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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR 10 JUN -2 AM 8: 37

HEARINGS CLERK
EPA -- REGION 10

In the matter of:)
)
)
Mike Vierstra) DOCKET NO. CWA-10-2010-0018
d/b/a Vierstra Dairy,)
)
Twin Falls, Idaho) COMPLAINANT'S MOTION FOR
) ADDITIONAL DISCOVERY ON
) ABILITY TO PAY
Respondent.)
_____)

Pursuant to Section 22.19(e) of "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits" ("Part 22 Rules"), the Complainant, U.S. Environmental Protection Agency, Region 10 (the "Complainant" or "EPA"), moves for an order compelling Mike Vierstra d/b/a Viersta Dairy ("Respondent") to produce documents supporting Respondent's ability to pay a penalty as set forth in ¶ VIII of the Answer to the Complaint it filed on December 8, 2009.

Procedural and Factual Background

On October 16, 2009, EPA filed a Complaint against Respondent alleging violations of Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a) for the unlawful discharge of pollutants into water of the United States, and proposed the assessment of an administrative civil penalty. In accordance with Section 22.14 of the Part 22 Rules, the Complaint did not include a specific penalty demand, but it did allege that, based on information then available to EPA, Respondent appeared able to pay a civil penalty not to exceed \$16,000 per violation for each day

during which the violation continued, up to the maximum administrative civil penalty allowed under 33 U.S.C. § 1319(g). Complaint at ¶ 2.14. On December 8, 2009, Respondent filed an Answer denying the Complaint's allegations with respect to ability to pay, claiming that "the Respondent's dairy is operating at a loss and he lacks the resources to pay a civil penalty." Answer at ¶ VIII.

On January 3, 2010, the Presiding Officer issued a Prehearing Order, which, among other things, stated that "Each party shall submit . . . copies of all documents and exhibits it intends to introduce into evidence." Prehearing Order at ¶ 1. Respondent submitted its Prehearing Information Exchange on March 12, 2010, but failed to include information supporting its claim of inability to pay a civil penalty, and did not include in its list of witnesses any person who proposed to testify to Respondent's assets, debts or liabilities. Respondent's Prehearing Information Exchange.

On March 15, 2010, Complainant filed its Prehearing Exchange, which identified witness Lloyd Oatis as a financial analyst with EPA Region 10. Complainant stated that Mr. Oatis will testify "regarding Respondent's ability to pay the proposed penalty should Respondent raise that defense." Complainant's Prehearing Exchange at ¶ 8. Pursuant to Section 22.14 of the Part 22 Rules, 40 C.F.R. § 22.14(a)(4)(ii), Complainant did not included a specific penalty in its prehearing exchange, pending receipt of Respondent's information. On March 26, 2010, EPA filed its Brief Regarding Proposed Penalty in which it proposed a penalty of \$30,000, citing, in part, the lack of any financial information in the record. *Id.* At 4-6.

To date, EPA has received no financial documentation from Respondent, either through prehearing exchange or otherwise.

Argument

Section 22.19(e) of the Part 22 Rules authorizes the Presiding Officer to order additional discovery if he or she finds that the following three elements are met: (1) the discovery will not unreasonably delay proceedings; (2) the information is not otherwise obtainable; and, (3) the information has significant probative value. 40 C.F.R. § 22.19(e). *See also In re City of New Bedford, Massachusetts*, 2003 EPA ALJ LEXIS 47 at *3-4, 6 (ALJ Moran, Order on Complainant's Motion for Order Compelling Production of Inability to Pay Documents, July 2, 2003) (ordering Respondent to provide financial information to EPA and noting "where [ability to pay] has become an issue, EPA must be given access to the respondent's financial records *before* the start of hearing and consistent with the prehearing exchange order") (emphasis in original); *In re Doug Blossom*, Docket No. 10-2002-0131, Slip Op. at 2 (ALJ Biro, Order on Complainant's Motion for Order Compelling Production of Ability to Pay Documents, November 28, 2003).

The information that Complainant seeks by this motion satisfies the Part 22 Rules' test for other discovery. The information will not unreasonably delay the proceeding or burden the Respondent because the hearing date set by the Presiding Officer is July 13, 2010. It is reasonable to assume that the information is in Respondent's possession because the information sought is the type kept in the ordinary course of business. Finally, the information has significant probative value as to the disputed material fact of Respondent's ability to pay.¹ As the Environmental Appeals Board ("EAB") has stated, "in any case where ability to pay is put in

¹ A violator's "ability to pay" is one of the statutory penalty factors that EPA must "take into account" in determining the amount of any penalty assessed under Section 309(g) of the Clean Water Act. 33 U.S.C. § 1319(g)(3).

issue, the Region must be given access to the respondent's financial records before the start of such hearing. The rules governing penalty assessment proceedings require a respondent to indicate whether it intends to make an issue of its ability to pay, and, if so, to submit evidence to support its claim as part of the pre-hearing exchange." *In re New Waterbury, Ltd.*, 5 E.A.D. 529, 542 (EAB 1994). The specific information will allow for a proper assessment of Respondent's financial position and ability to pay the penalty.

In the present case, EPA requests that Respondent supply in advance of the hearing all financial documentation upon which it intends to rely to show inability to pay the proposed penalty. In addition, EPA requests that Respondent supply, at a minimum, (1) copies of his federal and state tax returns for the last three years; (2) any audited and unaudited financial statements for the last three years he has for the dairy and other affiliated businesses he owns or controls; (3) current balances in all bank and investment accounts; (4) a list of all assets including but not limited to live stock, real estate, equipment, stocks, bonds, mutual funds, money market accounts or other financial assets that he owns and their respective estimated market values; and (5) terms and conditions of principal debts including bank loans, lines of credit, personal notes and the name and relationship of the lender for each of the debts identified and (6) copies of respondent's divorce decree and associated court rulings regarding distribution of marital assets. EPA requests that Respondent be ordered to supply this information to EPA no later than 15 days prior to hearing in order to allow EPA's expert time to review the documents and to prepare for his testimony.

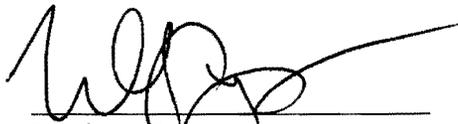
If Respondent fails to provide such documentation within a reasonable period of time, EPA requests that the Presiding Officer, *in limine*, exclude Respondent's financial

documentation from evidence and infer that such information would support a finding that Respondent has the ability to pay the entire assessed civil penalty pursuant to 40 C.F.R. § 22.19(g). As the EAB has noted, “where a respondent . . . fails to produce any evidence to support an inability to pay claim after being apprised of that obligation during the pre-hearing process, the Region may properly argue and the presiding officer may conclude that any objection to the penalty based upon ability to pay has been waived under the Agency’s procedural rules and thus this factor does not warrant a reduction of the proposed penalty.” *In re New Waterbury, Ltd.*, 5 E.A.D. at 542. In this case, Respondent raised an ability to pay claim in the Answer filed December 8, 2010, yet failed to support this claim with any financial documentation in its Prehearing Information Exchange.

Conclusion

In accordance with Section 22.19(e) and 22.19(g) of the Part 22 Rules, Complainant respectfully requests that the Presiding Officer order Respondent to provide within a reasonable time the financial information requested by EPA. Further, Complainant requests that the Presiding Officer order that, should Respondent fail to submit the requested information, any financial documentation or testimony offered by Respondent at hearing will be excluded from evidence and Respondent’s ability to pay arguments will be deemed waived.

Respectfully submitted this 24th day of May, 2010.



Mark A. Ryan
Assistant Regional Counsel
U.S. EPA Region 10

CERTIFICATE OF SERVICE

In the Matter of Mike Vierstra d/b/a Vierstra Dairy, No. CWA 10-2010-0018, I hereby certify that a copy of COMPLAINANT'S MOTION FOR ADDITIONAL DISCOVERY ON ABILITY TO PAY, was sent to the following persons in the manner specified on the date below:

Original and one true and correct copy, by pouch mail:

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

One true and correct copy, by U.S. Mail to:

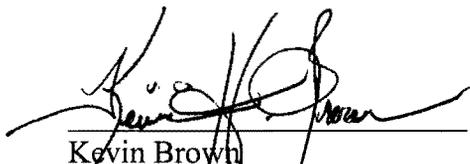
The Honorable Barbara A. Gunning
Administrative Law Judge
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Mail Code 1900L
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

A true and correct copy by hand delivery to:

Allen B. Ellis
Ellis, Brown & Sheils, Chartered
707 North 8th Street
P.O. Box 388
Boise, Idaho 83701-0388

Dated: _____

24 MAY 2010



Kevin Brown
Environmental Protection Agency