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**BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

In the Matter of:

Anthony Lerma,
Anchorage, Alaska

Respondent.

)
) DOCKET NO. CWA 10-2008-0009

)
) COMPLAINANT'S SPECIFICATION
) OF PROPOSED PENALTY

I. INTRODUCTION

Pursuant to the Administrative Law Judge's oral ruling granting Complainant's Unopposed Motion for Additional Time to File a Proposed Penalty on June 19, 2008, and Section 22.19(a) of the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits" ("Part 22 Rules"), the United States Environmental Protection Agency, Region 10, ("Complainant" or "EPA") hereby proposes a specific penalty amount and explains how this proposed penalty was determined in accordance with the Clean Water Act's ("Act") statutory penalty factors.

II. BASIS FOR PROPOSED PENALTY

In accordance with Section 22.14 of the Part 22 Rules, 40 C.F.R. § 22.14(a)(4)(ii), the Complaint in this matter did not specify penalty demand. Rather, Complainant decided to

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1 consider fully the information provided through the prehearing exchange process before
2 proposing a specific penalty. Having done so, and in accordance with Section 22.19(a)(4) of the
3 Part 22 Rules, 40 C.F.R. § 22.19(a)(4), Complainant hereby proposes that Respondent be
4 assessed a penalty of EIGHTY-THOUSAND DOLLARS (\$80,000) for the violations identified
5 in the Complaint.

6 In its Initial Prehearing Information Exchange, Complainant discussed the legal
7 framework it would employ in specifying a proposed penalty amount. See Initial Prehearing
8 Exchange, Section IV. In addition, Complainant provided a detailed statement describing the
9 factual information it considers relevant to the assessment of a penalty. *Id.* Having reviewed the
10 information submitted in Respondent's Prehearing Exchange, Complainant has found no
11 additional information that would affect its calculation of a proposed penalty, except for that
12 information regarding Respondent's ability to pay. Therefore, Complainant re-alleges
13 Paragraphs IV.1, 3-4, and 6 in its Initial Prehearing Information Exchange in justifying the
14 penalty proposed here. The following discussion re-states the legal framework and factual
15 information relevant to Complainant's consideration of Respondent's ability to pay; and
16 discusses Respondent's assertion of *an inability to pay* a penalty. In addition, the following
17 discussion considers how economic benefit relates the penalty proposed in this case.
18

19 **1. Respondent's Ability to Pay:**

20 The *New Waterbury, Ltd.* decision establishes the process for considering and proving in
21 the context of an administrative hearing a violator's ability to pay a civil penalty:
22

23 Where ability to pay is at issue going into a hearing, the Region will need to
24 present some evidence to show that it considered the respondent's ability to pay a
25 penalty. The Region need not present any *specific* evidence to show that the
respondent *can pay* or obtain funds to pay the assessed penalty, but can simply

1 rely on some *general* financial information regarding the respondent's financial
2 status which can support the *inference* that the penalty assessment need not be
3 reduced. Once the respondent has presented *specific* evidence to show that despite
4 its sales volume or apparent solvency it cannot pay any penalty, the Region as
5 part of its burden of proof in demonstrating the "appropriateness" of the penalty
6 must respond either with the introduction of additional evidence to rebut the
7 respondent's claim or through cross examination it must discredit the
8 respondent's contentions

9 *In re New Waterbury, Ltd.*, 5 E.A.D. 529, 542-430 (EAB 1994) (emphasis in original); *see also*

10 *In re Chempace Corp.*, FIFRA Appeal Nos. 99-2 & 99-3, slip op. at 21 (EAB, May 18, 2000).

11 Under this rubric, Complainant has the initial burden of production to establish that the
12 Respondent has the ability to pay the proposed penalty, "[t]he burden then shifts to the
13 respondent to establish with specific information that the proposed penalty assessment is
14 excessive or incorrect." *Chempace Corp.*, slip op. at 22. Respondent's failure to provide
15 specific evidence substantiating a claimed inability to pay results in waiver of that claim. *In re*
16 *Spitzer Great Lakes Ltd.*, TSCA Appeal No. 99-3, slip op. at 29 (EAB, June 30, 2000).

17 As discussed in its Initial Prehearing Exchange, Complainant will demonstrate at any
18 hearing on this matter, that it considered Respondent's ability to pay the specific penalty
19 proposed here. Complainant will at minimum present general financial information about
20 Respondent that shows he appears to be financially solvent and is the fee owner of several
21 valuable parcels of land. In particular, Complainant will present property tax records
22 demonstrating that Respondent, and entities Respondent owns and/or controls in the Anchorage
23 Borough, the Matanuska-Susitna Borough and the Kenai Peninsula Borough, Alaska, own real
24 estate with assessed values in excess of \$80,000. Complainant's Exhibit (CX)-16 and CX-28.
25 This information supports the *inference* that the penalty assessment in this case need not be
reduced.

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1 Respondent, however, asserted in his prehearing exchange that he has an inability to pay
2 a penalty. Respondent filed his prehearing exchange before Complainant filed its initial
3 prehearing exchange; therefore, it appears that Respondent is asserting he is unable to pay any
4 penalty in this case. Respondent included in his prehearing exchange documents reflecting his
5 financial condition.

6 Complainant's initial review of those materials revealed several deficiencies related to
7 Respondent's financial condition, and Complainant requested that Respondent provide those
8 supplemental materials for consideration. CX-26. On July 17, 2008, Respondent provided
9 Complainant with supplemental materials. CX-27. Complainant's evaluation of the information
10 provided by Respondent does not demonstrate an inability to pay an \$80,000 penalty. For
11 example, the information Respondent provided has been evaluated by Complainant's expert
12 financial analyst who concludes Respondent (1) has a positive net worth in real estate of
13 approximately \$1 million (CX-28 p. 3-4), (2) has the ability to address his current liabilities and
14 not adversely affect his ability to continue business (CX-28 p. 4), and (3) has not provided
15 sufficient evidence to substantiate a lack of income sufficient to pay a penalty (CX-28 p. 4-5).
16 In sum, the financial information Respondent provided does not support his "inability to pay"
17 claim. That same information also demonstrates that Respondent has funds to pay the proposed
18 penalty here. CX-28 p. 5. Therefore, the penalty proposed today is appropriate.

19
20
21 **2. Economic Benefit:**

22 Complainant believes that Respondent has realized at least a modest economic benefit as
23 a result of the violations alleged in the Complaint and described in greater detail in
24 Complainant's Initial Prehearing Information Exchange. This economic benefit includes delayed
25

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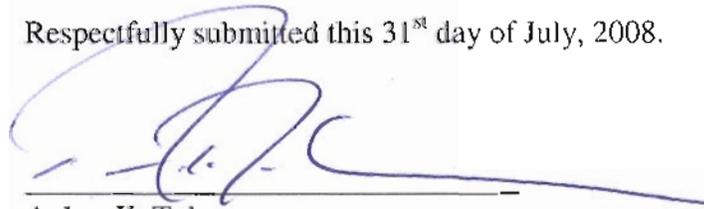
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1 or avoided compliance costs, such as consultant costs and fees, implementation of storm water
2 management technologies or practices, as well as maintenance and inspection costs, all of which
3 would have been necessary to fully implement the requirements under the Construction General
4 Permit. Complainant does not have in its possession at this time sufficient information to
5 quantify specifically Respondent's economic benefit of noncompliance, and Respondent's
6 prehearing exchange contained no documentation to aid in this inquiry. As a result, the penalty
7 proposed today assumes that Respondent in fact recognized no economic benefit. Complainant
8 reserves the right to seek discovery in accordance with Section 22.19(e) of the Part 22 Rules so
9 that this information may be considered in proposing a different penalty prior to hearing or in
10 supporting assessment of the specific civil penalty proposed today.
11

12 **III. CONCLUSION**

13 For all of the foregoing reasons, Complainant proposes that Respondent be assessed a
14 civil penalty of \$80,000. Such a penalty would be appropriate and would properly reflect the
15 considerations enumerated in Section 309(g) of the Act, 33 U.S.C. § 1319(g).
16

17 Respectfully submitted this 31st day of July, 2008.



18
19
20 Ankur K. Tohan
Assistant Regional Counsel

CERTIFICATE OF SERVICE

I certify that the foregoing "COMPLAINANT'S SPECIFICATION OF PROPOSED PENALTY" was filed and sent to the following person, in the manner specified, on the date below:

Original and one copy, hand-delivered:

Carol Kennedy, Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 10
1200 Sixth Avenue, Mail Stop ORC-158
Seattle, WA 98101

A true and correct copy, by first class mail:

David Shoup
Tindall Bennett & Shoup PC
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Anchorage, AK 99501

Judge Barbara A. Gunning
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Mail Code 1900L
1200 Pennsylvania Ave., NW
Washington, DC 20460-2001

Dated: 7/31/08

Asia Bringham
Office Manager
U.S. EPA Region 10

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