

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5

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U.S. ENVIRONMENTAL  
PROTECTION AGENCY

In the Matter of: )  
)  
Wisconsin Plating Works of Racine, Inc. )  
Racine, Wisconsin )  
Respondent. )  
\_\_\_\_\_ )

Docket No. CAA-05-2008-0037  
Honorable Judge Susan Biro  
Presiding Administrative Law Judge

**COMPLAINANT'S MOTION FOR PARTIAL ACCELERATED DECISION  
ON THE ISSUE OF ABILITY TO PAY, AND COMPLAINANT'S  
ALTERNATIVE MOTION TO COMPEL DISCOVERY RELATED TO  
RESPONDENT'S ABILITY TO PAY**

**I. Jurisdiction**

Complainant, through its undersigned attorney, files this Motion for Partial Accelerated Decision on the Issue of Ability to Pay, and Complainant's Alternative Motion to Compel Discovery Related to Respondent's Ability to Pay ("Motion") pursuant to the authority of Sections 22.16, 22.19(e) and 22.20 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*, ("Consolidated Rules" or "CROP") 40 C.F.R. §§ 22.16, 22.19(e) and 22.20. As indicated below, Complainant requests that this Honorable Court issue an Order granting Complainant a partial accelerated decision on the issue of Respondent's ability to pay.<sup>1</sup> Alternatively, Complainant requests this Court to order

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<sup>1</sup>Under Section 113(e)(1) of the CAA, 42 U.S.C. §7413(e)(1), one of the statutory penalty factors which must be considered in determining the amount of penalties is "the economic impact of the penalty on the business." As ALJ decisions have noted, this factor is identical to the more common phrase "ability to pay." See, e.g., *In the Matter of JHNY, Inc., a/k/a Quin-T Technical Papers and Boards*, Dkt. No. CAA-03-2003-0298 at 6, note 6, 2004 EPA ALJ LEXIS

Respondent, Wisconsin Plating Works of Racine, Inc. (Wisconsin Plating), to submit certain documents relevant to the issue of Respondent's ability to pay the proposed penalty of \$72,683 in this case. Complainant's counsel has contacted Respondent's counsel concerning this motion; Respondent's counsel indicates that Respondent objects to this Court granting the relief requested in this motion.

## **II. Background**

On September 15, 2008, Complainant issued to Respondent a Notice of Intent to File a Civil Administrative Complaint Against Wisconsin Plating Works of Racine, Inc. (notice letter) (Complainant's Exhibit 15) The notice letter provided the Respondent the opportunity to present information to Complainant, including *inter alia*, financial data bearing on Respondent's ability to pay the original proposed penalty of \$72,683. The notice letter specified that, to support a claim of inability to pay the proposed penalty, Respondent should provide "certified, complete financial statements including balance sheets, income statements, and all notes to the financial statements, and your company's signed income tax returns with all schedules and amendments, for the past three years" (Complainant's Exhibit 15) Respondent did not submit any financial information in response to Complainant's notice letter.

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143 (November 17, 2004). The Environmental Appeals Board (EAB or "the Board") has noted that, although the Clean Air Act (CAA) does not specifically use the terminology "ability to pay" in describing the statutory criteria for the assessment of penalties, the statutory penalty factor cited in Section 113(e) of the CAA, 42 U.S.C. §7413(e), "the economic impact of the penalty on the business," has traditionally been considered to be the equivalent of a violator's "ability to pay." *See In re: CDT Landfill Corporation*, 11 E.A.D. 88, at 120, note 60 (EAB 2003).

On September 22, 2008, Complainant filed an administrative penalty action against Respondent. The Complaint alleged that Respondent had violated Section 112 of the Clean Air Act by failing to monitor and record the temperature of the freeboard refrigeration device used on Respondent's vapor degreaser as required by the National Emission Standards for Hazardous Air Pollutants for Halogenated Solvents as set forth in 40 C.F.R. Part 63, Subpart T. Respondent filed an Answer to the Complaint on or about October 24, 2008. In its Answer, Respondent did not raise the issue of ability to pay the proposed penalty or economic impact of the proposed penalty on Respondent's business.

The parties did not engage in alternative dispute resolution in this matter although they attempted to discuss settlement on November 17, 2008. In addition, on January 9, 2009, Respondent submitted to Complainant tax returns for 2005, 2006 and 2007 as part of settlement discussions. An evaluation of that information at that time did not result in a settlement of this matter.

On or about February 20, 2009, Respondent, through its counsel, submitted its initial Prehearing Exchange (PHX). In its Prehearing Exchange, Respondent's counsel, in response to this Court's Prehearing Order, submitted copies of its tax returns for 2005, 2006, and 2007 and indicated that it would provide further information of losses Respondent suffered in the 4<sup>th</sup> quarter of 2008 and January 2009. Respondent also indicated that Jeffrey J. Toeppe, Vice President of Respondent, will testify, among other things, on "Respondent's financial state." To date, Respondent has only provided limited information to Complainant pertaining to the issue of ability to pay (a.k.a., "the economic impact of the penalty on the business").

On March 19, 2009, the parties discussed the possible settlement of this matter. Complainant requested additional financial information about Respondent so that Complainant

could evaluate Respondent's financial condition. As of the date of this filing, Respondent has not indicated whether it will provide those documents to Complainant.

Therefore, Complainant hereby moves this Honorable Court to issue an Order granting Complainant a partial accelerated decision on the issue of ability to pay, specifically finding that Respondent has waived the issue of ability to pay, and barring Respondent from introducing any testimony or other evidence on this issue. If the Court decides not to grant the partial accelerated decision Order described above, Complainant requests that the Court issue the following discovery order:

Within 30 days of issuance of the discovery order, Respondent shall provide the following documents to the Court and to Complainant:

- (1) True, accurate and complete copies of at least the last three years of signed and dated U.S. corporate income tax returns of Wisconsin Plating, including all associated schedules and attachments.
- (2) True, accurate and complete copies of the complete financial statements prepared on behalf of Wisconsin Plating by an outside accountant, including all balance sheets, statements of operations, statements of retained earnings, statements of cash flows, and all notes to each financial statement, for the three most recent fiscal years. Submit complete copies of all financial statements, including the auditor's cover letter and all notes to the financial statements.
- (3) True, accurate and complete copies of internal financial statements prepared by Wisconsin Plating, including all balance sheets, statements of operations, statements of retained earnings, statements of cash flows, analysis of performance relative to budget or forecast, and all notes to each financial statement, for all months/quarters which have occurred between the most recent fiscal year tax return and financial statement and the date of the hearing in this matter.
- (4) True, accurate and complete copies of all financial projections developed by Wisconsin Plating for the years 2009 and 2010, including but not limited to projected income statements, balance sheets, and analyses of projected cash flows, whether month-by-month, by quarter, or for the year.
- (5) True, accurate and complete copies of all documents reflecting the appraisal, fair market value or other valuation of all of Wisconsin Plating's corporate assets,

and true, accurate and complete copies of all documents reflecting the existence and the amounts, conditions and payment/repayment terms of all of Wisconsin Plating's liabilities. Documents responsive to this request include, but are not limited to, all loan applications prepared for existing loans, the loan documents themselves, and current statements reflecting the balance(s) due.

(6) True, accurate and complete copies of all documents regarding the contract Wisconsin Plating has with American NTN Bearings, including but not limited to the terms of the contract, and correspondence subsequent to the initial agreement, any modifications to the contract, and the projected annual order volumes and revenues resulting from the contract for the years 2009 and 2010.

(7) True, accurate and complete copies of documents containing information on the operating facility at 1000 12<sup>th</sup> Street. Documents responsive to this request include, but are not limited to the deed securing ownership of the property, all rent or lease agreements for the property, and the assessed value of the land and improvements.

(8) True, accurate and complete copies of all current insurance policies which may provide coverage or reimbursement for any penalties, attorneys' fees or other costs incurred in connection with litigation related to the violations alleged in the complaint.

(9) True, accurate and complete copies of the asset ledger for all assets owned by Wisconsin Plating during the three most recent tax years (at this time, 2006, 2007 and 2008).

(10) All other documentation that Wisconsin Plating feels is relevant and supportive of its claims of inability to pay the proposed EPA penalty.

If the information identified above is not provided to Complainant and the Court by the date or timeframe specified in the discovery order, Complainant requests that this Court issue an Order barring Respondent from proffering any testimony or other evidence relating to the issue of Respondent's ability to pay the proposed penalties or economic impact on Respondent's business, and granting Complainant's motion for partial accelerated decision on the issue of ability to pay / economic impact of the penalty on the business.

**III. Respondent has waived the issue of ability to pay, Respondent should be barred from introducing any evidence on this issue, and Complainant has met its burden to consider Respondent's ability to pay / the economic impact of the penalty on the business.**

Under the applicable rules of practice, as well as precedent of the Environmental Appeals Board (EAB or Board), Respondent has waived the issue of ability to pay (or "the economic impact of the penalty on the business"), and should be barred from raising this issue. First, Respondent failed to raise ability to pay or "the economic impact of the penalty on the business" as an issue in its Answer. The regulations at 40 C.F.R. Part 22 identify the information required to be set forth in complaints and answers to complaints. The regulations further specify the proper scope of any hearing. The Consolidated Rules specify that, if the respondent objects to the proposed order and penalty, that respondent must file an "answer" to the complaint, in which the respondent is required to include certain information. 40 C.F.R. § 22.15. Specifically, the respondent is required to "clearly and directly admit, deny or explain each of the factual allegations" contained in the complaint; the respondent is required to state the "circumstances or arguments which are alleged to constitute the grounds of any defense" which the respondent is asserting; and the respondent is required to state the "basis for opposing the proposed relief" requested in the complaint. *Id.* A claim of inability to pay (or a claim that consideration of "the economic impact of the penalty on the business" warrants a reduction in the penalty proposed in the complaint) is obviously a basis for opposing the proposed relief, the penalty. The Consolidated Rules also provide that a hearing shall be held, if requested, "upon the issues raised by the complaint and answer." *Id.* Here, Respondent failed to raise the issue of "the economic impact of the penalty on the business" or "ability to pay" in its Answer. Since that issue was not raised in either the complaint or answer, it cannot be an issue for hearing.

Second, even had Respondent raised the issue of ability to pay or “the economic impact of the penalty on the business” in its Answer, Respondent has failed to provide information that is essential to any analysis of its ability to pay a penalty. As held by the EAB in *In re: New Waterbury*, 5 E.A.D. 529 (EAB 1994), to fulfill the obligation to “take into account” the statutory penalty factor of “ability to pay” in a specific case, “a respondent’s ability to pay may be *presumed*” and that presumption can continue until the respondent’s “ability to pay” the proposed penalty “is put at issue by a respondent.” *New Waterbury*, 5 E.A.D. 529, at 541 (emphasis in original). Not only do the regulations require a respondent to include in its answer the “basis for opposing any proposed relief” (such as a claim that it has an “inability to pay” the proposed penalty), but the EAB has instructed that, where the respondent does raise a claim of inability to pay, the complainant “must be given access to the respondent’s financial records before the start of [any] hearing.” *New Waterbury*, 5 E.A.D. 529, at 542. If the respondent does not “raise its ability to pay as an issue in its answer,” or if, after having raised the claim, it “fails to produce any evidence to support its claim after being apprised of that obligation during the pre-hearing process,” it may be concluded that “any objection to the penalty based upon ability to pay has been waived under the Agency’s procedural rules.” *New Waterbury*, 5 E.A.D. 529, at 542. See also *In the Matter of Chippewa Hazardous Waste Remediation & Energy, Inc. d/b/a Chippewa Hazardous Waste, Inc. and Trustees of the Ohio Valley Christian Center of the Assemblies of God*, Docket No. CAA-03-2002-0144, 2004 EPA ALJ LEXIS 17, at 82-83.

It is obvious that no one other than Respondent itself is better able to produce information upon which to determine whether it has the ability to pay the penalty amount proposed in the complaint. This is a factual matter totally distinct and separate from the facts and circumstances

of any alleged violation.<sup>2</sup> Any credible consideration of a respondent's "ability to pay" a particular penalty amount will require a review of "evidence" consisting of proprietary and personal information in the exclusive possession of the respondent. Therefore, as held in *New*

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<sup>2</sup>It has long been recognized that, "based on considerations of fairness, [evidentiary law] does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary." *U.S. v. New York, New Haven & Hartford R.R.*, 355 U.S. 253, at 256 n.5 (1957). "Ordinarily a litigant does not have the burden of establishing facts peculiarly within the knowledge of the opposing party." *Browzin v. Catholic University of America*, 527 F. 2d 843, at 849 (D.C. Cir. 1975). In upholding a regulation of the Secretary of the Interior requiring a mine owner to come forward with information regarding his mine when challenging an "imminent danger" order, issued under the Federal Coal Mine Health and Safety Act of 1969, the Seventh Circuit Court of Appeals noted that "[a]s respondents logically say, it is, after all, his mine and he had the best knowledge of its condition." *Old Ben Coal Corporation v. Interior Board of Mine Operation Appeals*, 523 F. 2d 25, at 36 (7<sup>th</sup> Cir. 1975). Citing 9 Wigmore, Evidence § 2486 (3d ed.), the Court further noted that "[t]his is a consideration which has often been advanced as a special test for solving a limited class of cases, i.e., the burden of proving a fact is on the party who presumably has peculiar means of knowledge enabling him to prove its falsity, if it is false." *Id.* "Simply stated, the [adverse inference] rule provides that when a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him." *International Union (UAW) v. N.L.R.B.*, 459 F.2d 1329, at 1336 (D.C. Cir. 1972), which provides a substantial exposition on the history and purpose of the rule.



*Waterbury*, once the alleged violator requests a hearing and places at issue its “ability to pay” the proposed penalty, by identifying it as a “basis for opposing any proposed relief” in his answer, as required by 40 C.F.R. 22.15(b), the complainant “must be given access to the respondent’s financial records before the start of the hearing.” *New Waterbury Ltd.*, at 542. This is a reasonable interpretation, and application, of the directive Congress has given U.S. EPA to “take into account” a violator’s “ability to pay” the proposed penalty to be assessed for the violations.

The alleged violator must make its financial records available because the mere statement of a respondent that it is unable to pay the proposed penalty cannot be considered credible evidence that is of any value as a matter of proof that the respondent is unable to pay that amount of penalty.<sup>3</sup> The same logic applies when a corporate officer makes such a statement on behalf of his corporation; such statements are nothing more than conclusory announcements that certain circumstances exist, and furthermore constitute self-serving statements which the Board has recognized as being entitled to little or no weight. *See also In re: Bil-Dry Corporation*, 9

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<sup>3</sup>The final decision in *In Re Central Paint and Body Shop, Inc.*, recognized that the testimony of the Respondent’s president that it would be “very hard” to pay any penalty, “for the most part is self-serving and conclusory” and that “[s]elf-serving declarations are entitled to little weight.” 2 EAD 309, at 315 (CJO 1987). Consequently, as such statements are “entitled to little weight,” they have “little probative value,” and should not be admitted under the Consolidated Rules, 40 C.F.R. 22.22(a), or, if admitted, given little or no weight. This conclusion is warranted when a respondent has submitted limited financial records for review by Complainant and an inference is permitted that such records would be adverse to the respondent’s claim.

E.A.D. 575, at 614 (EAB 2001) (Board noted that the testimony of one affiliated with the respondent is inherently self-serving, and therefore entitled to little weight) <sup>4</sup>.

In the case at bar, Respondent failed to raise “ability to pay” as an issue in its Answer and additionally failed to produce sufficient financial evidence necessary to support any claim of inability to pay the proposed penalty. Even prior to filing of the Complaint, Respondent was specifically advised in the Agency’s notice letter that, if Respondent intended to claim that it did not have the ability to pay the proposed penalty, the company was required to submit financial information consisting at a minimum of three years of both financial statements and tax returns. (Complainant’s Exhibit 15) Respondent produced no financial information whatsoever in response to this pre-filing notice letter. After the Complaint was filed, Respondent failed to raise the issue of ability to pay in its Answer. In fact, Respondent has never specifically advised the Court or Complainant that it intends to raise its ability to pay the proposed penalty as an issue in this case. In its Prehearing Exchange, Respondent states that “the proposed penalty should be reduced based on the dire financial condition of the company due to current worldwide economic

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<sup>4</sup>An oral summary of a person, concluding that he or his business does not have the financial ability to pay a particular amount of penalty, is nothing more than self-serving claims motivated and produced by the pending litigation, and, as such, cannot be accepted as reliable and probative evidence. As was observed by a trial court in rejecting the proffer of a “verbal summary” of the witness’ examination of certain documents in a Federal Aviation Administration registry, “[t]he testimony in question represents an unabashed attempt to prove the contents of documents without producing either the originals or appropriate copies thereof.” *White Industries, Inc. v. Cessna Aircraft Company*, 611 F.Supp. 1049, at 1078 (D.C. Mo. 1985).

downturn, and also because the proposed penalty must have some reasonable, and proportionate nexus to the violations and the violators.” It seems that Respondent is attempting to provide inadequate financial documentation necessary to substantiate an inability to pay the proposed penalty while still asserting an inability to pay argument using the phrase “dire financial condition of the company.”

Therefore, it would be appropriate for this Court to issue an Order finding that, as a result of Respondent’s failure to raise the issue of ability to pay in its Answer and its failure to provide sufficient financial information, Respondent has waived any objection to the proposed penalty based on the issue of “ability to pay,” and is barred from raising this objection or proffering evidence on this issue. Therefore, this Court should GRANT Complainant’s motion for partial accelerated decision on the issue of ability to pay or economic impact of the penalty on the violator.

In the alternative, this Court should grant Complainant’s discovery motion described below.

#### **IV. Standard for Granting a Motion for Other Discovery**

In proceedings subject to the Consolidated Rules of Practice, motions for additional discovery are governed by Section 22.19(e) of the Consolidated Rules, 40 C.F.R. § 22.19(e). This rule provides that, after the prehearing exchange has taken place, other discovery may be ordered only if such discovery: (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. As explained in Section V, below, this motion for other discovery satisfies each of these elements.

## **V. Factors for “Other Discovery”**

### **A. The Prehearing Exchange Has Taken Place.**

Under the Consolidated Rules, a Party may request “other discovery” only after the prehearing information exchange ordered by the Presiding Officer has been completed. 40 C.F.R. § 22.19(e). The prehearing information exchanges in this case concluded with the filing and service of Complainant’s Rebuttal Prehearing Exchange on March 5, 2009. Therefore, Complainant may appropriately file this motion for additional discovery.

### **B. The Motion for “Other Discovery” Will Neither Unreasonably Delay the Proceeding Nor Unreasonably Burden the Non-moving Party.**

The Presiding Officer may grant a motion for “other discovery” only if doing so will neither unreasonably delay the proceeding nor unreasonably burden the non-moving party. The motion for discovery in the instant matter will not unreasonably delay the proceeding as the hearing in this matter has not yet been scheduled.

Production of the information sought will not unreasonably burden Respondent. Respondent is a small business, and therefore, any request for information outside the normal course of business will impose some burden on the Respondent. However, the standard for determining whether “other discovery” is or is not unreasonably burdensome is not that the requested discovery must impose no burden on the non-moving party. The standard is whether the requested discovery would create an “unreasonable burden” on the non-moving party. In this case, production of the information requested will not impose an unreasonable burden on Respondent. The information consists of records which Respondent should already have in its

possession. Such records are presumably already organized, as they consist of tax returns, financial statements, and documents relating to corporate assets and liabilities, which are records which a company must keep organized in order to prepare annual tax returns and meet its business obligations. The information which Complainant is requesting is all related to Respondent's financial condition, and all such information is in the control of Respondent.

It is also in Respondent's best interest to supply the requested information so that both the Court and the Complainant may accurately assess its ability to pay a penalty. It makes no sense to conceal this information, since production of such information could only serve to reduce the amount of the proposed penalty. As such, any minimal burden imposed by this request is outweighed by the significant impact the information could have on these proceedings, and the benefit which may inure to Respondent.

It is not unreasonable to expect Respondent to supply the information that Complainant has requested. The only other alternative would be for the Court to presume Respondent has the ability to pay the proposed penalties, issue a declaratory ruling that Complainant has met its burden to consider the factor of ability to pay, and to bar the introduction of any further testimony or other evidence pertaining to this issue.

**C. The Motion for "Other Discovery" Seeks Information that Is Most Reasonably Obtained from the Non-moving Party, and Which the Non-moving Party Has Refused to Provide Voluntarily.**

The Presiding Administrative Law Judge may grant a motion for "other discovery" only if the Judge determines that the motion seeks information which is most reasonably obtained from the non-moving party and which the non-moving party has refused to provide voluntarily. The Complainant seeks financial information pertaining to Respondent's financial condition, information which is solely in the possession of the Respondent. Complainant has already

investigated all publicly-available sources of information concerning Respondent's financial condition, and has considered this information in its assessment of Respondent's ability to pay (See Complainant's Exhibit 12). However, Complainant cannot obtain the information requested in this motion from any source other than Respondent. Therefore, the information sought by this motion is most reasonably obtained from Respondent.

Complainant initially requested in its September 15, 2008, notice letter that if Respondent believed it was unable to pay the proposed penalty, Respondent should submit specified financial information to Complainant. (Complainant's Exhibit 15) Respondent provided no documents at that time. At a later date, Respondent provided incomplete tax returns for 2005, 2006 and 2007, both in settlement and in its prehearing exchange. Respondent has also provided a financial report (but not a full set of financial statements) for the fourth quarter of 2008. Respondent has therefore failed to voluntarily provide sufficient information on its ability to pay the penalty in this matter.

**D. The Motion for "Other Discovery" Seeks Information that Has Significant Probative Value On a Disputed Issue of Material Fact Relevant to the Issue of Penalties.**

The information sought by this motion has significant probative value with respect to the issue of ability to pay. While Respondent did not raise the issue of ability to pay in its Answer to the Complaint, Respondent did raise this issue in its prehearing exchange and, if this Court decides to allow Respondent to raise this issue despite Complainant's motion for partial accelerated decision on the issue of ability to pay, such issue will be a "disputed issue of material fact." The information sought by this discovery motion clearly has significant probative value on the issue of ability to pay (or "the economic impact of the penalty on the business"). For example, the financial statements and tax returns of the Respondent for the last three years are

necessary to make any reasonably accurate assessment of Respondent's current financial situation, both in terms of identifying all available assets and current liabilities, and in terms of evaluating Respondent's historic cash flow, determining whether Respondent decided to disburse revenues to shareholders or officers (rather than retaining a cash reserve in the corporation), and assessing Respondent's capacity to obtain loans or other financing.

As Ms. Coad points out in her attached declaration, financial statements are a source of information to investors, creditors, and other interested persons about the financial condition of an enterprise. These documents include, but are not limited to, balance sheets, income statements, statements of cash flows, retained earnings statements, and notes to the financial statements. Balance sheets reveal the assets, liabilities, and owners' equity in an enterprise *at a specific date*; income statements provide a summary of a company's revenues and expenses, gains and losses, with the resultant net income of an enterprise for a particular time period; statements of cash flows reflect a company's net cash receipts from operating, investing and financing activities, thereby demonstrating how an enterprise has spent the cash generated from its operations during a particular time period; a retained earnings statement shows the amount of any earnings retained in the enterprise which were not disbursed in dividends or other distributions for a particular time period; and the notes to financial statements provide additional information about items not disclosed on the face of the balance sheet or income statement, such as parent/subsidiary relationships, accounting policies, related party (affiliate) transactions, debt acquisitions/terms of repayment, assets pledged to secure debt, details of outstanding loans, etc. (Coad Declaration ¶8).

Audited financial statements, which are prepared under generally accepted accounting principles, include an opinion by a certified public accountant stating whether the financial

statement fairly represents the financial position of the subject enterprise. Therefore, audited financial statements provide the highest level of reliability; however, a certified public accountant may also prepare either compiled or reviewed statements, which while of lower reliability than an audited statement are more valuable than statements otherwise compiled by the owner/management of the enterprise. (Coad Declaration ¶9).

Clearly, in assessing a company's ability to pay, one must have access to complete (and preferably audited) financial statements in order to conduct a thorough analysis of a respondent's financial position. Tax returns alone do not provide specific information regarding items such as the manner in which operating cash profits are spent, debt acquisitions, and related-party transactions. (Coad Declaration ¶10).

The relevance of financial statements has been recognized by the EAB. *In re Bil-Dry Corp.*, 9 E.A.D. 575, at 613-614, the EAB noted the superior reliability of complete financial statements as compared to tax returns, quoting extensively from the testimony of Dr. Joan Meyer of Industrial Economics:

Tax returns, of course, calculate the amount of the company's income that is subject to federal corporate taxation. The whole purpose of tax accounting is to minimize the federal income tax the company pays.

Tr. II at 302-03. With regard to financial statements, however, Dr. Meyer stated:

Financial statements, on the other hand, are supposed to be prepared according to generally-accepted accounting principles, also known as GAAP. The purpose of financial statements is to provide an accurate representation of the company's financial state of affairs. Financial statements have more information in them, typically, than a tax return. \* \* \* You'll find a statement of cash flows, which shows the company's cash position over the year. You'll also find notes to the financial statements which explain key transactions that have occurred throughout the year. \* \* \* You'll also find details about the debt that's owed by the company to other lenders or you'd find out details about the debt that the company itself has extended to other entities.



Tr. II at 302-03. Financial statements would have provided a detailed picture of Bil-Dry's financial state and showed whether it could pay the proposed penalty. Nevertheless, Bil-Dry chose not to provide its financial statements in support of its inability to pay claim, and did not offer an explanation for its decision to withhold its financial statements.

*Bil-Dry*, 9 E.A.D. 575, at 613-614.

Respondent's financial statements for the last three years are therefore essential to make a reasonably accurate assessment of Respondent's current financial situation, both in terms of identifying all available assets and current liabilities, and in terms of evaluating Respondent's historic cash flow, determining whether Respondent decided to disburse revenues to shareholders or officers (rather than retaining a cash reserve in the corporation), and assessing Respondent's capacity to obtain loans or other financing. Production of the requested information can only inure to the benefit of Respondent, as information concerning ability to pay can only lead to a reduction of the penalty, and never an increase.

Courts have recognized the probative value of documents such as financial statements and tax returns. *See In the Matter of Vemco, Inc.*, Docket No. CAA-05-2002-0012, 2003 WL 1919589 (E.P.A.) (Court granted Complainant's motion for discovery of information such as "complete and preferably audited financial statements and all corporate minutes for the last three years for Respondent ..."). *See also In the Matter of Mark Fastow and Fiberglass Specialties, Inc.*, Docket No. EPCRA-09-97-0013, 1998 WL 422191 (E.P.A.), June 24, 1998 (Court grants complainant's motion for discovery of respondent Fastow's personal federal income tax returns for most recent five years).

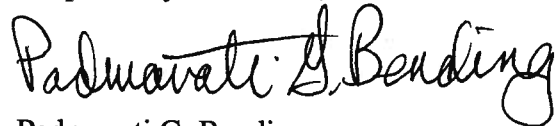
## **VI. Conclusion**

In summary, Complainant has demonstrated that this Motion meets the standards for granting other discovery under the Consolidated Rules. The motion has been filed in a timely

fashion, since it is being filed after conclusion of the prehearing exchange and in sufficient time prior to the hearing that it will not delay the proceeding. The request is reasonable in that it seeks information in Respondent's control and which is necessary to assess Respondent's ability to pay. Respondent has not voluntarily provided the requested information. The information that the Complainant seeks is relevant and has probative value on the issue of ability to pay. The motion seeks to obtain information directly pertaining to Respondent's ability to pay, so that the Court and Complainant may ascertain the appropriate amount of the penalty.

For all of these reasons, Complainant respectfully requests that its Motion be GRANTED.

Respectfully Submitted,

A handwritten signature in black ink, reading "Padmavati G. Bending". The signature is written in a cursive, flowing style with a large, prominent "P" and "B".

Padmavati G. Bending  
Associate Regional Counsel

CERTIFICATE OF SERVICE

I hereby certify that today I filed personally with the Regional Hearing Clerk, Region 5, United States Environmental Protection Agency, 77 West Jackson Boulevard (E-13J), Chicago, Illinois, 60604-3590, the original and one copy of the document entitled Motion for Partial Accelerated Decision on the Issue of Ability to Pay and Alternative Motion to Compel Discovery Related to Respondent's Ability to Pay for this civil administrative action, and that I issued to the Court (via pouch mail) and Respondent's Counsel (via first class mail) a copy of the original document:

The Honorable Susan L. Biro  
Chief Administrative Law Judge  
U.S. Environmental Protection Agency  
Mail Code 1900L  
1200 Pennsylvania Ave., N.W.  
Washington, D.C. 20460

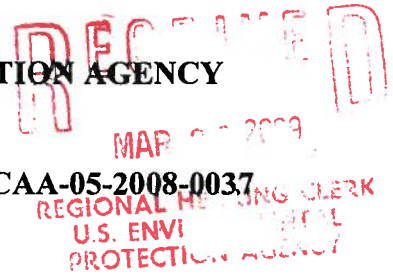
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Chicago, IL 60601

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Mildred Vargas  
Mildred Vargas  
Secretary

March 30, 2009  
Date

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5**



<b>In the Matter of:</b>	)	<b>Docket No. CAA-05-2008-0037</b>
	)	
<b>Wisconsin Plating Works of Racine, Inc.</b>	)	
<b>Racine, Wisconsin</b>	)	<b>Honorable Judge Susan Biro</b>
	)	<b>Presiding Administrative Law Judge</b>
<b>Respondent.</b>	)	
_____	)	

**DECLARATION**

I, Gail B. Coad, state as follows:

1. My name is Gail B. Coad. I make this declaration based on my personal knowledge and expertise.
2. I am a Principal of Industrial Economics, Incorporated, a management and economic consulting firm located at 2067 Massachusetts Avenue, Cambridge, Massachusetts 02140. I have a Master's Degree in Business Administration (1974) from Stanford University's Graduate School of Business in Palo Alto, California. I also have a B.A. Degree in Economics (1972) from Connecticut College in New London, Connecticut.
3. I provide consulting services on various subjects, including, but not limited to: performing regulatory impact analyses for governmental agencies; evaluating complex business organizations and the related party interactions; providing historical analyses of the evolution of a business in a litigation context; evaluating the criteria supporting piercing the corporate veil; providing technical litigation support in the areas of economics and business performance in damages claims; performing financial analyses in enforcement cases to determine economic benefit from noncompliance; and assessing the ability to pay of corporations, partnerships and individuals in enforcement cases. I have performed analyses of ability to pay

in more than 150 cases during my tenure with Industrial Economics, Inc. My qualifications are more fully outlined in my resume, Complainant's Exhibit 16.

4. The U.S. Environmental Protection Agency (EPA) retained me on or about February 27, 2009, to provide an expert opinion regarding the financial status of Wisconsin Plating Works of Racine, Inc. (Wisconsin Plating). EPA specifically asked me to evaluate the ability of the company to pay a civil penalty for alleged violations of federal Clean Air Act regulations.
5. In the course of my work on this case to date, and in preparing this declaration, I have reviewed documents produced by Respondents and the EPA. In addition, I, with the assistance of my staff, have collected publicly available information through independent research.
6. The purpose of an "ability to pay" analysis is to identify potential sources of funds that could be applied to either a penalty payment or for injunctive relief, along with the implications of applying those funds to a respondent's future financial stability. The issue is ability to pay, not willingness to pay. The purpose of the analysis is to inform the court's ultimate decision regarding penalty. In order to perform a useful and accurate analysis, I need up-to-date information on a respondent's assets, liabilities, income and expenses. I also need to understand any uncertainties that might affect a respondent's future financial status.
7. In cases such as this, I identify potential sources of funds by conducting an analysis with the following components.
  - a. First, I analyze the annual cash flow that the respondent is generating – cash income less cash expenses. Excess cash flow is available for a penalty, or may support assumption of a debt for a one-time payment. In the case of individuals or small companies, I use the federal income tax return as an initial basis for this analysis, following up with requests for

additional information as required. I assess whether expenses are reasonable, and if not, what expenses might be pared and what cash flow might then be generated. I also compare the expenses to “normal” expenditures for companies in the same business.

- b. Second, I analyze the net worth of the respondent – the assets and liabilities. I assess the valuation of the assets, both as represented by a respondent and through independent verification to the extent possible. I also assess the importance of the assets to the individual’s income generation (i.e., a rental property may generate necessary income). I identify any “luxury” items (boats, airplanes) that could be judged to be not essential. I also examine the amount of debt and the degree to which existing assets are collateralized.

- 8. Financial statements are a source of information to investors, creditors, and other interested persons about the financial condition of an enterprise. These documents include, but are not limited to, balance sheets, income statements, statements of cash flows, retained earnings statements, and notes to the financial statements. Balance sheets reveal the assets, liabilities, and owners’ equity in an enterprise *at a specific date*; income statements provide a summary of a company’s revenues and expenses, gains and losses, with the resultant net income of an enterprise for a particular time period; statements of cash flows reflect a company’s net cash receipts from operating, investing and financing activities, thereby demonstrating how an enterprise has spent the cash generated from its operations during a particular time period; a retained earnings statement shows the amount of any earnings retained in the enterprise which were not disbursed in dividends for a particular time period; and the notes to financial statements provide additional information about items not disclosed on the face of the balance sheet or income statement, such as parent/subsidiary relationships, accounting policies, related party (affiliate) transactions, debt acquisitions/terms of repayment, assets pledged to secure debt, details of outstanding loans, etc.

9. Audited financial statements, which are prepared under generally accepted accounting principles, include an opinion by a Certified Public Accountant stating whether the financial statement fairly represents the financial position of the subject enterprise. Therefore, audited financial statements provide the highest level of reliability. Certified public accountants may prepare financial statements that are "reviewed," incorporating some oversight of the company's financial data, or statements that are "compiled," which reflect no independent assessment of the quality of the company's financial data. Financial statements prepared by a certified public accountant are always preferable to statements compiled by the owner/management of the enterprise.
10. In order to fully assess a company's ability to pay a penalty (or the economic impact of a penalty on a company), one must have access to complete financial statements, preferably prepared by a Certified Public Accountant, in order to conduct a thorough analysis of a respondent's financial position. Tax returns alone do not provide specific information regarding items such as the manner in which operating cash profits are spent, the details of debt financing, and related-party transactions.
11. Wisconsin Plating is a S-Corporation, which means that the company's shareholders pay the company's income taxes on a proportionate basis. Wisconsin Plating has not provided complete tax returns, including all supplementary schedules for tax year 2007 (ending December 31, 2007) and 2006 (ending December 31, 2006). Without complete tax returns including all supplementary schedules, including the Schedule K-1's issued to the shareholders, it is difficult to develop a complete understanding of the company's situation.

12. Wisconsin Plating has provided an income statement for the three month period of October 1 through December 31, 2008 compiled by its accountant, Gordon J. Maier & Company, LLP. (Respondent's Exhibit 8) To my knowledge, Wisconsin Plating has not provided any other financial statements prepared by its accountant. As noted above, complete financial statements provide useful information and detail about the financial position of a company beyond what can be learned through review of a federal income tax return.


13. In order to gain a thorough understanding of Wisconsin Plating's current and expected financial condition, I also recommended to EPA that Wisconsin Plating be asked to provide the following information:

- a. Financial projections for 2009 and 2010, including projected income statements, balance sheets, and analyses of projected cash flows, whether month-by-month, by quarter, or for the year;
- b. Internal financial summaries showing year-to-date performance relative to budget;
- c. More detail on assets and liabilities; and,
- d. Documentation regarding the company's contract with American NTN Bearings, a significant new customer.

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Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct.

SIGNED: \_\_\_\_\_



Gail B. Coad  
Principal  
Industrial Economics, Inc.

DATE: 3-19-2009