



UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:)
)
GreenBuild Design & Construction, LLC,) Docket No. TSCA-10-2021-0006
)
Respondent.)

ORDER GRANTING COMPLAINANT’S MOTION IN LIMINE

On February 15, 2022, Complainant, the Director of the Enforcement and Compliance Assurance Division, United States Environmental Protection Agency, Region 10 (“EPA” or “the Agency”), filed a Motion to Compel Discovery, or in the Alternative, Motion in Limine (“Motion”), pursuant to 40 C.F.R. § 22.19(e). Respondent, GreenBuild Design & Construction, LLC (“Respondent”), has not filed a response to the Agency’s Motion. For the reasons discussed below, the Agency’s Motion is **GRANTED**.

I. Relevant Factual and Procedural Background

This action was initiated on November 25, 2020, when the Agency filed a Complaint and Notice of Opportunity for Hearing (“Complaint”) against Respondent. In the Complaint, the Agency alleged that Respondent had committed four violations of Subchapter IV of the Toxic Substances Control Act (“TSCA”), codified as amended at 15 U.S.C. §§ 2681 to 2692, and proposed a civil penalty of \$25,609 be assessed against Respondent. Compl. ¶ 5.3. The Agency explained that it had “reviewed publicly available information on Respondent’s financial condition, and has no information indicating that Respondent is unable to pay the proposed penalty.” Compl. ¶ 5.4. In its Answer, filed on January 27, 2021, Respondent denied that it owed a civil penalty. Answer ¶ 5.4. Respondent explained that a civil penalty “would cause a hardship to Respondent especially during a time of strict restrictions in place due to Covid.” Answer ¶ 5.4.

On February 3, 2021, this Tribunal issued a Prehearing Order pursuant to Section 22.19(a) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (“Rules of Practice” or “Rules”). The Prehearing Order directed Respondent to provide, as part of its Prehearing Exchange:

- (C) all factual information that Respondent considers relevant to the assessment of a penalty and any supporting documentation; and

(D) if Respondent takes the position that the proposed penalty should be reduced or eliminated on any grounds, such as an inability to pay, then provide a detailed narrative statement explaining the precise factual and legal bases for its position and a copy of any and all documents upon which it intends to rely in support of such position.

Prehearing Order at 3. In addition, the Prehearing Order informed the parties that, pursuant Section 22.19(a) of the Rules of Practice, any document not included in the prehearing exchange shall not be admitted into evidence, and any witness whose name and testimony summary are not included in the prehearing exchange shall not be allowed to testify. 40 C.F.R. § 22.19(a). Finally, the Prehearing Order explained that, pursuant to Section 22.19(f) of the Rules, any “addition of a proposed witness or exhibit to the prehearing exchange” must be filed “with an accompanying *motion to supplement the prehearing exchange* only when supplementation is sought within 60 days of the scheduled hearing.” 40 C.F.R. § 22.19(f). The Prehearing Order directed Respondent file and serve its Prehearing Exchange no later than April 9, 2021.

In an email exchange in March 2021, provided by the Agency as an attachment to the Motion (*see* Attachment A) and in its Supplemental Prehearing Exchange (*see* CX106), the Agency and Respondent discussed potentially settling the matter. On March 18, 2021, the Agency emailed Respondent with a revised penalty and the opportunity to settle. Attach. A at 3-4. On March 24, 2021, Respondent informed the Agency that it “unequivocally denie[d] any wrongdoing” and rejected the offer to settle. Attach. A at 2. Respondent wrote that it “desire[d] to settle this case with EPA in an amicable matter” but that the revised penalty and the proposed payment schedule would “put a hardship upon [it] and force GreenBuild into a decision of whether to make payroll or pay an unfounded penalty.” Attach. A at 2-3.

On March 29, 2021, the Agency informed Respondent that there were “other options” available to address Respondent’s proclaimed financial hardship. Attach. A at 1. The Agency explained that if Respondent “submit[ted] a statement explaining how COVID-19 has had a negative financial impact on it,” the Agency could either delay payment of the penalty or establish a payment plan. *Id.* The Agency informed Respondent that, alternatively, it could “submit additional financial documentation to support a claim that it is unable to pay the reduced penalty[.]” *Id.* The Agency explained that the “additional financial documentation” would include “things like financial statements prepared by an outside accounting firm, balance sheets, budgets and year-to-date results, asset ledgers, loan and mortgage agreements, and 3-5 years of federal tax returns.” *Id.*

On May 6, 2021, the Agency provided Respondent with a “Limited Liability Company (LLC) Ability to Pay Claim Initial Data Request” document. Attach. B at 1, 3-6. The Agency informed Respondent that, to support its claim of an inability to pay, “GreenBuild will have to submit all of the information requested in that document.” Attach. B. at 1. The Agency explained that after Respondent submits the requested financial documentation, “EPA’s financial analysts will then review GreenBuild’s submission and determine what, if any, GreenBuild can afford to pay.” *Id.*

The parties then engaged in the prehearing exchange process. Respondent's prehearing exchange did not include any information pertaining to its claim of an inability to pay.

On June 23, 2021, the Agency filed a Motion for Accelerated Decision as to Respondent's liability, which this Tribunal granted on November 17, 2021. Subsequently, an order was issued scheduling the hearing on penalty to begin on May 2, 2022.

On December 1, 2021, the Agency emailed Respondent, informing Respondent that it was "still able to settle this case before we go to a hearing on the penalty amount[.]" Attach. C at 4. In response, Respondent again expressed concern about its ability to pay a penalty, explaining that a "penalty that high" would "for sure close [its] company[.]" *Id.* at 3. In a response email sent on December 2, 2021, the Agency explained that

EPA has always been willing to review GreenBuild's financial documentation to determine whether the company is able to pay the proposed penalty. However, GreenBuild has yet to provide sufficient documentation to allow that review to occur. I'll note that GreenBuild also did not provide the Court with any such information to support the argument that it cannot pay the proposed penalty. If you are willing to submit detailed financial information----such as the last 3-5 years of GreenBuild's complete federal tax returns including all schedules and attachments, statements of financial condition, balance sheets, or other items that would accurately portray GreenBuild's financial status----then EPA would still be willing to review that material and determine what penalty GreenBuild can pay.

Attach. C at 2. In a response email, also sent on December 2, 2021, GreenBuild again asserted that paying a penalty would force GreenBuild to "end" its company "forever." *Id.* at 1. Respondent further proclaimed that it wanted to "talk with the judge about" the proposed penalty. *Id.* at 2. The Agency sent Respondent another email, in which it again stated that "it is not EPA's intention to put GreenBuild out of business" but that the penalty could not be reduced "without sufficient documentation supporting [Respondent's] argument that GreenBuild cannot pay a penalty without going out of business." *Id.* at 1. Again, the Agency informed Respondent that, if Respondent was "willing to submit detailed financial information—such as the last 3-5 years of GreenBuild's complete federal tax returns including all schedules and attachments, statements of financial condition, balance sheets, or other items that would accurately portray GreenBuild's financial status—then EPA would still be willing to review that material and determine what penalty GreenBuild can pay." *Id.*

On February 15, 2022, the Agency filed a Motion to Compel Discovery, or in the Alternative, Motion in Limine ("Motion"). In its Motion, the Agency requests this Tribunal issue an Order compelling GreenBuild "to submit certain documents relevant to the issue of Respondent's ability to pay the proposed penalty of \$25,609." Mot. at 1. Specifically, the Agency requests:

- (1) **Signed, Certified Statement.** A substantive statement with supporting information explaining the specific reasons why Respondent is claiming an inability to pay the proposed penalty.

- (2) **Federal Tax Returns.** True, accurate and complete copies of at least the last four years—2018, 2019, 2020, and 2021, if filed (hereinafter “the review period”)—of signed and dated U.S. corporate income tax returns of GreenBuild Design & Construction, LLC, including all associated schedules and attachments.
- (3) **Outside Financial Statements.** True, accurate and complete copies of the complete financial statements prepared on behalf of GreenBuild Design & Construction, LLC by an outside accountant, if such statements exist, including all balance sheets, statements of operations, statements of retained earnings, statements of cash flows, and all notes to each financial statement, for the review period. Submit complete copies of all financial statements, including the auditor’s cover letter and all notes to the financial statements.
- (4) **Annual Financial Statements.** If the statements requested in (3), above, do not exist, true, accurate and complete copies of internal financial statements prepared by GreenBuild Design & Construction, LLC, 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.
- (5) **Year To Date Financial Statements.** True, accurate and complete copies of all year to-date financial statements developed by GreenBuild Design & Construction, LLC for the years 2020, 2021, and 2022, 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.
- (6) **Assets and Liabilities.** True, accurate and complete copies of all documents reflecting the appraisal, fair market value or other valuation of all of GreenBuild Design & Construction, LLC’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 GreenBuild Design & Construction, LLC’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.
- (7) **LLC Management.** True, accurate and complete copies of (a) The names of senior LLC officers and each officer’s total annual remuneration (i.e., salary, bonuses, options, perquisites) for each of the years of the review period.

- (8) **Insurance.** 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) **Asset Ledger.** True, accurate and complete copies of the asset ledger for all assets owned by GreenBuild Design & Construction, LLC during the review period.
- (10) **Members.** True, accurate and complete copies of Stockholders/Partners/Members (hereinafter called Members) who hold the first eighty percent (80%) of the LLC's voting shares. For each Member named, indicate the type and percentage of shares held and the respective dollar value.
- (11) **Litigation.** True, accurate and complete copies statements with relevant details if the LLC currently is, or anticipates being a party to, any litigation which has not been noted in the most recent financial statement and which could impact the LLC's financial situation.
- (12) **Financial Settlements.** True, accurate and complete copies of statements with relevant details if the LLC currently is, or anticipates receiving or paying, a financial settlement which has not been noted in the most recent financial statements.
- (13) **LLC Control and Affiliations.** True, accurate and complete copies of (a) for the review period, statements if the LLC controlled or controls, or was or is controlled by or affiliated with any other company or entity, domestic or foreign.

- (14) **Credit.** True, accurate and complete copies of statements indicating (a) if the LLC has any lines of credit or other loans which have not been mentioned in the most recent financial statement, including the financial institution(s) or lender(s), the specific terms and conditions, and the current financial status of that line of credit or loan.

- (15) **Market Conditions.** If market conditions are a negative factor affecting the LLC's current financial health, true, accurate and complete substantive statements with supporting information.
- (16) **Other Assets.** If the LLC has a financial interest in, control of, or is the beneficiary of any asset (real estate, major equipment, aircraft, watercraft, etc.) in the U.S. or in another country that has not been identified in the LLC's federal tax returns or in other financial information provided to EPA, true, accurate and complete statements identifying each asset by type of asset, estimated value, and specific location (e.g., address, state or country).
- (17) **Forward Looking Statements.** True, accurate and complete "Forward looking statements" made or issued publicly by the LLC or someone acting on behalf of the LLC during the past year.

(18) **Additional Information.** True, accurate and complete statements of any additional substantive information which provides insight into its financial condition.

Mot. at 2-5.

The Motion requests that Respondent provide the above information within 30 days of issuance of a discovery order. The Agency explains that it “recognizes that Respondent may not have all of the information listed above readily available,” and so requests that Respondent submit, “at minimum, items number 1 through 5, above, and as much of the other requested materials as it can reasonably obtain.” Mot. at 5. Additionally, the Agency requests that, if this Motion is granted and Respondent fails to produce the requested documents within the required timeframe, this Tribunal issue an order in limine preventing Respondent “from raising its ability to pay the proposed penalty and finding that Respondent has waived any such arguments.” Mot. at 1.

As of this date, Respondent has not filed a response to the Motion.

II. Standard for Granting a Motion to Compel

Section 22.19(e) of the Rules of Practice set forth that a party may move for additional discovery after the initial prehearing information exchange. 40 C.F.R. § 22.19(e)(1). A motion for additional discovery must “specify the method of discovery sought, provide the proposed discovery instruments, and describe in detail the nature of the information and/or documents sought[.]” *Id.* The Presiding Officer “may order such other discovery only if” the discovery request:

- (i) Will neither unreasonably delay the proceedings 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.

Id.

The Rules further provide that a “party’s response to any written motion must be filed within 15 days after service of such motion.” 40 C.F.R. § 22.16(b). Where a party fails to provide information within its control as required by an order granting a motion for additional discovery, the Presiding Officer may, in her discretion, “[i]nfer that the information would be adverse to the party failing to provide it” or “[e]xclude the information from evidence[.]” 40 C.F.R. 22.19(g).

III. The Agency's Argument

The Agency contends that its Motion satisfies each of the elements of 40 C.F.R. § 22.19(e)(1). First, the Agency contends that granting its motion “will not unreasonably delay the proceeding as the hearing has been scheduled with sufficient time for Respondent to be able to fully comply with the requested order.” Mot. at 6. The Agency contends that “production of the information sought will not unreasonably burden Respondent” as Respondent “is a business.” *Id.* Thus, the Agency contends, Respondent’s records “are presumably already organized, as they consist of tax returns, financial statements, and documents relating to corporate assets and liabilities, which are records that a company must keep organized in order to prepare annual tax returns and meet its business obligations.” *Id.* at 6-7. The Agency acknowledges that some of the requested documents may be less readily available, but because the Agency would find a submission of requests one through five “sufficient,” the request “will not impose an unreasonable burden on Respondent.” *Id.* at 7. Thus, the Agency contends that its request satisfies 40 C.F.R. § 22.19(e)(1)(i).

Next, the Agency contends that its Motion satisfies 40 C.F.R. § 22.19(e)(1)(ii) because it “seeks financial information which is solely in the possession of Respondent.” Mot. at 7. The Agency avers that it has obtained all “publicly-available sources of information concerning Respondent’s financial conditions,” *see* CX08, CX09, CX75-78, but that it is unable to obtain information “necessary to evaluate Respondent’s alleged inability to pay” from any source “other than Respondent.” Mot. at 8. The Agency also contends that Respondent has “refused to provide the requested information voluntarily” despite the Agency’s repeated requests, *see* CX 106-108, Attach. A, B, and C, and this Tribunal’s request for information in the Prehearing Order. Mot. at 8.

Finally, the Agency contends that its Motion “seeks information that has significant probative value on a disputed issue of material fact[,]” satisfying 40 C.F.R. § 22.19(e)(1)(iii). The Agency suggests that Respondent’s ability to pay is likely to be a “major point of contention at the forthcoming hearing[,]” as, “[i]n every document that Respondent has filed with this Court to date, Respondent has referenced its status as a small business or how it would be unable to pay the proposed penalty.” Mot. at 9. The Agency disputes that Respondent is unable to pay the proposed penalty as it has not received any documentation supporting Respondent’s claim. *Id.* at 9-10. Furthermore, the Agency turns to the Environmental Appeals Board’s (“EAB”) decision in *New Waterbury, Ltd.*, 5 E.A.D. 529, 540 (EAB 1994) (Remand Order), in which the EAB determined that “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.” 5 E.A.D. at 540. *See* Mot. at 10. Thus, the Agency contends that it “believes that Respondent’s ability to pay the proposed penalty will be contested at the hearing, and as this motion seeks information that is central to assessing the veracity of Respondent’s assertion, this motion seeks information that has significant probative value on a disputed issue of material fact.” Mot. at 11.

In addition, the Agency argues that, if Respondent fails to provide the requested financial information, this Tribunal should “grant Complainant’s alternative motion in limine preventing Respondent from raising its ability to pay the proposed penalty as an argument at the forthcoming hearing and find that Respondent has waived any such arguments.” Mot. at 11.

The Agency contends that Respondent has already “waived its ability to argue that it cannot pay the proposed penalty,” as Respondent has not submitted “any evidence” related to its inability to pay despite numerous requests from the Agency and from this Tribunal. Mot. at 12. See CX 106–108; Prehearing Order at 3. The Agency contends that the EAB has held that, when a party “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 an ability to pay has been waived.” *New Waterbury, Ltd.*, 5 E.A.B. at 524. Thus, the Agency contends that, if Respondent fails to “produce the information requested herein by the deadline set by this Court, it would be perfectly reasonable for this Court to conclude that Respondent has waived its ability to contest Complainant’s proposed penalty based on an alleged inability to pay.” Mot. at 12.

As stated, Respondent did not file a response to the Agency’s motion.

IV. Discussion and Conclusion

First, as Respondent failed to respond to the Motion, Respondent has waived any objection to the granting of the Motion. See 40 C.F.R. § 22.16(b) (“[a]ny party who fails to respond within the designated period waives any objection to the granting of the motion”). Even so, after reviewing the Motion, I find that the Agency’s request satisfies the requisite elements of 40 C.F.R. § 22.19(e)(1).

Second, I find granting the request to compel superfluous, and that entry of an Order in Limine is appropriate.

The Rules provide that:

Where a party fails to provide information within its control as required pursuant to this section [proving for the Prehearing exchange of information], the Presiding Officer may, in his discretion:

- (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).

40 C.F.R. § 22.19(g).

In *New Waterbury, Ltd.*, the EAB held that, while the EPA “bears the burden of proof” as to whether a proposed penalty is “appropriate” under Section 16 of TSCA, the respondent “bears the burden of showing (1) through the introduction of evidence that the penalty is not appropriate because the Region had, in fact, failed to consider all of the statutory factors or (2) through the introduction of additional evidence that despite consideration of all of the factors the recommended penalty calculation is not supported and thus is not ‘appropriate.’” 5 E.A.B. at 538-39. As TSCA Section 16 requires the agency to consider a respondent’s “inability to pay” in calculating a proposed penalty, the agency must “produce some evidence regarding the respondent’s general financial status from which it can be inferred that the respondent’s ability to

pay should not affect the penalty amount.” *Id.* at 541. As such, “in any case where ability to pay is put in issue, the [agency] must be given access to the respondent’s financial records before the start of such hearing.” *Id.* at 542. When a respondent raises an inability to pay, but “fails to produce any evidence to support an inability to pay claim after being apprised of that obligation during the pre-hearing process, the [agency] may properly argue and the presiding officer may conclude that any objection to the penalty based upon ability to pay has been waived[.]” *Id.* See *Wisconsin Plating Works of Racine, Inc.*, 2009 WL 1266817 (EPA ALJ April 30, 2009) (Order on Complainant’s Motion for Partial Accelerated Decision and Ability to Pay or in the Alternative to Compel Discovery, and Motion to Supplement Prehearing Exchange) (applying *New Waterbury, Ltd.*, 5 E.A.D. at 538, 542-43).

Here, the Agency asserts that it considered the requisite factors of TSCA Section 16(a), including Respondent’s inability to pay the proposed penalty, in calculating the proposed penalty. The Agency claims, in its Complaint, that it did not find any “information indicating that Respondent is unable to pay the proposed penalty[.]” but added that it would “consider any additional information submitted by Respondent related to its ability to pay the proposed penalty.” Compl. ¶ 5.4. The burden, thus, shifts to Respondent to provide financial documentation supporting its claim of an inability to pay. And, though Respondent has repeatedly asserted an inability to pay, Respondent has yet to provide any “additional information” to support that claim.

Throughout the pre-hearing process, Respondent has been repeatedly “apprised” of its obligation to produce evidence supporting its claim of an inability to pay. See *New Waterbury, Ltd.*, 5 E.A.D. at 542. In the Prehearing Order issued over a year ago, this Tribunal informed Respondent that, if Respondent “takes the position that the proposed penalty should be reduced or eliminated on any grounds, such as an inability to pay,” then Respondent must “provide a detailed narrative statement explaining the precise factual and legal bases for its position and a copy of any and all documents upon which it intends to rely in support of such position.” Prehearing Order at 3. Yet, while Respondent expressed an inability to pay in its Answer, it failed to provide a statement, or any documentation, regarding its claim in its sole Prehearing Exchange document. Since then, the Agency repeatedly informed Respondent that certain financial information was required before the Agency could reduce the proposed penalty. However, Respondent failed to provide any documents or statements, despite informing the Agency, in numerous emails, that the proposed penalty would “close its business.” See CX106-108. While Respondent has expressed its interest in discussing its inability to pay at the penalty hearing, it failed to respond to the Agency’s Motion and failed to produce documents in support of its inability to pay claim.

The penalty hearing is now in approximately 30 days. There is no justification for continuing to prevail upon Respondent to submit documentation in support of its assertion of inability to pay when it has had notice and an extended opportunity to produce such documentation and has clearly chosen not to do so. Therefore, consistent with Rule 22.19(g) (40 C.F.R. § 22.19(g)), I hereby infer from Respondent’s failure to comply with the Prehearing Order, and subsequent entreaties by the Agency, that any information Respondent could produce would be adverse to its inability to pay claim. I thus exclude Respondent from entering any evidence relevant to inability to pay into evidence at hearing.

Based upon the foregoing, the Agency's Motion is **GRANTED**.

Accordingly, **IT IS HEREBY ORDERED THAT** Respondent is prohibited from entering any evidence in support of its claimed inability to pay claim at hearing.

SO ORDERED.

A handwritten signature in black ink, appearing to read 'S. Biro', written over a horizontal line.

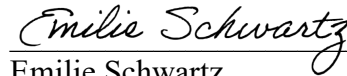
Susan L. Biro
Chief Administrative Law Judge

Dated: April 4, 2022
Washington, D.C.

GreenBuild Design & Construction, LLC, Respondent.
Docket No. TSCA-10-2021-0006

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Order Granting Complainant's Motion in Limine**, dated April 4, 2022, and issued by Chief Administrative Law Judge Susan L. Biro, was sent this day to the following parties in the manner indicated below.



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Attorney Advisor

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Dated: April 4, 2022
Washington, D.C.