ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
RONALD H. HUNT	)	**DOCKET No. TSCA-03-2003-0285**
PATRICIA L. HUNT	)	
DAVID E. HUNT	)	
J. EDWARD DUNIVAN	)	
GENESIS PROPERTIES, INC.,	)	
	)	
Respondents.	)	

ORDER ON JOINT MOTION FOR PROTECTIVE ORDER, COMPLAINANT'S MOTION FOR DISCOVERY AND MOTION IN LIMINE AND MOTION TO STAY ISSUANCE OF WITNESS SUBPOENAS

I. JOINT MOTION FOR PROTECTIVE ORDER

A hearing in this matter is scheduled to commence on September 14, 2004. On July 14, 2004, the parties filed a Joint Motion for Protective Order (Motion) to prevent information claimed confidential in several of both parties' proposed exhibits from being released to the public during the hearing.

Respondents have claimed that federal tax returns submitted with their Prehearing Exchange are confidential business information (CBI) under 40 C.F.R. part 2 subpart B.[1] Respondents' Exhibits (Rs' Exs.) 5, 6, 20, 21. Complainant's Exhibit 83 was filed under seal as possibly containing derivative CBI information. In addition, Complainant asserts that certain of its Prehearing Exchange exhibits contain social security numbers, driver's licenses and names of persons who are not parties to the proceeding and which are subject to the privacy requirements of Exemption 6 of the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(6), which Exemption protects against disclosure of "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Complainant lists the exhibits which contain such information subject to privacy requirements as Complainant's Exhibits (C's Exs.) 1 through 10, 28, 30, 32, 36, 38 through 41, 61, 72 through

[1] The information which is the subject of this Order is not CBI governed by Section 14 of the Toxic Substances Control Act (TSCA), which prohibits disclosure of data regarding chemical substances and mixtures obtained by EPA under provisions of TSCA, and which must be submitted pursuant to Section 14(c) of TSCA and must be handled by EPA in accordance with the procedures set forth in the TSCA Confidential Business Information Security Manual.

75, 79, 80.

Respondents have also requested that financial information that Complainant included in some of those exhibits, namely C's Exs. 38 through 41 and 72 through 75, and in addition, C's Exs. 76 through 82, be treated as confidential information.[2] The Motion states that Respondents are concerned about having information as to their assets grouped together in a public forum.

The Consolidated Rules of Practice provide that:

> In the presentation, admission, disposition, and use of oral and written evidence, EPA officers, employees and authorized representatives shall preserve the confidentiality of information claimed confidential . . . unless disclosure is authorized pursuant to 40 CFR part 2. A business confidentiality claim shall not prevent information from being introduced into evidence, but shall instead require that the information be treated in accordance with 40 CFR part 2, subpart B. The Presiding Officer . . . may consider such evidence in a proceeding closed to the public, and which may be before some, but not all, parties, as necessary. Such proceeding shall be closed only to the extent necessary to comply with 40 CFR part 2, subpart B, for information claimed confidential. Any affected person may move for an order protecting the information claimed confidential.

40 C.F.R. § 22.22(a)(2).

Complainant and Respondent have agreed that certain exhibits proposed to be submitted into evidence in this matter contain information which may be protected from disclosure and, thus, are entitled to confidential treatment. Therefore, good cause exists for issuance of an order requiring limited disclosure of such information. Considering that documents requested to be treated as confidential have already been filed in this proceeding, and that the hearing in this matter is scheduled to commence in a few weeks, this Protective Order is limiting disclosure as ordered below; provided, however, that nothing in this Order constitutes a determination of confidentiality under 40 C.F.R. part 2 subpart B. In light of the accelerated decision issued in this matter as to liability and the ruling herein on the Motion for Discovery, it is anticipated that very little if any confidential information will need to be discussed at the hearing. However, it is necessary to ensure that information which was produced in the course of this proceeding, and which the parties agree is entitled to confidential treatment, is treated as such unless and until any determination as to confidentiality and/or handling of the information in this matter is made by an Agency official with delegated authority to do so, or is made by a federal court with jurisdiction over the matter. Therefore, this Protective Order shall remain in effect and be binding during any period of appeal unless expressly set aside or modified by the appropriate

[2] Exemption 4 of FOIA applies to "commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4).

authority.

Upon consideration of the Motion for Protective Order, **IT IS HEREBY ORDERED THAT**:

1. The following Prehearing Exchange Exhibits are hereby designated as containing "Confidential Information": Rs' Exs. 5, 6, 20, 21 and C's Exs. 1 through 10, 28, 30, 32, 36, 38 through 41, 61, 72 through 83. The Confidential Information which these documents contain are federal tax returns, financial information, social security numbers, driver's licenses and names of persons who are not parties to the proceeding. All of these documents and any other information designated as "Confidential Information" shall not be utilized by any party, or the agents or employees thereof, except in accordance with the terms of this Order.

2. No party to this litigation, or officer, director, representative, agent or employee thereof, shall disclose or permit disclosure of such Confidential Information pertaining to others to any persons other than (1) counsel for the parties to this proceeding, including necessary professional, secretarial and clerical personnel assisting such counsel; (2) court reporters taking or recording testimony involving such documents or information and necessary stenographic, videographic and clerical personnel therefor; (3) independent consultants, expert witnesses and their staff who are engaged directly in this litigation; (4) parties, fact witnesses to this litigation, and third party witnesses who have previously written or received the confidential documents (but only with respect to such documents); (5) the undersigned, and her staff attorneys, legal staff assistants, and clerical personnel; and (6) Agency and/or court personnel to the extent necessary in connection with any appellate process in regard to this action.

3. All consultants, experts and witnesses who in the course of this case may see or learn of any documents pertaining to others that are designated in this litigation as "Confidential Information," or that are proposed to be designated as "Confidential Information," or who have access to any such documents or matters, shall be required to be bound by and to sign a confidentiality agreement in the following form:

> I, ___, have read a copy of the attached Protective Order entered in this case. I recognize that during my participation in the handling and development of this case I may have occasion to read or hear about documents pertaining to others produced in this litigation or other matters that are designated "Confidential Information." I agree to use any such documents and matters solely in connection with my participation in this case. I agree to abide by said Protective Order in every respect.

_____ Signature
_____ Date

Counsel for each party shall collect the signed confidentiality agreement for their respective consultants, experts and witnesses and retain them until the conclusion of the case, through the course of any administrative appeal to the Environmental Appeals Board and through the course of any appeal to a federal court.

4. All persons subject to this Protective Order who obtain information designated as "Confidential Information" hereunder, shall take all necessary and appropriate measures to maintain the confidentiality of the information pertaining to others, including, but not limited to, maintaining the information in a locked cabinet with limited access. Any person subject to this Protective Order who obtains information pertaining to others designated as confidential hereunder, shall share such information only with persons authorized to receive it pursuant to this Protective Order, and shall retain the information in a secure manner. Except as provided herein, no other person shall be permitted access to the information.

5. Any person who obtains access to Confidential Information as designated under this Protective Order may make copies, duplicates, extracts, summaries, or descriptions of the information or any portion thereof only for the purpose of preparation for litigation in this matter. All copies, duplicates, extracts, *etc*. shall be deemed and designated as "Confidential Information" and subject to the terms of this Protective Order to the same extent and manner as original documents.

6. EPA administrative enforcement hearings are generally open to the public. *See,* 40 C.F.R. § 22.3(a). At the hearing of this matter, to the extent possible, in referring witnesses to any documents which are the subject of this Order, counsel shall utilize only the redacted versions of such documents. To the extent that counsel for either party intends to refer a particular witness to an unredacted version of such a document, intends to elicit testimony which may refer to Confidential Information, or believes that Confidential Information may be mentioned in a particular witness' testimony, that counsel shall, as a preliminary matter on September 14, 2004, before the hearing goes on the record, request that a certain portion of the hearing be closed to the public and that only the parties and counsel, the particular witness(es), and any other persons agreed upon by the parties, shall be present for that segment of the hearing. If no such request is made, or if during other portions of the hearing, it becomes apparent to counsel for either party that Confidential Information may be referenced in a witness' testimony, then that counsel shall promptly make an oral motion to close the relevant segment of the hearing to the public.

7. Counsel for EPA shall ensure that the contract for procurement of court reporting services in regard to the hearing of this case includes a provision which will

prohibit the disclosure of any Confidential Information revealed at the hearing and/or of any Confidential Information contained in any exhibit accessible to the court reporter, except to the extent necessary to create, generate, and distribute to the parties in this case, their counsel and the undersigned a transcript of the hearing.

8. This Order is without prejudice to the rights of any party to seek an Order from the undersigned imposing greater, lesser or different restrictions on the dissemination of Confidential Information, or to seek to rescind, modify, alter, or amend this Order with respect to specific documents or information.

9. Nothing in this Order shall affect the admissibility into evidence of Confidential Information or other matters, as provided in 40 C.F.R. § 22.22(a)(2).

10. Within 30 days after this case is finally completed, whether by settlement, judgment or otherwise, including the final exhaustion of all administrative and judicial appeals, all copies of documents designated in this litigation as containing Confidential Information, which are in the possession of any consultants, witnesses, staff, and/or parties to this litigation, and which pertain to others, shall be returned to the respective party's counsel. Within 60 days after this case is finally completed, each party's counsel shall destroy such copies, and all other documents in his possession designated in this litigation as containing Confidential Information. Within 60 days after this case is finally completed, the undersigned, and her staff attorneys, legal staff assistants, and clerical personnel shall destroy all copies of documents in their possession which are designated in this litigation as containing Confidential Information. The Regional Hearing Clerk shall retain and handle the original of such documents as filed with her consistent with the Agency's record retention requirements and this Order.

II. COMPLAINANT'S MOTION FOR DISCOVERY AND MOTION IN LIMINE

Complainant submitted on June 14, 2004 a Motion for Discovery and Motion in Limine (collectively, "Motion"), seeking information in regard to tax returns of Genesis Properties, Inc. (Genesis), supplied in Respondents' Prehearing Exchange. Complainant requests information concerning the assets of Genesis and its financial relationship to Ronald and Patricia Hunt, which information Respondents have not provided voluntarily upon request from EPA. Complainant's motion in limine requests that Respondents be barred from introducing any such information at hearing if they fail to provide the requested discovery information within the time stated in any Order granting the Motion for Discovery.

In their Response, Respondents assert that they strongly object to any further discovery,

and that it is irrelevant to the issues as to the assessment of a penalty.[3] They explain that the statutory penalty determination factor "ability to pay"in Section 16(a)(2)(B) of TSCA is "no longer a defense raised by any of the Respondents." Response to Motion ¶ 4. Respondents point out that Complainant has conceded that it can meet its burden of proof without the requested information, and that its desire to further explore the financial relationships of Respondents is not a compelling enough reason for the Respondents' expense and time required to comply with the discovery requests.

In its Reply, Complainant states that the discovery request is indeed no longer relevant, and it will withdraw the request, if Genesis is conceding that it "can afford to pay the penalty requested against it by EPA . . . as per the twin financial statutory factors . . ., ability to pay and ability to continue in business." Reply at 4. Complainant believes that Respondents' withdrawal of the defense of ability to pay, and its statement in its Response (¶ 5) that, "given the withdrawal of ability to pay defense, any stipulation regarding Genesis Properties is unnecessary," suggests an admission of ability to pay as to *both* factors. Reply at 5, 6. In support, Complainant cites to *New Waterbury, Ltd.*, 5 E.A.D. 529 (EAB 1994) and *Helena Chemical Co.*, 3 E.A.D. 26 (CJO, 1989).

Complainant believes that it can demonstrate that it sufficiently considered the assets of Genesis in proposing a penalty, but is not sure what the presiding judge believes would satisfy Complainant's burden of proof, where there is little publicly available information on Genesis and its tax returns raise significant questions as to whether they present a complete and accurate picture of its financial situation.

Complainant asserts that if Respondents are not deemed to have conceded both ability to pay and ability to continue in business, and if Complainant's burden of proof has not been satisfied, then discovery is needed to clarify the sources of outside funding that Genesis appears to be receiving from related business entities, and Ronald and Patricia Hunt, who are in possession of such documents. In that event, Complainant asserts, such discovery would have significant probative value on a disputed issue of material fact as to the penalty, and would meet the criteria for discovery in 40 C.F.R. § 22.19(e)(1).

The Order on EPA's Motion for Accelerated Decision, dated July 2, 2004, concluded that Respondents have withdrawn ability to pay as an argument in mitigation of the penalty. Slip op. at 12. The remaining issue in regard to Respondents' finances is the statutory penalty factor in TSCA § 16(a)(2)(B), "effect on ability to continue to do business."

Complainant apparently believes that if a company has the ability to pay the penalty, then it has the ability to continue to do business, so there is no need to consider the latter factor if the former factor is conceded. However, this interpretation of TSCA § 16(a)(2)(B) would appear to

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[3] Respondents' additional argument that discovery would require rescheduling the hearing is now moot, as the hearing has been rescheduled.

render the latter factor, "effect on ability to continue to do business," redundant. EPA discussed the relationship between the two factors in the TSCA Civil Penalty Policy, 45 Fed. Reg. 59770, 59775 (Sept. 10, 1980), as follows:

> The Act lists "ability to pay" and "ability to continue in business" [sic] as two adjustment factors, but for the purposes of the penalty system the distinctions between the two are so narrow and artificial that they are treated as one. In making this determination it was considered that "ability to pay" might be limited (in the extreme sense) to such indicators as the market value of the violator in liquidation, the profits accrued by the firm over a given time period, the net sales or income generated over a given time period, the value of cash and other liquid assets held by the firm, and the value of all liquid assets plus borrowable cash. Essentially, however, a firm can pay up to the point where it can no longer do business. However, it is evident that Congress, by inserting these two factors into the Act, for *most* cases did not intend that TSCA civil penalties present so great a burden as to pose a threat of destroying, or even severely impairing, a firm's business.

Thus, if "ability to pay" is interpreted narrowly, a company may have the ability to pay a penalty but would not be able to continue in business, such as where it has sufficient liquid assets to pay a penalty but these assets are needed to keep the company financially viable. Furthermore, the "*effect on* the ability to continue to do business" may entail consideration of not only whether or not a company can afford to continue in business if it pays the penalty, but also what the impact of the penalty would be on the company's ability to do business.

EPA, however, has consistently interpreted "ability to pay" broadly, to include the overall financial health of the company, and to include consideration of financial information beyond the mere access of funds to pay a penalty. The TSCA Penalty Policy states that it uses the term "ability to pay" to include ability to continue in business, and that the focus of "ability to pay" is on the solvency of the firm. *Id.* 59771 and n. 4. *See also, e.g.*, "Guidance on Determining a Violator's Ability to Pay a Civil Penalty," also known as "GM-56" (Dec. 16, 1986). EPA has considered "ability to pay" as analogous to "ability to continue in business" when only the latter term is included in a statute. *CDT Landfill, Inc.*, CAA App. No. 02-02, 2003 EPA App. LEXIS 5, n. 60 (EAB June 5, 2003)(the penalty factor "the economic impact of the penalty on the business" in Section 113(e)(1) of the Clean Air Act, 42 U.S.C. § 7413(e)(1), which does not include "ability to pay," has traditionally been considered as "ability to pay"); *James C. Lin and Lin Cubing, Inc.*, 5 E.A.D. 595, 599 n. 4 (Dec. 6, 1994)(noting that the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) Penalty Policy, dated July 2, 1990, equates the penalty factor of FIFRA §14(a)(4), "ability to continue in business," with "ability to pay").

Although EPA interprets "ability to pay" broadly, it cannot immediately be presumed that Respondents also interpreted the term broadly in conceding they have the ability to pay the proposed penalty. The question is whether Respondents have raised and preserved any argument

as to the effect of a penalty on their ability to continue to do business. Respondents have not explicitly stated that the proposed penalty will (or will not) have an effect on their ability to continue to do business. Respondents have not indicated any intent to show that the proposed penalty may have an impact on their ability to continue business. Indeed, Respondents have stated that "[t]he finances of the Respondents are no longer at issue," and that financial information requested in the Motion for Discovery is "rendered unnecessary by the lack of a financial defense in this matter." Respondents' Response to EPA's Motion to Reschedule Hearing, dated June 14, 2004, ¶¶ 6, 11.[4] Respondents stated in their Response to the Motion for Discovery (¶¶ 4, 6) that the information requested "is presently irrelevant to the inquiry as to the proper level of penalty" and again affirm "a lack of a financial defense by the Respondents." It is concluded that Respondents have not raised any argument in mitigation of the penalty as to the effect of a penalty on the ability to continue to do business.

The next issue is whether the discovery requested is necessary for Complainant to sustain its burden to show that it has "take[n] into account" the various penalty determination factors and "that the relief sought is appropriate." TSCA § 16(a)(2)(B); 40 C.F.R. § 22.24(a). The Environmental Appeals Board (EAB) has explained that "the burden of proof goes to the appropriateness of the penalty taking *all* [statutory penalty determination] factors into account." *New Waterbury, Ltd.*, 5 E.A.D. 529, 538 (EAB 1994). For the EPA to make its initial *prima facie* case with regard to a proposed penalty, it "must come forward with evidence to show that it, in fact, considered each factor identified in Section 16 [of TSCA] and that its recommended penalty is supported by its analysis of those factors." *Id.*; *accord, Lin*, 5 E.A.D. at 599 (regarding factors in FIFRA § 14(a)(4)). In regard to ability to pay, the EAB has rejected a contention that EPA "must specifically and separately prove that a respondent has the funds necessary to pay a proposed penalty before a penalty can be assessed." *New Waterbury* at 539. The EAB stated that there is no specific burden of proof with respect to any individual factor. *Id.* Instead, the EAB stated that "The depth of consideration will vary in each case, but so long as each factor is touched upon and the penalty is supported by the analysis a prima facie case can be made." *Id.* at 538.

Complainant has undoubtedly "touched upon" the factor of ability to pay. Included in Complainant's Prehearing Exchange exhibits are printouts of computerized asset searches for Respondents (C's Exs. 38-40, 71-82), summaries of public information concerning property likely owned by Respondents (C's Exs. 41-43), Dun & Bradstreet reports for Genesis for 2002 and 2004 (C's Exs. 45, 46), and website information of Genesis (C's Exs. 47, 48). Complainant has submitted in its Prehearing Exchange a memorandum, entitled "Preliminary Ability to Pay

[4] It is noted that Respondents stated that they "suffer financial difficulty in the maintenance of their affairs based upon the pending Complaint" because they must explain to lenders, lessees and other possible business associates that EPA filed a complaint against them. Respondents' Response to EPA's Motion to Reschedule Hearing at ¶¶ 3, 12. This does not necessarily indicate that a penalty, once assessed, would impact their ability to continue to do business.

Evaluation," prepared by an economist, which assesses Respondents' current assets, based on review of Respondents' tax returns and other documents, and requests additional documentation. C's Ex. 83. Such analysis provides support for Complainant's decision not to mitigate the proposed penalty for ability to pay or for ability to continue in business.

The list of Complainant's discovery requests includes requests for additional tax returns, Genesis' financial statements, and information on Genesis' employees and their compensation, contractors, affiliate owners of properties managed by Genesis, and business transactions since the year 2000 between Genesis and businesses owned by Ronald and Patricia Hunt. The items in the parties' Prehearing Exchanges that are relevant to Respondents' finances, assets and business operations, coupled with the fact that Complainant has looked deeply enough into this information to identify the specific items in the discovery request, suggests that Complainant has considered not only Respondents' ability to pay but also the effect of a penalty on Respondents' ability to continue in business. While the information provided may not present a complete and consistent picture of Respondents' finances and business, it is sufficient to satisfy Complainant's burden of presentation under 40 C.F.R. § 22.24(a).

Because Respondents have not raised or disputed issues of ability to pay or to continue to do business, the discovery information requested by Complainant would not "have significant probative value on a disputed issue of material fact relevant to liability or the relief sought," which is a criterion that Complainant must meet for the granting of discovery. 40 C.F.R. § 22.19(e)(1)(iii).

Accordingly, the Motion for Discovery is **DENIED.** The Complainant's Motion in Limine is thus rendered moot.

III. COMPLAINANT'S MOTION TO STAY ISSUANCE OF WITNESS SUBPOENAS

Complainant had submitted on June 14, 2004 a Motion for Issuance of Witness Subpoenas, requesting subpoenas for the four individual Respondents, an employee and former officer of Genesis, and three employees of Lead-Safe Richmond Programs of the City of Richmond.[5] On July 26, 2004, Complainant submitted a Motion for Stay of Issuance of Witness Subpoenas (Motion). The Motion states that Respondent does not oppose it.

Complainant states that based on the Order granting accelerated decision as to Respondents' liability, some of the testimony proposed is no longer needed, and that potential stipulations may obviate the need for certain testimony. The Motion states that the parties will attempt to finalize stipulations by August 13, and that Complainant will then notify the undersigned which subpoenas Complainant deems necessary.

[5] The subpoenas show the dates of July 27 through July 30, 2004, and in light of the rescheduled hearing, are outdated.

It is appropriate to provide some time for Complainant to decide which witnesses it intends to present at the hearing, given the recent rulings in this proceeding, and to then renew its request for subpoenas only with regard to those witnesses.

Accordingly, Complainant's Motion to Stay Issuance of Witness Subpoenas is **GRANTED**.

Complainant shall, **on or before August 20, 2004,** submit either a Withdrawal of Motion for Issuance of Witness Subpoenas, or a Motion Renewing Request for Issuance of Witness Subpoenas, along with the requested subpoenas showing the corrected dates for hearing.

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Susan L. Biro
Chief Administrative Law Judge

Dated: August 3, 2004
Washington, D.C.