UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region 2

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. Proceeding Under Section 9006 of the Solid Waste Disposal Act, as amended.	**Hon. M. Lisa Buschmann, Presiding Officer** Docket No. RCRA-02-2011-7503

MOTION TO COMPEL PRODUCTION FINANCIAL RECORDS/ TO PRECLUDE/TO DRAW ADVERSE INFERENCES

Complainant in this proceeding, the Director of the Division of Enforcement and Compliance Assistance, EPA, Region 2 (EPA or Agency), through her attorney, moves this Court, pursuant to 40 C.F.R. §§ 22.16(a), 22.19(e) and 22.19(g), and also pursuant to the order of this Court, dated March 22, 2012,[1] for an order **a)** compelling Respondents to produce by no later than May 10, 2012 or some date certain designated by the Court, documentation (specified below) substantiating their alleged inability to pay/financial hardship claim **b)** precluding Respondents, if they fail to comply with the Court's order to produce such documentation, from introducing or admitting such documentation into the record of the hearing in this matter, and **c)** inferring, if Respondents fail to comply with the Court's order to produce such financial documentation, that the information in such documentation would be adverse to Respondents. As demonstrated below, Complainant submits that good cause exists for granting this motion, *i.e.*

[1] The March 22, 2012 order was denominated, "ORDER ON COMPLAINANT'S REQUEST FOR TIME TO FILE NON-DISPOSITIVE MOTIONS."

such relief against Respondents would be appropriate and warranted based upon an application of the law governing this proceeding to the circumstances (as detailed below).

This motion is divided into six sections, as follows: **Section I**, "Documentation EPA Seeks"; **Section II**, "History and Background"; **Section III**, "Prehearing Orders and an Inability to Pay/Financial Hardship Claim"; **Section IV**, "Respondents' Submissions and Their Inability to Pay/Financial Hardship Assertion"; **Section V**, "EPA's Efforts to Obtain Financial Documentation from Respondents"; **Section VI**, "Law Governing The Use of Documentary Evidence in 40 CFR Part 22 Proceeding"; **Section VII**, "Respondents Should Be Compelled to Produce Financial Documentation"; **Section VIII**, "Part 22 Case Law Would Support Compelling Production"; **Section IX**, "If Respondents Fail to Produce, Preclusion Would Be an Appropriate Sanction"; **Section X**, "If Respondents Fail to Produce, Drawing an Adverse Inference is Warranted"; and **Section XI**, "Conclusion."

I. Documentation EPA Seeks

Complainant seeks the production of the following documents:

> a) Copies of the three most recent years of signed and dated federal income tax returns for Respondent Andrew B. Chase and for each of the three named corporate respondents (Chase Services, Inc.; Chase Convenience Stores, Inc.; and Chase Commercial Land Development, Inc.);[2]
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> b) For each of the three named corporate respondents, copies of complete financial statements for the three most recent past fiscal years prepared on behalf of each such respondent by an outside accountant, and such statements should include all balance sheets, statements of operations, retained earnings and cash flows;
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> c) For each of the three named corporate respondents, copies of any financial

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[2] If such documents are not signed and dated, then they should be certifies as true and correct copies of the ones submitted to the Internal Revenue Service.

projections developed for the years 2012 and 2013;

d) For each of the three named corporate respondents, copies of the asset ledger for all assets owned during the three most recent years; and

e) Copies of any other documents for any of the Respondents they deem relevant and supportive of the claim of inability to pay/financial hardship.[3]

II. History and Background

The history of this proceeding has been provided to this Court on a number of recent occasions, with the most significant recitation of the operative facts and circumstances set forth in Complainant's[4] motion for partial accelerated decision filed on February 10, 2012.[5] That motion, submitted pursuant to 40 C.F.R. § 22.20, seeks a judgment of liability as a matter of law for 20 of the 21 counts of the complaint (not count 20). Those facts and circumstances were detailed in the declaration of Lee A. Spielmann (including the exhibits attached thereto), executed February 3, 2012, the declaration of Jeffrey K. Blair (including the exhibits attached thereto), executed on January 25, 2012 and the declaration of Paul Sacker (including the exhibits attached thereto), executed on February 10, 2012. The Court is respectfully referred to the partial accelerated decision motion papers for a more comprehensive discussion of such facts and circumstances. For the convenience of this Court, and to expedite its consideration of this

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[3] With regard to the items requested in paragraphs "b," "c," "d," and "e," if any such document does not exist, Respondents (or the individual Respondent) shall certify any such non-existence, and for any such certification, EPA requests this Court direct that such document(s) be henceforth barred from introduction into or any use at the hearing.

[4] For purposes of this motion, the term "EPA" will be used as synonymous with "Complainant."

[5] The other occasions are Complainant's "Motion to Supplement Complainant's Prehearing Exchange," submitted February 22, 2012, and Complainant's "Status Report/Motion for Time to File Non-Dispositive Motion," dated March 16, 2012.

motion, a quick summary of the background facts, in addition to those particular facts pertinent to this motion, will be provided below.

This is an administrative proceeding that was commenced under authority of Section 9006 of the Solid Waste Disposal Act, as amended, 42 U.S.C. § 6991e, in which EPA seeks a civil penalty of approximately $233,000 against various respondents for alleged violations of the underground storage tank regulations (40 C.F.R. Part 280) that occurred in the course of Respondents' ownership and/or operation of underground storage tanks located at six retail gasoline stations in New York State. The complaint alleges one respondent, Andrew B. Chase (an individual), is liable for each of the 21 counts, either singly or together with of three named corporate respondents. The corporate respondents are not alleged to be liable for all violations. The complaint alleges the following: Mr. Chase presently owns and operates the underground storage tanks (sometimes referred to below as "UST" or "USTs") systems at two of the six gasoline stations, the other four stations having been sold in July 2009. The violations concern the operation, maintenance and closure of the underground storage tanks, and these violations involve 19 underground storage tanks (these include violations pertaining to the piping connected to a number of the tanks) at the six service stations. The violations are alleged to concern three USTs at the service station identified as "Service Station I,"[6] three USTs at Service Station II, two USTs at Service Station III, three USTs at Service Station IV, three USTs at Service Station V and five USTs at Service Station VI..[7]

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[6] Paragraph 7 of the Sacker declaration, pages 5 and 6, identify the location of each of the six service stations.

[7] An overview of the specific violations alleged at the respective service stations, identifying the specific tanks and/or their attached piping is provided in the memorandum of law EPA

EPA learned of the facts set forth in the complaint and upon which it alleges the violations through information request letters (IRLs) EPA sent, pursuant to Section 9005(a) of the Act, 42 U.S.C. § 6991d(a), and 40 C.F.R. § 280.34, to Respondent Andrew B. Chase, and through a number of inspections the Agency conducted at the service stations. The first such IRL was sent from EPA to Mr. Chase in April 2009, and Mr. Chase provided a response to this IRL in June 2009.[8] The inspections occurred in August 2008, April 2009 and August 2010.

The January 5, 2012 order of this Court, "ORDER RESCHEDULING HEARING," directs that a hearing in the matter commence on June 12, 2012.

This motion is submitted in accordance with the March 22, 2012 order in which this Court extended the time for the filing of non-dispositive motions through March 26, 2012.

III. Prehearing Orders and an Inability to Pay/Financial Hardship Claim

The July 12, 2011 order of this Court, denominated "PREHEARING ORDER," required that Respondents must provide, if they assert an inability to pay/financial hardship claim, documentation in support of any such claim. On page 3 of that order, paragraph 3 stated, in part:

> In addition, Respondents shall submit the following as part of their Initial Prehearing Exchange(s):
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submitted as part of the motion for partial accelerated decision. , Section II, "Relief Sought By Complainant," pages 2 through 6.

[8] There were several follow-up IRLs: in October 2009; in January 2010; and in November 2010. Mr. Chase provided a response to EPA's IRLs (in addition to the June 2009 response) in December 2009; January 2010; and in October 2010 (received by EPA in November 2010). EPA inspector Paul Sacker sent e-mails to Mr. Chase on at least three occasion (on January 7, 2010, and twice on January 27, 2010), seeking additional information and/or clarification of information previously provided in an IRL response. Mr. Chase also communicated with Mr. Sacker by fax, one transmitted February 4, 2010, another on December 15, 2010. Paragraphs 12 through 17 of the Sacker declaration.

> (C) if Respondent 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 upon in support of such position; and
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> (D) if Respondents intend to take the position that the proposed penalty should be reduced or eliminated on any other grounds, a copy of any and all documents they intend to rely upon in support of such position [underscoring in original].

The need for Respondents to submit documentation upon which they might rely in support of their inability to pay/financial hardship assertion was reinforced in the March 22nd order, where it states on page 2:

> Both parties are reminded that if Respondents seek to mitigate any imposed penalty based on their alleged inability to pay, they are alone charged with substantiating that defense, as they bear the burden of proof on it. *Carroll Oil Co.*, 10 E.A.D. 635, 662-63 (EAB 2002).

IV. <u>Respondents' Submissions and Their Inability to Pay/Financial Hardship Assertion</u>

Respondents' answer, dated June 6, 2011, stated that they "dispute the amount of the proposed civil penalty." Page 13. No further explanation or clarification was given; the basis of their dispute was not set forth. Further amplification of this position was provided in Respondents' prehearing exchange, dated December 2, 2011. In it, Respondents explained ("Preliminary Statement" section, pages 3 and 4 of the document):

> By the time the EPA actually filed this Complaint, [Respondent] Andrew Chase, and the various companies owning and operating the stations at issue, has run into financial hardship. Each of the stations, but for Dannemora, has been sold, and Mr. Chase no longer has any interest in those stations. Due to the financial conditions of the stations, any net proceeds received from the sale were relatively minimal, and none of the corporations, but for Belmont, currently have any assets. None of the Respondent corporations have any financial ability to pay any amount of fine. Andrew Chase, as an alleged operator, and as an individual[,] does not have the capacity to pay the fines.
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> *** To impose the fines requested years after the fact and years after many of the

> stations have been sold, in fact, poses incredible financial hardship upon Andrew Chase, individually.

These statements make pellucidly clear that Respondents have formally placed in issue in this litigation the question whether there exists an inability to pay the proposed penalty and/or whether making payment of such penalty would result in their suffering significant financial hardship. Based upon these assertions, it logically follows, and EPA so deems, that Respondents would at trial pursue the inability to pay/financial hardship claim.

V. <u>EPA's Efforts to Obtain Financial Documentation from Respondents</u>

To date, EPA has made repeated requests for Respondents to submit financial documentation in support of their financial hardship assertion. A request for such documents in the context of this litigation was made in an e-mail from the undersigned to Respondents' counsel (Thomas Plimpton) on March 26, 2012, at 5:17 PM. This e-mail states, in part:

> Will your clients be submitting documents re their financial condition? Financial hardship was raised in the Chase prehearing exchange, and, under the July 12, 2011 prehearing order, page 3, items 3(C) and 3(D), respondents are required to provide documents they intend to rely upon if they raise inability to pay or financial hardship, or otherwise seek to reduce the penalty. EPA likely will move to compel production of such documents and related relief under 40 CFR 22.19. Such documentation is need[ed] in order to evaluate respondents' claim of financial hardship.

Additional requests were made in the following e-mails sent from the undersigned to Mr. Plimpton, as follows:[9]

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[9] While these requests were made in an effort to jump-start settlement negotiations between the parties, they should have served to remind Respondents of the need to submit financial documentation to support their inability to pay/financial hardship claim.

M arch 7, 2012, at 12:28 PM;
February 28, 2012, at 4:26 PM;
February 23, 2012, at 6:27 PM;
January 13, 2012, at 6:42 PM;
December 23, 2011, at 3:24 PM; and
December 15, 2011, at 9:37 PM.

To date, Respondents have not formally submitted documentation for this litigation concerning their inability to pay/financial hardship claim. They did not include any such documentation in their prehearing exchange, nor have they sought subsequently to supplement their prehearing exchange to include financial documentation.[10] No financial documentation was otherwise ever submitted to the Court or the Regional Hearing Clerk.

Accordingly, Complainant now moves to compel Respondents to produce such documentation for the litigation.

VI. Law Governing The Use of Documentary Evidence in 40 CFR Part 22 Proceeding

As noted above, the July 12th order expressly required, and concomitantly put Respondents on notice, that, if they "intend to take the position that they are unable to pay the

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[10] By e-mail dated March 22, 2012, @ 4:06 PM, Mr. Plimpton submitted to EPA, in PDF format, three federal tax returns, one of which was an individual tax return (Form 1040) for Respondent Andrew B. Chase (and his spouse), and a second was for one of the named corporate respondents; the third was for an entity not named in the complaint. Each was for the year 2010. Not only is the provided documentation incomplete and inadequate for EPA to make a proper evaluation of the financial hardship/inability to pay claim (EPA requests for each person at least three years of federal income tax returns), it appears Respondents submitted these documents for settlement purposes; nothing in the accompanying e-mail transmission states or intimates otherwise. Respondents have never sought to formally introduce such documentation into this litigation, and they have not moved to supplement their prehearing exchange. Under these circumstances, these documents submitted in the e-mail likely would not be admissible into the record of the hearing; at the very least, there are fundamental threshold questions concerning their admissibility. *Compare In re Service Oil, Inc.*, Docket Number CWA-08-2005-0010 (Biro, C.J., April 12, 2006) at 4.

While EPA appreciates that Mr. Plimpton has sent some documentation and is encouraged by the effort toward settlement, EPA seeks more complete financial information and has so communicated with him (e-mail of March 22nd, at 6:44 PM).

proposed penalty or that payment will have an adverse effect on their ability to continue to do business," they are obligated to provide as part of the 40 C.F.R. § 22.19 prehearing exchange process, "a copy of any and all documents they intend to rely upon in support of such position." Page 3 of that order. The July 12th order additionally cited to 40 C.F.R. § 22.19(a) to put the parties on additional notice that such provision provides that "any document not included in the prehearing exchange shall not be admitted into evidence....Therefore, each party is advised to very carefully and thoughtfully prepare its prehearing exchange." Page 4 (bolded emphasis omitted). Additional notice was given to Respondents (also on page 4): "Respondents are hereby notified that the failure...to comply with the prehearing exchange requirements set forth herein...can result in the entry of a default judgment against the defaulting party" (bolded emphasis omitted). Also as noted above, the recent March 22, 2012 order of this Court buttressed the earlier admonitions. Citing to the Environmental Appeals Board (EAB or Board) leading decision in *Carroll Oil Company*, the order stated that if they assert an inability to pay claim, Respondents are required to "substantiat[e] that defense, as they bear the burden of proof on it." Page 2 of that order.

Carroll Oil was a Subtitle I underground storage tank case, as is the instant proceeding. The EAB observed that one issue was "whether and how Carroll Oil's affirmative defense of inability to pay should be considered in the context of a penalty assessment." *In re Carroll Oil Company*, RCRA (9006) Appeal No. 01-02, 10 EAD 635, 662. The Board's explanation is applicable to this proceeding, and the principles govern the issue:

> [I]t is important to first recognize that the statutory penalty factors are restricted to 'seriousness of the violation' and 'good faith efforts to comply.' Thus, considering 'ability to pay' is not part of the Agency's prima facie burden in determining a penalty amount. *** [B]ecause it is not part of the Agency's proof,

> 'ability to pay,' in order to be considered, must be raised to and proven as an affirmative defense by the respondent. The rules governing this proceeding provide that 'the respondent has the burdens of presentation and persuasion for any affirmative defenses.' 40 C.F.R. § 22.24. Consistent with the foregoing, in previous RCRA cases, recognizing that statutory penalty factors do not include 'ability to pay,' the Board and its predecessors have treated 'ability to pay' as a defense that must be raised and substantiated by respondents [footnotes omitted; citations omitted].

10 EAD at 662-63.

Part 22 provides a mechanism for a party to seek documents beyond what its adversary has included in its prehearing exchange. To obtain such discovery, a party must comply with 40 C.F.R. § 22.19(e)(1), which authorizes the Presiding Officer to order "other discovery" only if it:

> (I) Will neither unreasonably delay the proceeding nor unreasonably burden the non-moving party;
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> (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
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> (iii) Seeks information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought.

Where a party does not comply with a prehearing exchange requirement of 40 C.F.R. § 22.19, the Part 22 rules empower the Presiding Officer to effect sanctions. Forty C.F.R. § 22.19(g) provides that, "[w]here a party fails to provide information within its control as required pursuant to this section, the Presiding Officer may, in his discretion" do any of the following:

> (1) Infer that the information would be adverse to the party failing to provide it;
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> (2) Exclude the information from evidence; or
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> (3) Issue a default order under § 22.17(c).

Other portions of the Part 22 rules additionally codify the general authority of the

Presiding Officer to control events leading up to, and through, a hearing. These provisions specifically provide the Presiding Officer with an armamentarium of powers to enable her to "conduct a fair and impartial proceeding, assure that the facts are fully elicited, adjudicate all issues, and avoid delay." 40 C.F.R. § 22.4(c). To effect these ends, a Presiding Officer is specifically empowered to, *inter alia*:

> (5) Order a party, or an officer or agent thereof, to produce testimony, documents, or other non-privileged evidence, and failing the production thereof without good cause being shown, draw adverse inferences against that party;
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> (6) Admit or exclude evidence;
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> ***
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> (10) Do all other acts and take all measures necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues arising in proceedings governed by [40 C.F.R. Part 22][[11]].

VII. Respondents Should Be Compelled to Produce Financial Documentation

Respondents have asserted in this litigation, through their prehearing submission, that EPA's proposed penalty would entail significant financial hardship and they lack the capacity to make payment. Unless Respondents declare otherwise, the presumption should be operative that they intend to pursue this issue at hearing. The July 12th order of this Court required that, if they intend to raise such an issue in this proceeding, they provide documentation to support such a

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[11] These provisions establishing the reach of a Presiding Officer's authority over Part 22 proceedings are further complemented by the reservoir of authority set forth in 40 C.F.R. § 22.1(c), which provides:

> Questions arising at any stage of the proceeding which are not addressed in these Consolidated Rules of Practice [40 C.F.R. Part 22] shall be resolved at the discretion of the Administrator, Environmental Appeals Board, Regional Administrator, or Presiding Officer, as provided for in these Consolidated Rules of Practice.

claim, and Respondents were again reminded of that obligation in the recently issued March 22nd order. Governing case law unequivocally holds Respondents bear the burden of proof and persuasion on this issue. Yet Respondents have never formally provided any such documentation into this litigation. For example, they have not provided such documentation to the Regional Hearing Clerk, or to the Court; their prehearing exchange did not contain such documentation, nor have they moved to supplement their prehearing exchange to include financial documentation.

Respondents therefore should be required formally to provide such documentation to EPA (and also to the Court) with sufficient time for the Agency to analyze and evaluate such documentation and to prepare any rebuttal arguments; they should not be permitted to attempt to substantiate their claim of financial hardship/inability to pay by relying on documentation belatedly provided to EPA. Doing so would be prejudicial to EPA, or, at the least, potentially compromise EPA's ability to present a thorough rebuttal to that claim. Such a development likely would thwart a fair adjudication of this issue. Any documents Respondents produce for their use at hearing must be produced and presented to this Court and EPA with enough time remaining prior to the hearing for EPA to prepare and present appropriate rebuttal testimony or documentary evidence; basic fairness militates that for any such documentation, Respondents must formally submit them (*i.e.* not just for settlement purposes but for possible introduction at the hearing and for possible inclusion within the hearing record) within a time frame sufficient to allow EPA reasonable opportunity to examine and evaluate such documentation.[12] Hence

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[12] The position EPA takes with regard to Respondents' formally producing such documents is not intended or to be construed as EPA waiving, prejudicing, compromising, or otherwise forfeiting the right to object to the admissibility of such documents on any grounds permitted or otherwise recognized

Complainant seeks an order compelling Respondents to provide to EPA and to this Court financial documentation upon which they will, or might, rely at the hearing.

EPA requests that any such order direct such production occur by May 10, 2012, or some other date designated by Court that would allow for proper evaluation prior to the hearing. Not only are Respondents obligated under governing EAB case law and an order of this Court to produce such financial documentation, but as well Part 22's pronounced concern that proceedings be fairly adjudicated provides an ancillary and supporting basis for this Court to issue an order compelling production. The law governing this proceeding provides ample support for this Court to require Respondents to produce these statements.

The circumstances in this proceeding satisfy the 40 C.F.R. § 22.19(e) criteria for an order compelling such additional discovery.

Compelling Respondents to produce these statements will neither unreasonably delay the proceeding nor unreasonably burden them. At present, the hearing remains almost three months away, but Respondents have been on actual notice since no later than July 2011 that if they intend to raise an inability to pay/financial hardship claim, they are required to support such a claim with requisite financial documentation. It was in early December that Respondents expressly asserted a financial hardship/inability to pay claim. The records sought concern the financial situation of Respondents, and certainly they are in the best position to possess these types of records (such as federal income tax returns), and likely already possess and/or control such records. Under these circumstances, compelling production should not unreasonably delay this proceeding.

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by 40 C.F.R. Part 22 and its interpretive jurisprudence.

For the same reasons, compelling such production should not unreasonably burden Respondents: for example, presumably they would have filed the required federal income tax forms for years past. Such and related financial records most likely (and most reasonably) would be within the control of Respondents, if not in their outright possession; it stands to reason that a party possesses and controls documents it is required under law to file on an annual basis and/or which contain the information needed for such filing. If Respondents did not actually prepare such records, they most likely assisted in the development and preparation of them. Because such documents are not publicly available, as on the Internet, the most likely and obvious source for documents that pertain to Respondents' financial condition would be Respondents themselves, especially with regard to documents they are obligated by law to file and/or use in preparation of such filing. If Respondents do not possess such records, they are the ones who could most expeditiously authorize the person(s) who possess them (such as the entity that prepared their income tax) to release such documents. Respondents are in a far superior position compared to EPA to obtain and provide financial information regarding their own financial condition and that would shed light on their alleged financial hardship/inability to pay claim.

As noted above, EPA has questioned Respondents whether they would formally introduce into this litigation financial documentation. To date they have not done so. EPA additionally made several attempts to obtain such documentation for settlement purposes, and other than the limited response of March 22nd, Respondents have not provided requisite financial documentation to the Agency.[13] Respondents have not voluntarily provided the necessary

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[13] Providing such documentation to an adversary for settlement purposes does not constitute formally providing that documentation into the litigation, and it does not meet the threshold Part 22 requirements for admissibility into the record of a hearing. 40 C.F.R. §§ 22.19(a), 22.22(a).

documentation to substantiate their claim, either for formal litigation purposes (whether in their prehearing exchange, a motion to supplement the prehearing exchange, or otherwise in a tender to the Court), or for purposes of settlement.

And it should be self-evident that the information is of significant probative value on a disputed issue of material fact: Respondents have expressly raised the financial hardship/inability to pay claim in their prehearing exchange, and the sought-for documentation should demonstrate the validity (or non-validity) of such claim. To properly and adequately evaluate and weigh this claim, proper financial documentation is needed. To the extent there is any credence to their claim is material to any eventual penalty determination that this Court might have to make. Adequate and competent financial documentation is of significant probative value because it goes to the very heart of their assertion of financial hardship/inability to pay.

Complainant thus submits she has met the 40 C.F.R. § 22.19(e) criteria necessary to obtain the sought-for financial documentation. The circumstances surrounding this proceeding unequivocally demonstrate that compelling Respondent to produce these statements is justified under the governing criteria of 40 C.F.R. § 22.19(e)(1).

VIII. <u>Part 22 Case Law Would Support Compelling Production</u>

The EAB stated in the case of *In re New Waterbury, Ltd.*, TSCA Appeal No. 93-2, 5 E.A.D. 529, 542 (1994), "[I]n 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."[14]

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[14] While *New Waterbury* was a proceeding under a statute expressly requiring EPA to consider ability to pay (under the Toxic Substances Control Act, EPA must consider "ability to pay" and "effect on ability to continue to do business"), in this matter there is no such requirement in the enabling statute. Still the principle that a respondent must provide such documents is valid, whether respondent bears the burden *ab initio* or subsequent to the burden having shifted as a result of EPA meeting its initial burden on the question of ability to pay. *Carroll Oil*, 10 EAD at 662 n.24.

Presiding Officers have cited to or relied upon the *New Waterbury* rule to require respondents to produce documentation in support of claims of inability to pay. Recent Part 22 case law affirms both the authority of Presiding Officers, and their exercise of that authority, to compel a party to produce documentary evidence supporting a respondent's purported claim of financial hardship.

In *In re Doug Blossom*, Docket Number CWA-10-2002-0131, 2003 WL 22940544 (Judge Biro November 28, 2003), respondent's prehearing exchange failed to provide documents relevant to his financial condition or upon which his listed expert witness might base his testimony. EPA moved to compel production of any such documentation. In granting that motion, the Court explained (page 2 of 3 of Westlaw opinion):

> The hearing of this matter is set to begin on January 6, 2004, about six weeks from now. Thus, prompt production of the discovery sought will not delay the proceedings. Specific, current information regarding Respondent's finances is solely within Respondent's possession and should not unreasonably burden Respondent, and was not provided voluntarily by Respondent. The information Complainant seeks is of significant probative value on the penalty issue. Respondent has not clearly put 'ability to pay' at issue, but it is suggested by the summary of proposed testimony by Mr. Moore [the listed expert witness]. To clarify whether Respondent intends to raise it as an issue for hearing, and to enable Complainant to address this issue, Respondent shall be required to produce the requested documents [citation omitted].

Other cases have similarly ruled. *See, e.g., In re Vemco, Inc., d/b/a Venture Grand Rapids,* Docket Number CAA-05-2002-0012, 2003 WL 1919589 (Judge Biro March 28, 2003), page 1 of Westlaw opinion (Complainant's motion granted; it sought an order compelling respondent to produce "complete and preferably audited financial statements and all corporate minutes for the last three years [for respondent and another company]; Respondent's cumulative depreciation schedules for the last three years; and debt instruments supporting Respondent's

intercompany payable debt for December 31, 2001 and December 31, 2002"); *In re Gerald Strubinger, Gregory Strubinger*, Docket Number CWA-3-2001-001, 2002 WL 1773053 (Judge Gunning July 12, 2002), page 3 of Westlaw opinion (EPA moves to compel respondent to provide financial documents; the court rules: "[I]f Respondent Gerald Strubinger, Sr. wants to put his ability to pay the proposed penalty in issue, he must provide to Complainant the relevant financial records to support this claim. These records must be furnished to Complainant in sufficient time to allow Complainant to review the records and prepare for hearing"); *In re Compania Petrolera Caribe, Inc.*, Docket Number II-RCRA-UST-97-0310, 1999 WL 362882 (Judge Biro January 13, 1999) (EPA moves to compel respondent to produce all the documents it will rely in to support its claim of inability to pay and to produce financial information that might impact EPA's analysis of this question by January 19, 1999; court grants the motion to the extent it required respondent to produce the documentation by February 8, 1999 for EPA use at a hearing then scheduled to begin March 1, 1999).

Respondent should be compelled shortly to provide to EPA the documentation listed in Section II, above (at the least, the three most recent years of filed federal income tax returns for Respondent Andrew Chase and for each of the named corporate respondents) by May 10, 2012, or a date established by this Court.

IX. If Respondents Fail to Produce, Preclusion Would Be an Appropriate Sanction

To be effective, an order compelling production of documents must provide for sanctions in case of failure to comply with such order. The Part 22 rules specifically provide for such sanctions in 40 C.F.R. § 22.19(g), and the authority given to the Presiding Officer in this section is reinforced with the sanctions available in 40 C.F.R. § 22.4(c)(5), (6) and (10). Under the

jurisprudence of Part 22, EPA tribunals have issued preclusion orders (or noted their authority to do so) where a party did not comply with a pre-trial order of production, and the circumstances in those proceedings were similar in their operative facts to those that obtain in this proceeding.

In 2010, in the case of *In re Mike Vierstra d/b/a Vierstra Dairy*, Docket Number CWA-10-2010-0018, 2010 EPA ALJ Lexis 14 (Judge Gunning, June 2, 2010), the court set forth the operative principle that should similarly govern this matter (2010 EPA ALJ Lexis at *6-*7):

> By claiming in his Answer that he lacks the ability to pay a civil penalty in this case, Respondent put his ability to pay at issue, and, thus, has an obligation to provide information in support of his claim in advance of the hearing. Accordingly, Respondent is hereby directed to provide no later than 15 days prior to the hearing the six set of documents enumerated above. Should Respondent fail to submit these documents, Respondent is deemed to have waived his claim of inability to pay and any information offered by Respondent at the hearing in support of this argument will be precluded from evidence.[15]

Other tribunals have upheld the preclusion sanction under such circumstances and/or recognized their authority to impose this sanction.

See, e.g., In re 1836 Realty Corporation, Docket Number CWA-2-I-98-0017, 1999 WL 362869 (Judge Gunning April 8, 1999), where the court, ruling on EPA's motion to strike respondent's defense of ability to pay, states, "The record before me...supports a finding that the Respondent has chosen not to comply with the Discovery Order. Pursuant to EPA's motion, I find...that the Respondent is precluded from raising the defense of ability to pay." *See also Doug Blossom*, CWA-10-2002-0131, 2003 WL 22940544, where the court, after granting EPA's

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[15] The enumerated documents included, "copies of [Respondent's federal and state tax returns for the last three years," "any audited and unaudited financial statements for the last three years that [Respondent] has for the dairy and other affiliated businesses he owns or controls," "current balances in all bank and investment accounts," "a list of all assets [Respondent] owns and their respective estimated market values" and "the "terms and conditions of principal debts...and the name and relationship of the lender of each of the debts identified." 2010 EPA ALJ Lexis 14 at *3.

motion to compel production, admonished respondent that if he failed to produce the requested documentation within the time set by the judge's order granting EPA's motion, "he risks being prohibited from introducing any testimonial or documentary evidence in support of any reduction or elimination of the penalty based upon his financial circumstances" (*dicta*); *Vemco*, CAA-05-2002-0012, 2003 WL 1919589, where the court, after granting EPA's motion to compel production of financial documents, noted that if the information were of significant probative value and respondent failed to provide it within the time frame established by the court, "the information may be excluded from evidence" (*dicta*).;

The Part 22 rule permitting Presiding Officers to exclude evidence from admission into the record of a hearing corresponds to practice in the federal courts. *See, e.g.*, *Ross v. Garner Printing Company*, 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"; citation omitted, internal quotation marks omitted); *Armstrong v. Burdette Tomlin Memorial Hospital*, 276 F. Supp.2d 264, 276 (D. N.J. 2003) (exhibit never given during discovery nor listed in joint pre-trial order; court notes that under Rule 16(e) of the Federal Rules of Civil Procedure, courts are empowered to exclude from evidence "last minute evidence parties wish to present at trial").[16]

Not only does this Court possess the authority under 40 C.F.R. Part 22 to issue a preclusion order against Respondents if they fail timely to produce the sought-for financial documentation, the facts of this proceeding merit that it exercise such authority to issue such an

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[16] *See also In re Wisconsin Plating Works of Racine, Inc.*, Docket Number CAA-05-2008-0037, 2009 WL 1266817 (Judge Biro, April 30, 2009), where the court, in granting EPA's motion to compel discovery of financial documentation, observed that "the timing of production of documents must ensure that the opposing party has sufficient time to review them and prepare for the hearing."

order. 40 C.F.R. § 22.19(g)(2).

X. If Respondents Fail to Produce, Drawing an Adverse Inference is Warranted

As previously noted, the drawing of an adverse inference from a party's refusal to comply with a pretrial order is a device expressly sanctioned in 40 C.F.R. §§ 22.4(c)(5) and22.19(e)(1). Where such refusal has occurred, Part 22 tribunals have drawn such inferences.

In the EAB ruling in *In re William E. Comley, Inc. & Bleach Tek, Inc.*, FIFRA Appeal No. 03-01, 11 EAD 247 (EAB 2004), the Presiding Officer drew an adverse inference against respondents for their failure to comply with his discovery order. In so doing, he ruled that one respondent ("TEK") was the successor in interest to the liability of another respondent ("WECCO"). One basis for respondents' appeal was their assertion that the Presiding Officer abused his discretion in making a factual determination through invoking this sanction. The Board disagreed and upheld the Presiding Officer's ruling. It explained (11 EAD at 256):

> [T]he ALJ properly exercised his discretion in applying the sanction provision at 40 C.F.R. § 22.19(g) in response to the Respondents' failure to provide information probative of whether TEK was a successor in interest to WECCO's liability. The Respondents' assertion that the ALJ erroneously 'created a factual determination through sanction'...is mistaken, since an ALJ in accordance with 40 C.F.R. § 22.19(g) is allowed to draw factual inferences that are adverse to a party that fails to comply with a discovery order. Thus, the ALJ in this case was simply following what the regulations prescribe.

Part 22 trial courts have recognized their authority to draw adverse inferences and have effected it when, in circumstances similar to the instant proceeding, warranted. *See, e.g.*, *Doug Blossom*, CWA-10-2002-0131, 2003 WL 22940544, where the court strongly advised the respondent that his failure to produce the required documentation by the court-imposed deadline entails "that an inference may be drawn adverse to [him] with respect to ability to pay"; *Vemco*,

CAA-05-2002-0012, 2003 WL 1919589, in which decision the court noted that, "If any such information [financial documents] is significantly probative, and Respondent fails to provide it within the time provided, an inference may be drawn that the information would be adverse to Respondent"; *1836 Realty*, CWA-2-I-98-1017, 1999 WL 362869, where the court, after concluding the respondent has not properly complied with its discovery order, granted EPA's motion to strike the defense of ability to pay, stating, "I find that an adverse inference may be drawn as to the information to be discovered and concerning the issue of the Respondent's ability to pay the proposed penalty...."[17] *See also In re Bituma-Store, Inc., d/b/a/ Bituma Corporation and Gencor Industries, Inc.*, Docket Number EPCRA-7-99-0045, 2001 WL 66547 (Judge Gunning, January 22, 2001), where the court stated:

> Respondent did not give Complainant access to its financial records prior to the hearing nor did it produce in its prehearing exchange the financial documents that were described in the Prehearing Order to support a claim of inability to pay. Furthermore, Respondent has failed to comply with my two Orders directing Respondent to produce certain financial documents to support its claim of inability to pay, including certified copies of financial statements or tax returns. In view of Respondent's failure to comply with the Orders to produce the financial documents within its control, I am compelled to draw the inference that the requested documents would be adverse to Respondent. See 40 C.F.R. § 22.19(g)(1) [footnote omitted].

Part 22 jurisprudence is consistent with this Court drawing adverse inference against Respondents if they were to fail to comply with an order compelling the production of documents

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[17] The EAB noted that, in the context of an appeal of a default order, "In accordance with our jurisprudence on the 'ability to pay' penalty criterion, it is our view that [respondent], by not complying with the prehearing exchange requirement to provide documentary evidence demonstrating its inability to pay the proposed penalty, failed to raise its ability to pay as a cognizable issue. Thus, the company waived its ability to contest the Region's penalty proposal on this basis." *In re JHNY, INC., a/k/a Quin-T Technical Papers and Boards,* 12 EAD 372, 398-99 (EAB 2005).

this motion seeks.[18]

XI. Conclusion

For all the reasons set forth above, Complainant respectfully requests this Court issue an order that **a)** compels Respondents to provide EPA by no later than May 10, 2012 the financial documentation set forth in Section II, above; **b)** deems that Respondents, if they fail timely to provide the sought-for financial documentation, have waived their financial hardship/inability to pay claim, and concomitantly precludes Respondents from introducing and admitting into evidence at upcoming hearing in this matter documentation that would (or might) substantiate, or otherwise that is or might be relevant to, their claim of financial hardship/inability to pay; **c)** draws the appropriate adverse inferences for Respondents' failure to produce the sought-for financial documentation if they fail to comply with an order compelling production; and **d)** grants EPA such other and further relief that this Court deems just, lawful and proper.

Dated: March 25, 2012
New York, New York

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[18] Parts of this motion seek relief (having this Court issue an order of preclusion and draw an adverse inference) contingent upon Respondents failing to comply with an order this tribunal has yet to issue; these sanctions would be triggered only if Respondents were to violate an order this Court may never issue. Nonetheless, seeking a preclusion order and an order to draw adverse inferences now is not premature nor lacks sufficient ripeness for decision. Given that Respondents affirmatively asserted their financial hardship/inability to pay claim in December — nearly four months ago — and given that to date they have not attempted to introduce into this litigation any corroborating documentation, and given the scheduled trial date of slightly more than two and one-half months, EPA submits this matter is ripe for adjudication, and the sanctions sought are neither premature nor the need for them speculative. The pendency of such sanctions fortifies the legal effect and incentive for the necessity of prompt compliance therewith.

In re Andrew B. Chase et al.
Docket No. RCRA-02-2011-7503

CERTIFICATE OF SERVICE

I certify that I have this day caused to be sent the foregoing "MOTION TO COMPEL PRODUCTION FINANCIAL RECORDS/TO PRECLUDE/TO DRAW ADVERSE INFERENCES,"dated March 25, 2012, in the above-referenced proceeding in the following manner to the respective addressees listed below:

Original and One Copy
By Inter-Office Mail:

Office of Regional Hearing Clerk
U.S. Environmental Protection
Agency - Region 2
290 Broadway, 16th floor
New York, New York 10007-1866

Copy by Pouch Mail:

Honorable M. Lisa Buschmann
Administrative Law Judge
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Mail Code 1900 L
Washington, DC 20460

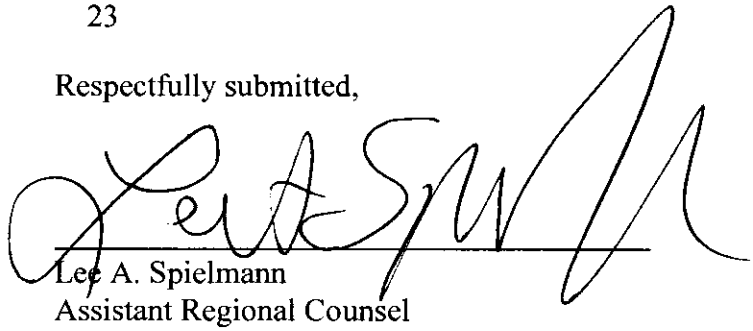
Copy by Certified Mail,
Return Receipt Requested:

Thomas W. Plimpton, Esq.
Stafford Piller et al.
One Cumberland Avenue
P.O. Box 2947
Plattsburgh, New York 12901

Dated: March 26, 2012
New York, New York

Lee A. Spielmann

Respectfully submitted,



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TO: Honorable M. Lisa Buschmann
Administrative Law Judge
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Washington, DC 20460

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