



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY BEFORE THE ADMINISTRATOR

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In the Matter of:)
Paco Swain Realty, L.L.C.,) Docket No. CWA-06-2012-2712
Respondent) Dated: December 4, 2014

ORDER ON MOTION TO COMPEL PRODUCTION OF FINANCIAL INFORMATION

In response to the Complaint in this matter, alleging that Respondent violated the Clean Water Act and proposing assessment of a civil penalty for the violation, Respondent asserted in its Answer an inability to pay more than a nominal penalty. The parties filed their respective prehearing exchanges in this matter, and on September 26, 2013, Respondent submitted state and federal income tax returns in a supplemental prehearing exchange, in support of its assertion of inability to pay a penalty. A motion for accelerated decision was granted as to Respondent's liability and denied as to the penalty, by order dated July 23, 2014. Subsequently, an order was issued scheduling the hearing in this matter to begin on January 15, 2015.

On November 13, 2014, Complainant filed a Motion to Compel Production of Financial Ability to Pay Information ("Motion"). To date, Respondent has not filed a response to this Motion.

I. The Parties' Arguments

Complainant, Director of Compliance Assurance and Enforcement Division of EPA Region 6 ("EPA"), points out that the Order on Complainant's Motion for Accelerated Decision noted that a genuine issue of material fact exists regarding Respondent's ability to pay a penalty. Mot. at 2. EPA states that it has hired Industrial Economics, Inc. ("IEc") to analyze Respondent's financial information and its ability to pay a penalty. Mot. at 2. IEc has analyzed all the financial information provided by Respondent, which consists of tax returns for 2005 through 2013, and determined them incomplete because they are unsigned and "numerous parts of the tax returns are missing." Id. Thus, Complainant maintains, what Respondent has provided is insufficient to analyze Respondent's ability to pay. Id.

Consequently, there have been follow-up communications between the parties, and Complainant provides copies of some of them as attachments to the Motion. Complainant gave Respondent a written list of missing information, as identified by IEc. Id. This was first

provided to Respondent on October 24, 2014 (Attachment A to the Motion), and a more detailed, updated version was provided on November 10, 2014 (Attachments B and C).¹ *Id.* Included with the October 24, 2014, communication was an “Individual Ability to Pay Claim Financial Data Request Form” (“ATP Form”). *Id.* The information requested on the ATP Form “is not reflected in tax returns but is necessary to complete the ability to pay analysis,” according to IEC and Complainant. *Id.* IEC’s cover letter indicates that the ATP Form requests information such as “living expenses, assets or liabilities (e.g., bank accounts, investments, real estate holdings and any associated debts).” *Mot.*, Attachment A.

EPA avers that, on October 24, 2014, Respondent provided its 2013 tax return and agreed to complete the ATP Form. *Id.* However, as of the date of the Motion, the Agency had not received a completed ATP Form from Respondent. *Id.* at 2-3. Complainant’s Motion includes, as Attachment D, an email from Respondent’s counsel documenting objections to IEC’s conclusions that the tax returns Respondent previously provided are deficient. *Id.* at 3. Respondent’s objections prompted the update Complainant provided on November 10, 2014, with greater detail as to the missing information (Attachments B and C). *Id.* Complainant summarizes the November 10, 2014 update from IEC as identifying missing forms that correspond to a line in a tax return, and “contingent forms” that may be missing depending on the information corresponding to a line in a tax return. *Id.* The lists of missing information that Complainant gave Respondent present, in an organized and precise manner, the tax schedules and forms that are missing, for each tax year from 2005 to 2013, including a table showing, year by year, which documents were provided and which were missing in any given year. *Mot.*, Attachments A and B.

Complainant asserts that the recently provided but incomplete 2013 tax return is inadequate to assess Respondent’s inability to pay defense. *Id.* Complete copies of the tax returns and the ATP Form are required, EPA asserts. *Id.* at 3-4. The Agency argues that “Respondent has the ability to obtain and provide complete copies of its tax returns and Respondent alone is capable of completing the ATP Form.” *Id.* To provide IEC adequate time to perform its analysis before the hearing, Complainant requests Respondent be ordered to produce the requested information by December 3, 2014. *Id.* at 4-5. If Respondent fails to comply, Complainant requests that any incomplete tax returns previously provided by Respondent be stricken from the record and that any evidence or testimony regarding ability to pay be prohibited at the hearing. *Id.*

Although Respondent did not file a response to this Motion, Attachment D to the Motion is an October 24, 2014 email message from Respondent’s attorney, replying to Complainant’s email that attached IEC’s list of deficiencies as to the financial information Respondent had previously provided. In his email message, Respondent’s counsel states that Respondent will complete the ATP Form, so he requests that be omitted from the Motion. *Mot.*, Attachment C. Respondent also stated that the tax returns provided to Complainant without signatures were

¹ The Motion’s identification of its attachments is a bit confusing, but it appears Complainant’s intent is that Attachment B is IEC’s cover letter dated November 10, 2014, and Attachment C provides the detailed lists of missing information that IEC attached to its November 10th letter. Also, page 2 of the Motion says November 5, but IEC’s second letter is actually dated November 10.

“submitted by a licensed preparer with electronic signature,” so they “should be evaluated as submitted, with a disclaimer if there is any doubt as to authenticity.” *Id.* Respondent also asserted that some of the missing schedules identified by IEC “were not included in the returns at all, as there is no need for a schedule that matches a blank line.” *Id.* Respondent gave as an example, “a Schedule B ... for years for which no Interest and Ordinary Income is reported.” *Id.* However, Respondent’s attorney acknowledged that, at the time he wrote his email reply, he had perused only the 2013 tax return, not the those for prior years, and he was not asserting “that no forms are missing.” *Id.* (emphasis in original).

EPA rejects the suggestion of Respondent’s counsel to submit IRS Form 4506 to request the IRS to send Respondent’s signed and completed tax returns directly to Complainant, because that process typically takes up to 75 days and would not be completed soon enough before the hearing. *Id.* at 3-4.

II. Relevant Regulatory Provisions

The Rules of Practice provide 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.” 40 C.F.R. § 22.19(e).

The Rules of Practice 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).

III. Discussion and Conclusion

Respondent has not responded to the Motion. The Rules provide 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.” 40 C.F.R. § 22.16(b). Therefore, Respondent has waived any objection to the Motion. Nevertheless, the merits of the Motion are addressed below.

In *New Waterbury, Ltd.*, TSCA Appeal No. 93-2, 5 E.A.D. 529 (EAB, Oct. 20, 1994), the Environmental Appeals Board (“EAB”) provided an in depth analyses of the parties’ respective burdens of proof regarding a respondent’s ability to pay a penalty. The EAB opined that “to make a prima facie case on the appropriateness of its recommended penalty, [EPA] must come forward with evidence to show that it, in fact, considered each factor identified in [the penalty section of the statute] . . .” *New Waterbury*, 5 E.A.D. at 538. Because EPA’s “ability to obtain much information about a respondent’s ability to pay is likely to be limited when a complaint is filed, . . . a respondent’s ability to pay may be *presumed* until it is put at issue by a respondent.” *Id.* at 541 (emphasis in original). However, “in any case where ability to pay is put in issue,

[EPA] must be given access to the respondent's financial records before the start of such hearing." *Id.* at 542. Additionally, the EAB held that "where a respondent does not raise its ability to pay as an issue in its answer, or fails to produce any evidence to support an ability to pay claim after being apprised of that obligation during the pre-hearing process, [EPA] may properly argue and the presiding officer [ALJ] may properly conclude that any objection to the penalty based upon ability to pay has been waived." *Id.*

In the instant case, under Section 309(g)(3) of the Clean Water Act, Complainant must consider, among other statutory penalty factors, the violator's "ability to pay" the penalty. 33 U.S.C. § 1319(g)(3). The Prehearing Order in this proceeding stated that as part of their Prehearing Exchange, Respondents "shall submit . . . [i]f Respondent believes that it is unable to pay the proposed penalty or that payment will have an adverse effect on its ability to continue to do business, a brief statement to that effect, and a copy of documents in support, such as tax returns and/or certified copies of financial statements." Prehearing Order at 3. Furthermore, the Rules of Practice require a respondent to indicate whether it will raise the issue of ability to pay, and if so, to submit evidence to support its claim as part of the prehearing exchange. *See* 40 C.F.R. §§ 22.15(a) - (b), 22.19(a) (3) - (4).

Respondent raised the issue of its inability to pay the penalty in this case. In its Answer, Respondent asserted an inability to pay "more than a nominal civil penalty." Ans. ¶ 21. Respondent's Supplemental Prehearing Exchange provided federal income tax returns of Gordon L. Swain and his wife for years 2005 through 2012, each with attached Schedule C forms indicating substantial net losses of Respondent for the years 2007 through 2012, and indicating a substantial negative individual income for Mr. Swain and his wife for the years 2009 to 2012. R's Suppl. PHE Ex. 3. Respondent filed additional financial information in response to Complainant's Motion for Accelerated Decision, including a personal financial statement showing a negative net worth and a Declaration describing severe financial strains resulting from legal actions taken against it by both EPA and the bank holding a mortgage on the property in issue. Thus, in ruling on that motion, this Tribunal concluded that "Respondent has shown that a genuine issue of material fact exists with respect to Respondent's ability to pay the proposed penalty." *Accel. Dec. Order* at 21.

Complainant has now provided detailed lists of information missing from the tax returns Respondent has provided, as identified through a thorough analysis performed by a financial contractor specifically hired to assess Respondent's ability to pay. Thus, the information Complainant seeks has significant probative value on a disputed issue of material fact relevant to the relief sought. The requested information is reasonably within Respondent's possession or control, but has not yet been provided by Respondent. (It is noted that in a December 1, 2014, email message to my staff attorney, EPA counsel reported that, on November 25, 2014, his office received Respondent's completed ATP Form, but the completeness of that form had not yet been evaluated by IEC.) Complainant provided Respondent with a detailed list of missing information on October 24, 2014, and then in response to Respondent's failure to remedy many of the alleged deficiencies, Complainant provided Respondent a more detailed listing of the information requested and the reasons therefor on November 10, 2014. Respondent asserted, in an email to Complainant, that some of the missing information never existed, but this was based on a review of his 2013 tax return alone, and none of the tax returns for prior years.

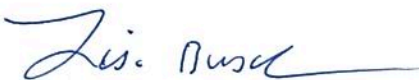
Respondent has not filed an opposition, which not only constitutes a waiver, but also leaves this Tribunal without any explanation of Respondent's reasons for refusing to provide the requested information. Sufficient time remains so that this information can be provided and used prior to the hearing. As all the terms of Rule 22.19(e) are satisfied here, the Motion is **GRANTED**.

Accordingly, **IT IS ORDERED THAT** Respondent shall serve on the Complainant **on or before December 10, 2014** the following:

1. Complete copies of income tax returns for the years 2005 through 2013, including all information outlined in the attachments to IEC's November 10, 2014 letter and identified as Attachment B to the Motion. 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. Unless notified by Complainant that it has determined the copy received on November 25, 2014 to be complete, a completed copy of the Individual Ability to Pay Claim Financial Data Request Form ("ATP Form"), including any information identified by Complainant as missing from the copy received on November 25, 2014.

If Respondent fails to timely submit to Complainant all the information listed above, Respondent may be deemed to have waived any claim of inability to pay a penalty or financial hardship, it 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.

SO ORDERED.

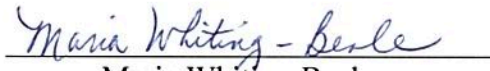


M. Lisa Buschmann
Administrative Law Judge

In the Matter of Paco Swain Realty, L.L.C., Respondent
Docket No. CWA-06-2012-2712

CERTIFICATE OF SERVICE

I certify that the foregoing **Order On Motion To Compel Production Of Financial Information**, dated December 4, 2014, was sent this day in the following manner to the addressees listed below:



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Dated: December 4, 2014
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