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BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:)	DOCKET NO. CWA-10-2005-0081
)	
LANDSING DEVELOPMENT)	MOTION FOR ADDITIONAL
GROUP, LLC)	DISCOVERY ON ABILITY TO PAY
)	
Boise, Idaho)	
)	
Respondent.)	

INTRODUCTION

Pursuant to 40 C.F.R. Sections 22.16 and 22.19(e) of the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits" ("Part 22 Rules"), Complainant U.S. Environmental Protection Agency Region 10 ("Complainant" or "EPA") moves for additional discovery on the issue of Respondent Landsing Development Group, LLC's ("Respondent" or "Landsing Development Group") claimed inability to pay the proposed penalty amount.

BACKGROUND

On April 5, 2005, EPA filed a complaint against Respondent alleging violations of the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, that occurred at a construction site in Boise, Idaho, owned and operated by Respondent. Complaint at ¶ 3.2. CWA Section 309(g)(2)(B), 33 U.S.C. § 1319(g)(2)(B), and 40 C.F.R. Parts 19 and 22 authorize the administrative assessment of civil

1 penalties up to \$11,000 per day per violation, not to exceed \$157,500. Instead of specifying a
2 penalty amount, the Complaint requested an assessment of a penalty “up to ... \$40,000.”
3 Complaint at ¶ 4.1. In EPA’s Opening Prehearing Exchange, EPA proposed a specific penalty
4 amount of \$25,000. *See* Complainant’s Opening Prehearing Exchange at Section III.
5 In Respondent’s Answer to the Complaint, Respondent stated that “Landsing [Development
6 Group] is currently in a Chapter 11 proceeding, and is unable to pay any proposed penalty.”
7 Answer to Complaint at ¶ XIII. The Chapter 11 proceeding filed by Respondent was terminated
8 on September 22, 2005 and the company remains solvent.

9 In Respondent’s Opening Prehearing Exchange, Respondent states that “Landsing
10 Development [Group] is a very small construction company and a \$25,000 penalty would be a
11 large hardship on the company.” Respondent’s Opening Prehearing Exchange at Section III.
12 This statement indicates that Respondent may be contending that it has an inability to pay the
13 proposed penalty amount. Respondent, however, has not submitted any information to
14 substantiate its inability to pay and Complainant does not have any information that indicates
15 that Respondent has an inability to pay the proposed penalty amount. For good cause shown,
16 EPA respectfully requests the Presiding Officer grant its motion for additional discovery on the
17 issue of inability to pay and order Respondent to file and provide copies of documentation in
18 Respondent’s possession that indicates an inability to pay the penalty amount.

19 ARGUMENT

20 I. EPA’s Motion to for Additional Discovery Should be Granted

21 40 C.F.R. Section 22.19(e) authorizes the Presiding Officer to order additional discovery
22 if the following three elements are met:

- 23 (1) The discovery will neither unreasonably delay the proceeding nor unreasonably
24 burden the moving party;

1 (2) The discovery seeks information that is most reasonably obtained from the non-
2 moving party, and which the non-moving party has refused to provide
3 voluntarily; and

4 (3) The discovery seeks information that has significant probative value on a disputed
5 issue of material fact relevant to liability or the relief sought.

6 40 C.F.R. § 22.19(e).

7
8 **A. Additional discovery will neither unreasonably delay the proceeding nor
unreasonably burden the non-moving party.**

9 Respondent claims that the proposed penalty “would be a large hardship on the
10 company.” Respondent’s Opening Prehearing Exchange at Section III. Since Respondent has
11 placed inability to pay at issue, Respondent should be required to submit financial
12 documentation prior to the start of the hearing in this matter. As the Environmental Appeals
13 Board (“EAB”) has stated, “in any case where ability to pay is put in issue, [EPA] must be given
14 access to the respondent’s financial records before the start of such hearing.” *In re New*
15 *Waterbury, Ltd.*, 5 E.A.D. 529, 542 (EAB 1994); *See also In re City of Bedford, Massachusetts*,
16 Docket No. CWA-01-2002-0059 (ALJ Moran, Order on Complainant’s Motion for Order
17 Compelling Production of Inability to Pay Documents, July 2, 2003); *In re Doug Blossom*,
18 Docket No. CWA-10-2002-0131 (ALJ Biro, Order on Complainant’s Motion for Order
19 Compelling Production of Ability to Pay Documents, November 28, 2003); *In re Gordon Head*
20 *and William Spangler*, Docket No. TSCA-V-C-057-93 (ALJ Charneski, Order Directing
21 Respondents to Provide Information, Feb. 8, 1996).

22 An order for additional discovery at this time would not delay the proceedings and
23 would avoid delays later in the proceeding. At this time, the hearing in this matter has been set
24 to begin on April 25, 2006, approximately three months from now.
25

1 Since the current hearing date is three months away, additional discovery would not
2 unreasonably delay the proceedings. Moreover, additional discovery will not unreasonably
3 burden Respondent. EPA is seeking information that is readily available to Respondent.
4 Although it may take some time for Respondent to compile the documents and, if needed, to
5 present the documents in written form, the time requires should not be excessive. Further, only
6 Respondent can provide evidence as to why and how the penalty will be a “large hardship on the
7 company.”

8 **B. The Additional Discovery Seeks Information That Is Most Reasonably**
9 **Obtained From The Non-Moving Party, and Which The Non-Moving Party**
10 **Has Not Provided Voluntarily.**

11 All EPA is requesting is documentation regarding inability to pay to substantiate
12 Respondent’s broad statement that the proposed penalty amount “would be a large hardship on
13 the company.” EPA has not discovered any information that indicates that Respondent is unable
14 to pay the proposed penalty amount. Any information that would indicate Respondent’s
15 inability to pay the proposed penalty amount, including, but not limited to, current income,
16 assets, and liabilities, is not publicly available and is within Respondent’s control. In addition,
17 Respondent has not provided this information in Respondent’s Opening Prehearing Exchange or
18 in a Reply Prehearing Exchange.

19 Therefore, Respondent has not voluntarily provided any inability to pay documentation
20 to substantiate the broad statement that the proposed penalty “would be a large hardship on the
21 company.”

22 **C. The Financial Information Sought Has Significant Probative Value On A**
23 **Disputed Issue Of Material Fact Relevant To The Relief Sought.**

24 Under CWA Section 309(g)(e), a violator’s “ability to pay” is one of the statutory
25 penalty factors that EPA must “take into account” in determining the amount of any penalty

1 assessed under the CWA. *See* 33 U.S.C. § 1319(g)(3). As such, the additional discovery that
2 EPA seeks has significant probative value as to the disputed material fact of Respondent's
3 ability to pay the proposed penalty amount. 40 C.F.R. Section 22.24 states that EPA has the
4 burden of presentation and persuasion that the relief sought is appropriate, and following EPA's
5 establishment of a *prima facie* case, Respondent has the burden of presenting any response or
6 evidence with respect to the appropriate relief. *See* 40 C.F.R. § 22.24(a).

7 Where, as here, ability to pay is one among many statutory factors EPA must consider in
8 proposing an administrative penalty, EPA has the burden to show that it considered
9 Respondent's ability to pay the proposed penalty. *In re New Waterbury*, 5 E.A.D. 529, 542
10 (EAB 1994). Here, EPA believes that it can meet this burden.¹ The burden then shifts to
11 Respondent to present specific evidence to show it cannot pay the penalty. *Id.* at 543. EPA
12 must then introduce new evidence or discredit Respondent's evidence to demonstrate the
13 appropriateness of the penalty it seeks. *Id.*

14 Although Respondent was, at one time, in Chapter 11 proceedings, those proceedings
15 have been terminated. No other public information appears to exist that indicates that
16 Respondent is unable to pay the proposed penalty amount. Respondent, however, has asserted
17 in its Opening Prehearing Exchange that the proposed penalty "would be a large hardship on the
18 company" but has failed to provide any information to support this claim. If Respondent does
19 have information to substantiate this broad statement, EPA believes that all parties would be
20

21 ¹ In *In re New Waterbury*, a Toxic Substances Control Act ("TSCA") case, the EAB stated the
22 standard for EPA's burden:

23 "The Region need not present any specific evidence to show that the respondent
24 can pay or obtain funds to pay the assessed penalty, but can simply rely on some
25 general financial information regarding the respondent's financial status which
can support the inference that the penalty assessment need not be reduced."


In re New Waterbury, 5 E.A.D. at 542.

1 better served if Respondent submits this evidence to allow EPA to evaluate this evidence in
2 advance of hearing.²

3 **CONCLUSION**

4 For the foregoing reasons, EPA requests that the Presiding Officer order Respondent to
5 produce documents supporting Respondent's inability to pay the proposed penalty. If
6 Respondent fails to provide such documentation within a reasonable period of time prior to the
7 hearing date, EPA requests that the Presiding Officer preclude Respondent from offering any
8 evidence at hearing of inability to pay in accordance with 40 C.F.R. Section 22.19(g).

9
10 DATED: January 17, 2006

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12 

13 Courtney J. Hamamoto
14 Assistant Regional Counsel
15 U.S. EPA Region 10
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24 ² Moreover, if Respondent fails to submit this information prior to hearing, EPA may object to
25 the admittance of this evidence at hearing and *New Waterbury* suggests that such an objection
may be sustained. *Id.* at 542.

1 **CERTIFICATE OF SERVICE**

2 I certify that the foregoing "Motion to Compel Production of Documents Or,
3 Alternatively, Motion in Limine," "Declaration of Courtney J. Hamamoto Supporting Motion to
4 Compel Production Or, Alternatively, Motion in Limine," and "Motion for Additional Discovery
on Ability to Pay," was sent to the following persons, in the manner specified, on the date below:

5 Original plus one copy, by hand delivery:

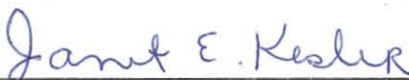
6 Carol Kennedy
7 Regional Hearing Clerk
8 U.S. EPA Region 10
1200 Sixth Avenue, ORC-158
Seattle, WA 98101

9 A true and correct copy, by U.S. Mail:

10 Judge Carl C. Charneski
11 U.S. EPA
Office of Administrative Law Judges
12 Mail Code 1900L
Ariel Rios Building
13 1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

14 Bruce Hessing
15 Landsing Development Group, LLC
16 5800 South Cole Road
Boise, ID 83709

17 DATED: January 17, 2006

18 
19 _____
20 Janet Kesler
21 U.S. EPA, Region 10
22
23
24
25