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BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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EPA -- REGION 10

In the matter of:)	
)	DOCKET NO. CWA-10-2003-0007
Thomas Waterer)	
and)	MOTION FOR DISCOVERY OR
Waterkist Corp. dba Nautilus Foods)	IN THE ALTERNATIVE MOTION
Valdez, Alaska)	IN LIMINE
)	
Respondents.)	
_____)	

Pursuant to 40 C.F.R. §§ 22.16(a) and 22.19(e), Complainant, U.S. Environmental Protection Agency, Region 10 (“Complainant” or “EPA”), moves for an order compelling Thomas Waterer (“Respondent”) to produce documents supporting Respondent’s ability to pay. In the alternative, Complainant moves to exclude from evidence any testimony or documents other than the three tax returns already disclosed regarding ability to pay.

Procedural and Factual Background

On December 11, 2002, EPA filed an administrative Complaint against Respondents for alleged violations of Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), specifically, for the discharges of seafood wastes to Valdez Harbor, Alaska in violation of an NPDES permit.

On March 26, 2003, Counsel for EPA wrote Respondents to request specific financial information in order to conduct an ability-to-pay analysis. See Attachment A. No response was received. On May 19, 2003, the Presiding Officer ordered the parties to file their prehearing exchanges no later than July 21, 2003. On June 2, 2003, Complainant again wrote to Respondent requesting the information outlined in the March 26 letter. Attachment B. Again, Respondents

did not reply to EPA's request for financial information. On August 5, 2003, Complainant moved for default for failure of Respondents to file their prehearing exchange as required by the Presiding Officer's Order of May 19, 2003. On August 22, 2003 Respondents filed their Prehearing Statement in response to a Show Cause Order issued by the Presiding Officer on August 15, 2003. On November 5, 2003, the Presiding Officer issued an Order denying Complainant's motion for default.

In their Prehearing Statement, Respondents listed three witnesses who will testify regarding ability of Waterkist Corp. to pay the proposed penalty: Thomas Waterer, Chalene Kok and Bryce Morgan. Ms. Kok and Mr. Morgan are CPA's who will testify regarding the financial condition of Waterkist Corp. Respondents' Prehearing Statement at 1-2. Respondents provided copies of federal tax returns for 1999, 2000 and 2001 for Waterkist Corp. They provided no additional information such as financial statements, audits, etc. to explain the corporate finances. They provide no current financial information about the company. Respondents provided no documentation regarding ability to pay for Thomas Waterer.

Forty C.F.R. section 22.19(a)(3) states that, in cases where the Complainant has specified a proposed penalty, as in this case, "the respondent shall explain in its prehearing information exchange why the proposed penalty should be reduced or eliminated." The Presiding Officer's Prehearing Order of May 19, 2003, stated "if Respondent intends to take the position that it is unable to pay the proposed penalty, or that payment will have an adverse effect on Respondent's ability to continue business, Respondent shall furnish supporting documentation such as financial statements or tax returns." Respondents clearly intend to raise ability to pay as a defense for Waterkist Corp. Consequently, Respondent should have included in their Prehearing Statement

all factual information they considers relevant to their ability to pay the proposed penalty. Despite this express order from the Presiding Officer, Respondents provided only three old tax returns for Waterkist Corps and they provided no information at all regarding any alleged inability of Thomas Waterer to pay the proposed penalty.

In light of Respondent's intent to raise ability to pay the proposed penalty at hearing, EPA requests that the Presiding Officer issue an order requiring the Respondents to produce the specific information set forth in the Complainant's March 26, 2003, letter (Attachment A). In the alternative, Complainant requests that the Presiding preclude from evidence all testimony and other records regarding the current finances of Waterkist Corp. and preclude from evidence all testimony and records regarding the alleged inability to pay of Thomas Waterer.

Argument

I. MOTION FOR DISCOVERY.

Under 40 C.F.R. § 22.19 (e), the Presiding Officer may issue a discovery order 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. See In re Doug Blossom, Docket No. CWA-10-2002-0131 (ALJ Biro November 28, 2003) (motion for discovery and motion in limine re ability to pay granted); In re City of New Bedford, Massachusetts, Docket No. CWA-01-2002-0059, 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") (emphasis in

original). EPA 's discovery request in this case meets all three elements.

The issuance of a discovery order at this juncture in the case would not delay the proceedings; rather, it would avoid delays later in the proceeding. Furthermore, this information is not otherwise obtainable as it is exclusively within the control of the Respondents. Finally, such information is, by definition, probative of Respondents' ability to pay the proposed penalty according to the standards by which EPA evaluates such a claim. As the Environmental Appeals Board held in In re New Waterbury, Ltd., 5 E.A.D. 529, 542 (EAB 1994), "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. 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."

As indicated in Attachment A, the specific information requested will allow for a proper assessment of Respondent's financial position and its ability to pay the penalty. The three old tax returns provide no information regarding the current financial resources of Waterkist Inc. At best, they show the taxable income of the company two years ago. Complainant is put at a distinct disadvantage if the three proposed witnesses are allowed to take the stand at hearing and proffer testimony regarding the current finances of the company when they have provided no supporting documentation regarding the current finances. Similarly, Respondents provided no information regarding Mr. Waterer's personal finances despite the fact that he is personally named as a respondent in the case. Complainant cannot meaningfully rebut testimony at hearing regarding Mr. Waterer's personal finances if it has not had the opportunity, prior to hearing, to review supporting financial documentation.

II. MOTION IN LIMINE.

If the Respondents fail to provide the requested documentation within a reasonable period of time, EPA requests that the Presiding Officer, *in limine*, exclude such defense and documentation from the record pursuant to 40 C.F.R. § 22.19(g). As the EAB further 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.

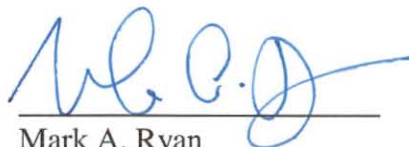
In the present case, EPA twice asked for their financial records outside of the prehearing exchange. Attachments 1 and 2. Respondents were notified of their obligation to include all documents related to ability to pay in the Presiding Officer’s May 19, 2003, Prehearing Order. Nevertheless, Respondents have provided only outdated tax returns for Waterkist, and have failed to include any evidence in their Prehearing Statement related to Thomas Waterer’s ability to pay the proposed penalty. Consequently Respondents should be precluded from offering any testimony at hearing regarding the current finances of Waterkist Inc. should they fail to produce the requested information. Second, Respondents should be precluded from offering any testimony or other evidence at hearing regarding the alleged inability to pay of Thomas Waterer in the absence of disclosure by him of the requested financial information.

Conclusion

For the reasons stated above, Complaint requests that the Presiding Officer order Respondents to produce documents supporting Respondents’ inability to pay a penalty as set

forth in their Prehearing Statement. In particular, Complainant requests that Respondents be ordered to respond to the March 26, 2003, letter requesting specific financial information of Respondents and included as Attachment A. Should Respondents fail to provide such documentation within a reasonable period of time Complainant requests that the Presiding Officer, *in limine*, preclude Respondents from providing any testimony at hearing regarding Respondents' inability to pay the proposed penalty.

RESPECTFULLY SUBMITTED this 12th day of December, 2003.

A handwritten signature in blue ink, appearing to read 'M.A. Ryan', written over a horizontal line.

Mark A. Ryan
Ann L. Coyle
Assistant Regional Counsel
Region 10

CERTIFICATE OF SERVICE

I certify that the foregoing "Motion for Discovery or in the Alternative Motion in Limine" was sent to the following persons, in the manner specified, on the date below:

Original and one copy, via pouch mail:

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

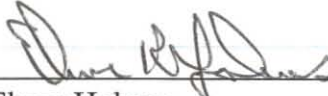
Copy, by FAX and mail:

Honorable William B. Moran
Administrative Law Judge
EPA Office of Administrative Law Judges
Mail Code 1900L
Aerial Rios Building
Washington, D.C. 20460

Copy, by FAX and mail:

Edward P. Weigelt, Jr.
4300 198th St. S.W., Suite 100
Lynwood, WA 98036.

Dated: 12/12/03



Elmer Holmes
U.S. EPA Region 10



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
IDAHO OPERATIONS OFFICE
1435 N. Orchard St.
Boise, Idaho 83706

March 26, 2003

Edward P. Weigelt, Jr.
4300 198th St. N.W., Suite 100
Lynnwood, Washington 98036

Re: In re Thomas Waterer and Waterkist Corp.; financial disclosure forms

Dear Ed:

Please find enclosed the financial disclosure forms that we discussed at yesterday's settlement conference. As I informed you, in order to consider an ability-to-pay argument, we must receive the requested information. As soon as you return the completed forms, our financial analyst will review the materials and either give me his opinion regarding the respondents' ability to pay the proposed penalty, or ask me for more information. There are seven forms enclosed:

- (1) Initial Request Form - Corporate
- (2) Disclosure Form - Corporate
- (3) Form 8821, Tax Information Authorization - Corporate
- (4) Individual Ability to Pay Claim
- (5) Disclosure Form - Individual
- (6) Ability to Pay - Individual Request for Information
- (7) Form 8821, Tax Information Authorization - Individual.

Please have your client complete the enclosed forms, and return them to me at your earliest convenience. If you have any questions, please call me at (208) 378-5768.

Very truly yours,

Mark A. Ryan
Assistant Regional Counsel

Attachment A.

cc: Chris Cora



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
IDAHO OPERATIONS OFFICE
1435 N. Orchard St.
Boise, Idaho 83706

June 2, 2003

VIA FACSIMILE AND MAIL

Edward P. Weigelt, Jr.
4300 198th St. N.W., Suite 100
Lynnwood, Washington 98036

Re: In re Thomas Waterer and Waterkist Corp.; financial information

Dear Ed:

I still have not received the financial information we requested in March. As I informed you by phone on May 23, if we do not reach agreement to settle this case in advance of July 21, then we will have to file our pre-hearing exchanges. Also as I informed you, I will be out of the office June 16 to July 7. It is imperative that your clients provide that information to EPA as quickly as possible in order that we can have time to review it, and assess your clients' claims of inability to pay.

If you have any questions, please call me at (208) 378-5768.

Very truly yours,

A handwritten signature in black ink, appearing to read "M.A. Ryan".

Mark A. Ryan
Assistant Regional Counsel

Attachment B.

cc: Chris Cora