attachment 2.

therefore, to support an appropriate ability to pay adjustment to the proposed penalty, financial documents from both Respondents must be submitted to the Complainant.

On April 22, 2009, Complainant requested the documents 1-9 listed above from Respondents.[6] To date Respondents have not provided to EPA any of the requested documents. If EPA cannot obtain the documents it is herein requesting, by at least July 14, 2009, EPA will not be able to properly assess Respondents' ability to pay the proposed fine before the hearing in this matter, which is scheduled to commence on Tuesday, August 11, 2009, some five weeks hence. The same is true about Steven Sussman's expected testimony regarding Stevenson's financial wherewithal. The reason why EPA expects that it will take longer than the 15 days set out in Part 22 is that it foresees the need to obtain the services of an expert to review complicated financial documents, including low-income housing credits, and contracts between the Respondents.

III. Applicable Part 22 Provisions re Documentary Evidence and its Admissibility

The Part 22 rules are explicit that prehearing exchanges must include copies of any documentary exhibits parties list or plan to introduce into evidence at hearing. In 40 C.F.R. § 22.19(a)(2)(ii), it states that, "[e]ach party's prehearing information exchange shall contain... [c]opies of all documents and exhibits which it intends to introduce into evidence at the hearing." Under these rules, a party's failure to include

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[6] Attachment 3, a copy of Letter to Daniel Riesel, counsel for Respondents, from Marie Quintin, counsel for Complainant, together with the FedEx receipt attesting to Respondents' receipt of the letter on April 23, 2009.

documentary evidence in its prehearing exchange may result in exclusion of such evidence.

Forty C.F.R. § 22.19(a)(1) provides, "[e]xcept as provided in § 22.22(a), a document or exhibit that has not been included in prehearing information exchange shall not be admitted into evidence...." The cited provision, 40 C.F.R. § 22.22(a)(1), dealing with admissibility of evidence at a hearing, states, in part:

> The Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable or of little probative value.... If, however, a party fails to provide any document, exhibit, witness or summary of expected testimony required to be exchanged under § 22.19 (a), (e) or (f) to all parties at least 15 days before the hearing date, the Presiding Officer shall not admit the document, exhibit, or testimony into evidence, unless the non-exchanging party had good cause for failing to exchange the required information and provided the required information to all other parties as soon as it had control of the information, or had good cause for not doing so.

The Part 22 rules obligate a party to supplement its prehearing exchange submission to ensure that it is current and to ensure its continuing accuracy. In 40 C.F.R. § 22.19(f) the provision reads:

> A party who has made an information exchange under paragraph (a) of this section, or who has exchanged information in response to a request for information or a discovery order pursuant to paragraph (e) of this section, shall promptly supplement or correct the exchange when the party learns that the information exchanged or response provided is incomplete, inaccurate or outdated, and the additional or corrective information has not otherwise been disclosed to the other party pursuant to this section.

Part 22 provides a mechanism for a party to seek documents beyond what its adversary has included in its prehearing exchange. To obtain such discovery, a party must comply with 40 C.F.R. § 22.19(e)(1), which authorizes the Presiding Officer to order "other discovery" only if it:

(i) Will neither unreasonably delay the proceeding nor unreasonably burden the non-moving party;

(ii) Seeks information that is most reasonably obtained from the non-moving party, and which the non-moving party has refused to provide voluntarily; and

(iii) Seeks information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought.

Where a party does not comply with a prehearing exchange requirement of 40 C.F.R. § 22.19, the Part 22 rules empower the Presiding Officer to effect sanctions. Forty C.F.R. § 22.19(g) provides that, "[w]here a party fails to provide information within its control as required pursuant to this section, the Presiding Officer may, in his discretion" do any of the following:

(1) Infer that the information would be adverse to the party failing to provide it;

(2) Exclude the information from evidence; or

(3) Issue a default order under § 22.17(c).

Other portions of the Part 22 rules additionally codify the general authority of the Presiding Officer to control events leading up to, and through, a hearing. These provisions specifically provide the Presiding Officer with a residuary of powers to enable her to "conduct a fair and impartial proceeding, assure that the facts are fully elicited, adjudicate all issues, and avoid delay." 40 C.F.R. § 22.4(c). To effect these ends, a Presiding Officer is specifically empowered to, inter alia:

(5) Order a party, or an officer or agent thereof, to produce testimony, documents, or other non-privileged evidence, and failing the production thereof without good cause being shown, draw adverse inferences against that party;

(6) Admit or exclude evidence;

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(10) Do all other acts and take all measures necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues arising in proceedings governed by [40 C.F.R. Part 22].

These provisions establishing the reach of a Presiding Officer's authority over Part 22 proceedings are further complemented by the authority set forth in 40 C.F.R. § 22.1(c), which provides:

> Questions arising at any stage of the proceeding which are not addressed in these Consolidated Rules of Practice [40 C.F.R. Part 22] shall be resolved at the discretion of the Administrator, Environmental Appeals Board, Regional Administrator, or Presiding Officer, as provided for in these Consolidated Rules of Practice.

IV. Respondents Should Be Compelled to Produce the Requested Documents and Summary of Testimony

Given the operative facts in this proceeding, Respondents should be compelled to produce the requested documents pursuant to 40 C.F.R. § 22.19(e) and to provide a summary of Steven Sussman's expected testimony pursuant to 40 C.F.R § 22.19(f). Part 22's pronounced concern that proceedings be fairly adjudicated provides an ancillary and supporting basis for this Court to issue an order compelling such production. The law governing this proceeding provides ample support for this Court to require Respondents to produce the requested documents and expected testimony.

A. The "Other Discovery Provisions" of 40 C.F.R. § 22.19(e)

The circumstances in this proceeding satisfy the 40 C.F.R. § 22.19(e) criteria for an order for additional discovery.

Compelling Respondents to produce the requested documents will neither unreasonably delay the proceeding nor unreasonably burden Respondents. The hearing is scheduled to commence in about five weeks, as the parties have known since the April 28, 2009 Order Scheduling Hearing and Respondents, to comply with the 15-day requirement of 40 C.F.R. § 22.22(a)(1), would have to produce these documents and expected testimony anyway. Since the hearing is set to begin on August 11, 2009 an order compelling Respondents to produce the documents and expected testimony by July 14, 2009 not only will not delay the proceeding but will ensure that Respondents comply with the Part 22 rules governing pre-trial proceedings. It will also ensure that EPA has a reasonable opportunity to review the new evidence. Nor should compelling such production unreasonably burden Respondents: these are documents within their control and possession, as the information they contain pertains to Respondents' own financial conditions (and thus clearly are within Respondents' knowledge).

Respondents have raised an inability to pay defense and would be required to submit financial documents from each Respondent to support the defense. Also since EPA's April 23, 2009 letter, the Respondents have been aware that EPA specifically sought to review them. These financial documents are not readily or publicly available: EPA could not realistically obtain such information without this Court's intervention, since such information is not available through public sources, such as the Internet. To date Respondents have not voluntarily provided the requested documents, and they have given no assurance or indication that they will. Respondents have never offered voluntarily to turn over the requested documents. The documents – because they contain information about Respondents' financial conditions and because Respondents

have raised the inability to pay defense – contain information that has significant probative value on a disputed issue of fact (Respondents' ability to pay the proposed penalty) relevant to the relief EPA seeks (payment of the proposed penalty).

The circumstances surrounding this proceeding unequivocally demonstrate that compelling Respondents to produce the requested documents is warranted under the governing criteria of 40 C.F.R. § 22.19(e)(1).

B. Part 22's Concern for Fair Adjudications Support Compelling Production

Other circumstances in this proceeding reveal that additional considerations demonstrate that Respondents should be compelled to produce the requested documents; these considerations strongly implicate Part 22's expressed concern that adjudications be conducted fairly. In order that the upcoming hearing be conducted in a fair and orderly manner and that it be conducted in accordance with the applicable Part 22 rules, it is vital that this Court compel Respondents to produce the documents and summary of testimony herein requested. More specifically, in order to provide EPA with a reasonable opportunity to review and evaluate the requested documents, which constitute the documentary evidence Respondents will have to introduce on the inability to pay issue at hearing, and to permit EPA a reasonable opportunity to address and rebut this central defense, it is imperative that the requested production be ordered.

Respondents raised their inability to pay defense in their Answer on October 30, 2008 and then again in their Pre-Hearing Exchange on April 9, 2009. They have had ample opportunity to collect and/or prepare supporting documentation In EPA's Rebuttal Pre-Hearing Exchange, dated April 22, 2009, EPA stated: "EPA finds that the

information provided is not sufficient to support an ability to pay determination."[7] Respondents never sought to amend or supplement their Answer or Pre-Hearing Exchange to list (and provide) complete, current or up-to-date documentary evidence in support of this defense, such as financial documents for both Respondents from the most current years available. Thus, Respondents failed to comply with the 40 C.F.R. § 22.19(f) requirement that a party "shall promptly supplement or correct the [prehearing] exchange when the party learns that the information exchanged...is incomplete, inaccurate or outdated, and the additional or corrective information has not otherwise been disclosed to the other party pursuant to [40 C.F.R. § 22.19(f)]." Furthermore, on April 22, 2009, EPA requested additional documentation from Respondents to allow the EPA to further assess Respondents' ability to pay the proposed penalty in this matter but to date Respondents have still not provided to EPA any or all of the requested documents.

EPA obviously does not know how lengthy, detailed or complex the requested documents might be. To properly analyze such documents and then to prepare questions or arguments that seek to rebut their assertions (including to use them as a basis for the cross-examination of Respondents' witness if/when he discusses Respondents' financial condition), EPA necessarily needs time. To prepare potential rebuttal arguments, EPA needs to utilize the services of a retained financial expert and such preparatory work as an expert would have to undertake to digest, evaluate and possibly prepare a written report (and then share his/her analyses and conclusions with EPA) is similarly time consuming. If these documents are not produced within the time

[7] Attachment 4, Complainant's Rebuttal Pre-Hearing Exchange, dated April 22, 2009.

period this motion requests, EPA likely will be deprived of a reasonably sufficient amount of time needed to undertake adequate preparation for the hearing, and that would certainly be prejudicial to Complainant. EPA also needs to obtain Steven Sussman's expected testimony regarding Respondent Stevenson's financial condition, so EPA's financial expert can review it along with Respondents' financial documents.

Respondents' failure to provide EPA with each Respondents' current or most recent financial documents should not be permitted to prejudice or compromise EPA's ability to present a thorough rebuttal Respondent's inability to pay argument(s). Whether the reason for Respondents' failure to date to provide these requested documents is willful or unintentional, deliberate or inadvertent is not material to EPA's ability to prepare properly for this case.[8] What is germane is that Respondents' failure to include any financial documents for Respondent Grenadier and no current or complete financial documents for Respondent Stevenson in their Pre-Hearing Exchange, or to provide them when requested by EPA, should not prejudice EPA's ability to refute this critical affirmative defense,[9] and these therefore, EPA is requesting that this Court compel Respondents to produce the requested documents.

An order compelling Respondents to produce the requested documents will ensure compliance with the applicable provisions of 40 C.F.R. Part 22 that require that adjudications be conducted fairly. As these same provisions provide the Presiding

[8] Nothing herein is intended to call into question Respondents' motive(s) as to why they have not to date provided any or all of the requested documents.

[9] *See, e.g.*, In re Vemco, Inc., d/b/a Venture Grand Rapids, Docket Number CAA-05-2002-0012, 2003 WL 1919589 (Judge Biro March 28, 2003), at 3 ("If Respondent produced financial documents on the eve of the hearing, without providing Complainant with adequate time to analyze them and prepare for hearing, Complainant may be severely prejudiced in its attempt to rebut such evidence"). *See also* Ware v. Rodale Press, 322 F.3d 218, 222 (3rd Cir. 2003) ("[T]he burden imposed by impeding a party's ability to prepare effectively a full and complete trial strategy is sufficiently prejudicial").

Officer with the tools to do so, the circumstances herein are appropriate for their exercise.

V. Under Similar Circumstances, Courts Have Upheld Motions to Compel

The Part 22 rules require that such information as contained in the requested documents be exchanged "at least 15 days before the hearing date." 40 C.F.R. § 22.22(a). Compelling Respondents to produce the documents EPA has requested serves as a predicate requirement "for the maintenance of order and for the efficient, fair, and impartial adjudication of issues" arising in this Part 22 proceeding. 40 C.F.R. § 22.4(c)(10). This proceeding must not be allowed "to go to the wire" before Respondents produce the requested documents, and to prevent such a possibility this Court should utilize its authority under 40 C.F.R. § 22.19(e) to order Respondents to produce the requested documents. Part 22 case law supports a Presiding Officer issuing an order requiring the timely production of documents under these circumstances.

The Environmental Appeals Board (EAB or Board) stated in re New Waterbury, Ltd., TSCA Appeal No. 93-2, 5 E.A.D. 529, 542 (EAB 1994):

> As a practical matter, the Region will know after an answer has been filed and well before any hearing whether ability to pay will be in issue. Indeed, 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. 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 and thus this factor does not warrant a reduction of the proposed penalty [footnotes omitted].

Presiding Officers have cited to or relied upon the New Waterbury rule to require respondents to produce factual documentation in support of claims of inability to pay.[10] Recent Part 22 case law detailed below affirms both the authority of Presiding Officers, and their exercise of that authority, to compel a party to produce documentary evidence supporting a respondent's purported claim of financial hardship.

In re Doug Blossom, Docket Number CWA-10-2002-0131, 2003 WL 22940544 (Judge Biro November 28, 2003), a proceeding under the Clean Water Act, respondent's prehearing exchange failed to provide documents relevant to his financial condition or upon which his listed expert witness might base his testimony. EPA moved to compel production of any such documentation. In granting that motion, the Court explained (page 2 of 3 of Westlaw opinion):

> The hearing of this matter is set to begin on January 6, 2004, about six weeks from now. Thus, prompt production of the discovery sought will not delay the proceedings. Specific, current information regarding Respondent's finances is solely within Respondent's possession and should not unreasonably burden Respondent, and was not provided voluntarily by Respondent. The information Complainant seeks is of

[10] The EAB has from time to time reaffirmed the ongoing vitality of the principles it set forth in New Waterbury. *See, e.g.*, In re William E. Comley, Inc. & Bleach Tek, Inc., FIFRA Appeal No. 03-01, 11 EAD 247, 265-66 (EAB 2004). There the Board, citing, inter alia, New Waterbury, upheld an Administrative Law Judge (ALJ) imposing the full amount of the penalty sought where respondents did not provide financial information in support of an inability to pay claim. It explained:

> [T]he ALJ...did not err in determining that imposing the maximum penalty amount upon WECCO was appropriate in light of the related penalty factors of WECCO's business size and 'ability to continue in business.' [O]nce the Region established a prima facie case that the proposed $22,000 penalty amount was appropriate...it was incumbent upon the Respondents to respond with 'specific evidence to show that despite [their] sales volume or apparent solvency' they could not pay the penalty. Through the course of ths proceeding, both during prehearing discovery (when they declined to provide financial information) and during the evidentiary hearing, the Respondents have failed to provide any such specific financial information to rebut the Regions prima facie case [footnote omitted].

> significant probative value on the penalty issue [citing to the Clean Water Act's provision listing ability to pay as a factor in penalty determinations]. Respondent has not clearly put 'ability to pay' at issue, but it is suggested by the summary of proposed testimony by Mr. Moore [the listed expert witness]. To clarify whether Respondent intends to raise it as an issue for hearing, and to enable Complainant to address this issue, Respondent shall be required to produce the requested documents.

Other cases have similarly ruled. *See, e.g.*, In re Vemco, Inc., d/b/a Venture Grand Rapids, Docket Number CAA-05-2002-0012, 2003 WL 1919589 (Judge Biro March 28, 2003), page 1 of Westlaw opinion (Complainant's motion granted; it sought an order compelling respondent to produce "complete and preferably audited financial statements and all corporate minutes for the last three years [for respondent and another company]; Respondent's cumulative depreciation schedules for the last three years; and debt instruments supporting Respondent's intercompany payable debt for December 31, 2001 and December 31, 2002"); In re Gerald Strubinger, Gregory Strubinger, Docket Number CWA-3-2001-001, 2002 WL 1773053 (Judge Gunning July 12, 2002), page 3 of Westlaw opinion (EPA moves to compel respondent to provide financial documents; the court rules: "[I]f Respondent Gerald Strubinger, Sr. wants to put his ability to pay the proposed penalty in issue, he must provide to Complainant the relevant financial records to support this claim. These records must be furnished to Complainant in sufficient time to allow Complainant to review the records and prepare for hearing"); In re Compania Petrolera Caribe, Inc., Docket Number II-RCRA-UST-97-0310, 1999 WL 362882 (Judge Biro January 13, 1999) (EPA moves to compel respondent to produce all the documents it will rely in to support its claim of inability to pay and to produce financial information that might impact EPA's analysis of this question by January 19, 1999; court grants the motion to the extent it required

respondent to produce the documentation by February 8, 1999 for EPA use at a hearing then scheduled to begin March 1, 1999).

Respondents should be compelled to provide to EPA the requested documents and the summary of Mr. Sussman's testimony no later than July 14, 2009.

VI. If Respondents Fail to Produce, Preclusion Would be an Appropriate Sanction

To be effective, an order compelling production of documents must provide for sanctions in case of failure to comply with such order. The Part 22 rules specifically provide for such sanctions in 40 C.F.R. § 22.19(g), and the authority given to the Presiding Officer in this section is reinforced with the sanctions available in 40 C.F.R. § 22.4(c)(5), (6) and (10). Under the jurisprudence of Part 22, tribunals have issued preclusion orders (or noted their authority to do so) where a party did not comply with a pre-trial order of production, and the circumstances in those proceedings were factually similar to those in this proceeding.

In re 1836 Realty Corporation, Docket Number CWA-2-I-98-0017, 1999 WL 362869 (Judge Gunning April 8, 1999), the court, ruling on EPA's motion to strike respondent's defense of ability to pay, states, "The record before me...supports a finding that the Respondent has chosen not to comply with the Discovery Order. Pursuant to EPA's motion, I find...that the Respondent is precluded from raising the defense of ability to pay." *See also* Doug Blossom, CWA-10-2002-0131, 2003 WL 22940544, where the court, after granting EPA's motion to compel production, admonished respondent that if he failed to produce the requested documentation within the time set by the judge's order granting EPA's motion, "he risks being prohibited from introducing any testimonial or documentary evidence in support of any reduction or elimination of

the penalty based upon his financial circumstances"; and Vemco, CAA-05-2002-0012, 2003 WL 1919589, where the court, after granting EPA's motion to compel production of financial documents, noted that if the information were of significant probative value and respondent failed to provide it within the time frame established by the court, "the information may be excluded from evidence."

The Part 22 rule permitting Presiding Officers to exclude evidence from admission into the record of a hearing corresponds to practice in the federal courts. *See, e.g.*, Ross v. Garner Printing Company, 285 F.3d 1106, 1114 (8th Cir. 2002) ("A district court has broad discretion to exclude evidence not disclosed in compliance with its pretrial orders"; citation omitted, internal quotation marks ornitted); and Armstrong v. Burdette Tomlin Memorial Hospital, 276 F. Supp.2d 264, 276 (D. N.J. 2003) (exhibit never given during discovery nor listed in joint pre-trial order; court notes that under Rule 16(e) of the Federal Rules of Civil Procedure, courts are empowered to exclude from evidence "last minute evidence parties wish to present at trial").

Not only does this Court possess the authority under 40 C.F.R. Part 22 to issue a preclusion order against Respondents if they fail timely to produce the requested documents, the facts of this proceeding merit that it exercise such authority to issue such an order. 40 C.F.R. § 22.19(g)(2).

VII. If Respondents Fail to Produce, Drawing an Adverse Inference is Warranted

As previously noted, the drawing of an adverse inference from a party's refusal to comply with a pretrial order is a device expressly sanctioned in 40 C.F.R. §§ 22.4(c)(5) and 22.19(e)(1). Where such refusal has occurred, Part 22 tribunals have drawn such inferences.

The EAB has upheld a Presiding Officer's authority to draw adverse inferences where a Respondent fails to comply with discovery orders. See, In re William E. Comley, Inc. & Bleach Tek, Inc., FIFRA Appeal No. 03-01, 11 EAD 247 (EAB 2004), where the Presiding Officer drew an adverse inference against respondents for their failure to comply with his discovery order. In so doing, he ruled that one respondent ("TEK") was the successor in interest to the liability of another respondent ("WECCO"). One basis for respondents' appeal was their assertion that the Presiding Officer abused his discretion in making a factual determination through invoking this sanction. The Board disagreed and upheld the Presiding Officer's ruling. It explained (11 EAD at 256):

> [T]he ALJ properly exercised his discretion in applying the sanction provision at 40 C.F.R. § 22.19(g) in response to the Respondents' failure to provide information probative of whether TEK was a successor in interest to WECCO's liability. The Respondents' assertion that the ALJ erroneously 'created a factual determination through sanction'...is mistaken, since an ALJ in accordance with 40 C.F.R. § 22.19(g) is allowed to draw factual inferences that are adverse to a party that fails to comply with a discovery order. Thus, the ALJ in this case was simply following what the regulations prescribe.

Part 22 trial courts have recognized their authority to draw adverse inferences and have effected it when, in circumstances similar to the instant proceeding, warranted. *See, e.g.,* Doug Blossom, CWA-10-2002-0131, 2003 WL 22940544, where the court strongly advised the respondent that his failure to produce the required documentation by the court-imposed deadline entails "that an inference may be drawn adverse to [him] with respect to ability to pay"; Vemco, CAA-05-2002-0012, 2003 WL 1919589, where the court noted that, "If any such information [financial documents] is significantly probative, and Respondent fails to provide it within the time provided, an

inference may be drawn that the information would be adverse to Respondent"; and 1836 Realty, CWA-2-I-98-1017, 1999 WL 362869, where the court, after concluding the respondent has not properly complied with its discovery order, granted EPA's motion to strike the defense of ability to pay, stating, "I find that an adverse inference may be drawn as to the information to be discovered and concerning the issue of the Respondent's ability to pay the proposed penalty...."[11]

Part 22 jurisprudence is consistent with this Court drawing adverse inference against Respondents if they were to fail to comply with the order compelling production this motion seeks.[12]

VIII. Conclusion

For all the reasons set forth above, Complainant respectfully requests this Court issue an order that compels Respondents to provide EPA by, and no later than July 14, 2009, the requested documents. EPA also respectfully requests that, if Respondents fail to provide such documentary materials by July 14, 2009 such order should also: a) preclude Respondents from admitting into evidence at the August 11, 2009 hearing any document supporting Respondents' inability to pay claim that was not provided to EPA by July 14, 2009; b) draw an inference that the information in such documents

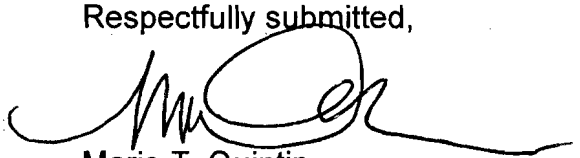
[11] The EAB noted that, in the context of an appeal of a default order, "In accordance with our jurisprudence on the 'ability to pay' penalty criterion, it is our view that [respondent], by not complying with the prehearing exchange requirement to provide documentary evidence demonstrating its inability to pay the proposed penalty, failed to raise its ability to pay as a cognizable issue. Thus, the company waived its ability to contest the Region's penalty proposal on this basis." In re JHNY,INC., a/k/a Quin-T Technical Papers and Boards, 12 EAD 372, 398-99 (EAB 2005).

[12] Parts of this motion seek relief (having this Court issue an order of preclusion and draw an adverse inference) contingent upon Respondents failing to comply with an order this tribunal has yet to issue; these sanctions would be triggered only if Respondents were to violate an order this Court may never issue. Nonetheless, seeking a preclusion order and an order to draw adverse inferences now is not premature nor lacks sufficient ripeness for decision. Given the close proximity of this motion to the start of the actual hearing date and Respondents refusal to provide EPA with the documents requested three months ago, EPA submits this matter is ripe for adjudication, and the sanctions sought are neither premature nor the need for them speculative.

would be adverse to Respondents; and c) grant EPA such other and further relief that this Court deems just, lawful and proper.

Dated: July 2, 2009
New York, New York

Respectfully submitted,



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212-637-3243

TO:

Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 2

Honorable Susan L. Biro
Presiding Officer

Daniel Riesel, Esq.
Sive, Paget & Riesel, P.C.
Counsel for Respondents

In re Stevenson Commons Associates, L.P., and Grenadier Realty Corp.
Docket No. CAA-02-2008-1220

CERTIFICATE OF SERVICE

I, Kara Murphy, certify that the foregoing Motion to Compel Production, and, Failing Respondents' Compliance, for an Order of Exclusion and the Drawing of an Adverse Inference was sent this day in the following manner to the addressees listed below:

Original and One Copy
By Hand:

Office of Regional Hearing Clerk
U.S. Environmental Protection
Agency - Region 2
290 Broadway, 16th floor
New York, NY 10007-1866

Copy by
Federal Express Overnight:

The Honorable Susan L. Biro
Chief Administrative Law Judge
U.S. Environmental Protection Agency
1099 14th Street, N.W.
Suite 350
Washington, D.C. 20005

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Dated: July 6, 2009
New York, New York

Kara Murphy
Kara Murphy