



UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG.11
2012 MAY 15 A 11:26
REGIONAL HEARING
CLERK

In the Matter of:)
)
Andrew B. Chase, a/k/a Andy Chase,)
Chase Services, Inc., Chase Convenience)
Stores, Inc., and Chase Commercial)
Land Development, Inc.,)
)
Respondents.)

Docket No. RCRA-02-2011-7503

**ORDER ON COMPLAINANT'S MOTIONS TO SUPPLEMENT PREHEARING
EXCHANGE AND TO COMPEL PRODUCTION OF DOCUMENTS,
AND
ORDER RESCHEDULING HEARING**

A Prehearing Order in this matter was issued on July 12, 2011. Certain prehearing deadlines set therein and response deadlines set forth in the applicable procedural rules, 40 C.F.R. part 22 ("Rules"), were extended upon motion by Orders dated July 18, 2011, August 16, 2011, October 11, 2011, December 22, 2011, January 31, 2012, February 21, 2012, and March 22, 2012. The parties filed Prehearing Exchanges, and by Order dated January 5, 2012, the hearing was rescheduled to begin on June 12, 2012, and continue if necessary through June 15, 2012, in Plattsburgh, New York. Several motions were filed, some of which are ruled upon herein.

I. Motion to Supplement Complainant's Prehearing Exchange

The undersigned's office received a copy of Complainant's Initial Prehearing Exchange on November 15, 2011, Respondent's Pre-Hearing Exchange on December 6, 2012, and Complainant's Rebuttal Prehearing Exchange on December 15, 2011. Thereafter, Complainant filed a Motion to Supplement Complainant's Prehearing Exchange ("Motion"), dated February 22, 2012, seeking an order permitting Complainant to supplement its Prehearing Exchange with six additional documents referred to as "PBS Applications." Complainant argues in the Motion that Respondents will not be prejudiced, unfairly disadvantaged or surprised by the addition of these documents to its prehearing exchange materials. Complainant states in the Motion that the

PBS Applications were “obtained in the course of the Agency preparing the motion for partial accelerated decision” from the New York State Department of Environmental Conservation.¹ Mot. at 6. The PBS applications are the “antecedent,” Complainant asserts, to the Petroleum Bulk Storage certificates that have already been submitted with Complainant’s Initial Prehearing Exchange, and they involve the same service stations that are at issue in this matter. Also, Complainant states, Respondent Andrew B. Chase signed the six applications, each of which identify one or more Respondent as an owner or operator of the subject stations. Mot. at 12.

The PBS Applications have been stipulated as admissible by the parties. Signed by Complainant and agreed to via email by Respondent’s counsel, Joint Stipulations were received by this office on March 26, 2012. On page 11 of the Joint Stipulations, the parties state that they waive any objection and consent to the admissibility of certain exhibits listed therein. Enumerated as Complainant’s Exhibits 58 through 63, six Petroleum Bulk Storage applications are described in the Joint Stipulations as being the same that “are more fully described and discussed in Complainant’s February 22, 2012 motion to supplement.” Joint Stipulations at 16-17, n.4-5. Further indicating Respondents’ consent to the Motion, none of them have filed a response to the Motion to date.²

For the reasons set forth in the foregoing discussion, Complainant’s Motion to Supplement Complainant’s Prehearing Exchange is **GRANTED**.

II. Complainant’s Request for Conference or Extension of Hearing Date

Complainant filed a Status Report / Request for Conference or Extension of Hearing Date (“Extension Request”) dated March 25, 2012, wherein Complainant states that a personal family commitment of expected EPA co-counsel will prevent such person’s preparation for the hearing as scheduled, and that one of Complainant’s witnesses may not be available in the second half of June. Therefore, to determine an appropriate alternate hearing date, Complainant requests the undersigned convene a conference call with the parties to discuss parties’ and witnesses’ availability, or to reschedule the hearing to begin either Tuesday, July 17, 2012, or Tuesday, July 24, 2012. Respondents’ counsel submitted a letter dated April 4, 2012, in which he stated that Respondents do not oppose Complainant’s Extension Request.

A staff attorney of the undersigned spoke on the telephone with the parties’ representatives on May 3, 2012, to discuss available dates on which to reschedule the hearing.

The Rules of Practice governing this proceeding, 40 C.F.R. part 22, provide, “No request

¹ Complainant’s Motion for Accelerated Decision on Liability was received by this office on February 14, 2012.

² The Rules provide that a response to a motion shall be filed “within 15 days after service of such motion.” 40 C.F.R. § 22.16(b).

for postponement of a hearing shall be granted except upon motion and for good cause shown.”
40 C.F.R. § 22.21(c).

The Complainant requests that the hearing be rescheduled to a date not long after the current commencement date, and which is still available on the undersigned’s hearing calendar. Complainant reports that settlement negotiations have resumed in earnest. For good cause shown, Respondent’s Motion for Extension of Hearing Date is **GRANTED**. In the event the parties have not filed a fully executed Consent Agreement and Final Order settling this matter beforehand, the parties shall make prehearing filings according to the following schedule:

1. Any non-dispositive motions shall be filed on or before **June 15, 2012**.
2. If a party wishes to add a proposed witness, document, or exhibit to its prehearing exchange, it must file a motion to supplement the prehearing exchange no later than **July 2, 2012**. Motions filed after this date will not be considered absent extraordinary circumstances.
3. The parties may file prehearing briefs (which may substitute for an opening statement at the hearing) on or before **July 6, 2012**. It should be emailed (oaljfilng@epa.gov), faxed and/or hand-delivered to the undersigned by that date.

The hearing in this matter is hereby rescheduled to begin promptly at 9:30 a.m. on Tuesday, July 17, 2012, in Plattsburgh, New York, continuing if necessary, on July 18-20, 2012. The Hearing Clerk will make appropriate arrangements for a courtroom. The parties will be notified of the exact location and of other procedures pertinent to the hearing when those arrangements are complete.

Individuals requiring special accommodations at the hearing, including wheelchair access, should contact the Hearing Clerk, as soon as possible so that appropriate arrangements can be made.

RESPONDENT IS HEREBY ADVISED THAT FAILURE TO APPEAR AT THE HEARING, WITHOUT GOOD CAUSE BEING SHOWN THEREFOR, MAY RESULT IN A DEFAULT JUDGMENT BEING ENTERED AGAINST IT. COMPLAINANT IS HEREBY ADVISED THAT FAILURE TO APPEAR AT THE HEARING MAY RESULT IN DISMISSAL OF THIS MATTER.

If either party does not intend to attend the hearing, or has good cause for not being able to attend the hearing as scheduled, it shall notify the undersigned at the earliest possible moment.

III. Order on Motion to Compel Production of Financial Records

A. Complainant's Arguments

Complainant filed a "Motion to Compel Production of Financial Records/To Preclude/To Draw Adverse Inference, dated March 25, 2012 ("Motion" or "Mot."), seeking an order compelling Respondents to produce financial documents. The documents sought are copies of the three most recent years of signed and dated federal income tax returns for each Respondent, copies of complete financial statements for the three most recent past fiscal years for each corporate Respondent prepared by an outside accountant to include all balance sheets, statements of operations, retained earnings and cash flows, copies of financial projections for each corporate Respondent developed for the years 2012 and 2013, copies of the asset ledger of each corporate Respondent for all assets owned during the three most recent years; and copies of any other documents Respondents deem relevant and supportive of the claim of inability to pay/financial hardship. If any of the documents requested do not exist, Complainant requests that Respondents certify to that fact and that such documents be barred from any use at the hearing. Mot. at 1-3. The Motion further requests an order precluding Respondents, if they fail to comply, from introducing into the record documentation that may be relevant to their financial hardship and inability to pay claim, deeming them to have waived such claim, and inferring that the information in such documents would be adverse to them.

Complainant asserts that in seven separate emails sent between December 15, 2011 and March 26, 2012, it asked Respondents to submit financial documentation in support of their assertion of financial hardship. Respondents have not submitted any financial documentation in the Prehearing Exchange, Complainant points out, and have not moved to add any such documentation to the Prehearing Exchange. Mot. at 7-8. Complainant states that for settlement purposes, Respondents have informally sent it tax returns for the year 2010 for Andrew Chase and one of the corporate Respondents, but this documentation is inadequate, incomplete, and of questionable admissibility. Motion at 8 n. 10 (referring to *Service Oil, Inc.*, EPA Docket No. CWA-08-2005-0010 (ALJ, April 12, 2006), slip op. at 4).

Complainant asserts that Part 22 case law would support compelling production, citing: *New Waterbury, Ltd.*, 5 E.A.D. 529, 542 (EAB 1994) (in any case where ability to pay is put in issue, the EPA must be given access to the respondents' financial records before the start of the hearing); *Doug Blossom*, EPA Docket Number CWA-10-2002-0131, 2003 WL 22940544 (ALJ, Nov. 28, 2003) (respondent was required to produce financial documents where conditions of 40 C.F.R. § 22.19(e) were met); *Vemco, Inc., d/b/a Venture Grand Rapids*, EPA Docket Number CAA-05-2002-0012, 2003 WL 1919589 *1 (ALJ, Mar. 28, 2003)(production of financial documents ordered); *Gerald Strubinger, Gregory Strubinger*, EPA Docket Number CWA-3-2001-001, 2002 WL 1773053 * 3 (ALJ, July 12, 2002)(ordering respondent to produce financial records to support claim of inability to pay proposed penalty in sufficient time to allow complainant to review the records and prepare for hearing); and *Compania Petrolera Caribe*,

Inc., EPA Docket Number II-RCRA-UST-97-0310, 1999 EPA ALJ LEXIS 19 (ALJ, Jan. 13, 1999) (respondent ordered to produce documents supporting its claim of inability to pay three weeks in advance of hearing). Mot. at 15-17.

Complainant contends that an order compelling production of documents must provide for a sanction in case of failure to comply, and that preclusion would be an appropriate sanction. In support of that contention, Complainant cites: *Mike Vierstra d/b/a Vierstra Dairy*, EPA Docket Number CWA-10-2010-0018, 2010 EPA ALJ Lexis 14, at *6-7 (ALJ, June 2, 2010) (respondent was directed to produce six sets of financial documents sought no later than fifteen days before the hearing, failing which he would be deemed to have waived his claim of inability to pay and information offered by him at hearing in support of that argument would be precluded); *1836 Realty Corp.*, EPA Docket Number CWA-2-1-98-0017, 1999 WL 362869 (ALJ, Apr. 8, 1999) (respondent who had chosen not to comply with a discovery order was precluded from raising the defense of ability to pay); *Doug Blossom* (respondent was warned that failure to comply with order compelling production might result in prohibition on introducing evidence of financial circumstances); *Vemco* (judge noted that failure to provide financial documents within time frame established may result in their exclusion from evidence); *Ross v. Garner Printing Co.*, 285 F.3d 1106, 1114 (8th Cir. 2002) (a district court has broad discretion to exclude evidence not disclosed in compliance with its pretrial orders); *Armstrong v. Burdette Tomlin Mem'l Hosp.*, 276 F. Supp.2d 264, 276 (D. N.J. 2003) (courts are empowered to exclude from evidence last minute evidence parties wish to present at trial); and *Wisconsin Plating Works of Racine, Inc.*, EPA Docket Number CAA-05-2008-0037, 2009 WL 1266817 (ALJ, Apr. 30, 2009) (the timing of production of documents must ensure that the opposing party has sufficient time to review them and prepare for hearing). Mot. at 17-19.

In support of the contention that drawing an adverse inference would also be an appropriate sanction, Complainant relies on: *William E. Comley, Inc. & Bleach Tek. Inc.*, 11 E.A.D. 247 (EAB 2004) (upholding decision pursuant to 40 C.F.R. § 22.19(g) to draw adverse inference from failure to comply with discovery order); *Doug Blossom* (respondent warned that failure to produce documents by court-imposed deadline might result in an adverse inference being drawn with respect to his ability to pay); *Vemco* (judge noted that failure to provide financial documents within established time frame may result in drawing inference that the information they contain is adverse to the respondent); *1836 Realty* (on failure of respondent to comply with discovery order, judge drew adverse inference as to information to be discovered and concerning ability to pay and granted motion to strike defense of ability to pay); *Bituma-Stor, Inc., d/b/a Bituma Corp. and Gencor Indus., Inc.*, EPA Docket Number EPCRA-7-99-0045, 2001 WL 66547 (ALJ, Jan. 22, 2001) (in view of respondent's failure to comply with orders to produce financial documents, judge drew inference that they would be adverse to respondent); and *JHNY, Inc., a/k/a Quin-T Technical Papers and Boards*, 12 E.A.D. 372, 398-99 (EAB 2005) (by failing to comply with prehearing exchange requirement to provide documentary evidence demonstrating inability to pay proposed penalty, respondent failed to raise ability to pay as a cognizable issue and so waived its ability to contest EPA's proposed penalty). Mot. at 20-21.

B. Relevant Regulatory Provisions

The Rules provide in 40 C.F.R. § 22.19(e), that after the initial prehearing information exchange a party may move for additional discovery and the Administrative Law Judge (ALJ) may order such additional discovery “only if it: (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.”

The Rules further provide that if a party fails to provide information within its control as required for the prehearing exchange or by order granting a motion for additional discovery, the ALJ 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).

C. Discussion and Conclusion

Respondents have not responded to the Motion. The Rules provide that at 40 C.F.R. § 22.16(b) that a response to a motion must be filed within 15 days after service of the motion, and that “[a]ny party who fails to respond within the designated period waives any objection to the granting of the motion.” Therefore, Respondents have waived any objection to the Motion. Nevertheless, the merits of the Motion are addressed herein.

The Prehearing Order stated that as part of their Prehearing Exchange, Respondents “shall submit . . . if Respondents intend to take the position that they are unable to pay the proposed penalty or that payment will have an adverse effect on their ability to continue to do business, a copy of any and all documents they intend to rely in support of such position.” Further, the Order issued in this proceeding on March 22, 2012 reminded Respondents that they bear the burden of proving that the proposed penalty should be mitigated based on their inability to pay, citing *Carroll Oil Co.*, 10 E.A.D. 635, 662-63 (EAB 2002). Respondents’ Answer (at 13) stated that they “dispute the amount of the proposed civil penalty,” and their Prehearing Exchange (at 3-4) asserted that none of the Respondents has the financial ability to pay any amount of fine. However, to date, Respondents have not filed any financial document in support of such assertions.

As there is no indication that Respondents have provided the requested documents to Complainant, the question is whether to compel production of the documents under 40 C.F.R. § 22.19(e). Considering the criteria under that provision, there is a period of nine weeks before the start of the hearing on July 17, 2012, Respondents have been aware of their obligation to produce documents in support of their asserted inability to pay for almost one year, and Complainant reasonably requests documents which Respondents should have in their possession or control.

The financial documents sought are not publicly available, and Respondents have not contested Complainant's assertions as to the inadequacy of the financial documents voluntarily submitted. The financial documents requested would have significant probative value as to the issue of inability to pay the penalty.

The question arises, whether the financial documents are relevant to the relief sought where Respondents have not submitted in its Prehearing Exchange any documentation as to inability to pay a penalty. The criteria set forth in the applicable statute, the Resource Conservation and Recovery Act ("RCRA"), for assessing a penalty are "the seriousness of the violation" and "good faith" efforts to comply. Therefore, "because it is not part of the Agency's required proof, 'ability to pay,' in order to be considered, must be raised and proven as an affirmative defense by the respondent." *Carroll Oil*, 10 E.A.D. at 663. In that there is no obligation on Complainant to prove that Respondents are able to pay the proposed penalty, the instant proceeding differs from proceedings under other environmental statutes. If Respondents do not offer any evidence to prove inability to pay, then it will not affect the assessment of the penalty, and Complainant need not address the issue.

At this point, however, the issue is relevant to the relief sought by virtue of Respondents having raised it. If Respondents present evidence on the issue and it is admitted into the record, it may be considered in assessing the penalty in this matter. On one hand it may be excluded if Respondents do not submit such evidence in a timely supplement to the prehearing exchange, under 40 C.F.R. § 22.22(a)(1), which states that if a party fails to provide, at least 15 days prior to the hearing date, any document, exhibit, witness name or testimony required in the prehearing exchange, it shall not be admitted into evidence absent good cause. On the other hand, if financial documents are submitted 15 or more days before the hearing, or fewer days with a showing of good cause, then potentially they could be admitted into evidence and Complainant may not have sufficient time for witnesses and analysts to review them and to prepare a rebuttal, which may result in prejudice to Complainant. Therefore, the Complainant's request to compel production of financial documents is granted, and Respondents will be required to provide the documents within the time period set forth below.

The next question is whether to grant Complainant's request for an order precluding Respondents, if they fail to comply, from introducing into the record documentation that may be relevant to inability to pay, and inferring that such documentation would be adverse to them. A sanction cannot be definitively imposed at this point in the proceeding as the condition therefor, the failure to provide the financial documents, has not yet taken place and may not occur. An automatic sanction set forth in advance is also not appropriate. In the event that Respondents timely submit some financial documents and Complainant finds that they are insufficient, a determination must be made as to whether the submittal is sufficient or whether it constitutes a failure under 40 C.F.R. § 22.19(g) to "provide information within its control as required," before a sanction may be imposed. Furthermore, there may be a question of appropriateness of imposing a sanction if there is a question of timeliness, such as documents being received after the deadline but purportedly submitted in advance thereof. Therefore, an appropriate conditional

statement of sanction is included below.

Accordingly, **IT IS ORDERED THAT** Respondents shall serve on the Complainant **on or before May 30, 2012** the following:

1. Copies of the three most recent years of federal income tax returns for Respondent Andrew B. Chase and for each of the three named corporate Respondents. The copies must be either signed and dated or accompanied by a certification that they are true and correct copies of the ones submitted to the Internal Revenue Service.
2. For each of the three named corporate Respondents, copies of complete financial statements for the three most recent past fiscal years prepared by an outside accountant, and such statements should include all balance sheets, statements of operations, retained earnings and cash flows.
3. For each of the three named corporate Respondents, copies of any financial projections developed for the years 2012 and 2013.
4. For each of the three named corporate Respondents, copies of the asset ledger for all assets owned during the three most recent years.
5. Copies of any other documents for any of the Respondents that they deem relevant and supportive of the claim of inability to pay/financial hardship.
6. If any of the documents requested above do not exist, a statement of Respondents certifying to that fact with respect to each such document.

If Respondents fail to timely submit to Complainant all of the information listed above, they may be deemed to have waived any claim of inability to pay a penalty or financial hardship, they may be precluded from introducing any documentation or information relevant to such claim into the record in this proceeding, and/or an inference may be drawn that any such information would be adverse to such claim.



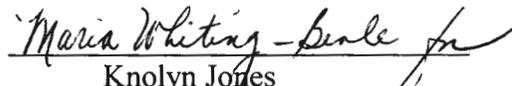
M. Lisa Buschmann
Administrative Law Judge

Date: May 11, 2012
Washington, D.C.

In the Matter of Andrew B. Chase, a/k/a Andy Chase, Chase Services, Inc., Chase Convenience Stores, Inc., and Chase Commercial Land Development, Inc., Respondents
Docket No. RCRA-02-2011-7503

CERTIFICATE OF SERVICE

I hereby certify that a true copy of this **Order On Complainant's Motions To Supplement Prehearing Exchange And To Compel Production Of Documents, And Order Rescheduling Hearing**, dated May 11, 2012, was sent this day in the following manner to the addressees listed below.


Knolyn Jones
Legal Staff Assistant

Original And One Copy By Regular Mail To:

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Dated: May 11, 2012
Washington, D.C.