

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY



BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
COLLEEN TILLION, RICK) DOCKET NO. CWA-10-2004-0067
RICHARDS, AND PATRICIA)
RICHARDS,)
)
RESPONDENTS)

**ORDER ON COMPLAINANT'S MOTION FOR
ADDITIONAL DISCOVERY ON ABILITY TO PAY**

This proceeding arises under the authority of Section 309(g) of the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act ("CWA"), as amended, 33 U.S.C. § 1319(g), and is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (the "Rules of Practice"), 40 C.F.R. §§ 22.1-32. The Complaint issued in the above-cited matter charges Respondents with violating Section 301(a) of the CWA, 33 U.S.C. § 1311(a), and proposes a total civil administrative penalty in the amount of \$37,500. Respondents are *pro se* litigants in this matter.

Following the parties' submission of their prehearing exchanges in this matter, an Order Rescheduling Hearing was entered on March 2, 2005. Pursuant to that Order, the parties were directed to file a joint set of stipulated facts, exhibits, and testimony by September 28, 2005. The hearing is scheduled to begin on October 24, 2005 in Homer, Alaska.

On August 18, 2005, the United States Environmental Protection Agency, Region X ("Complainant" or "the EPA") filed Complainant's Motion for Additional Discovery on Ability to Pay ("Motion for Discovery"). The EPA seeks an order that directs Respondents to produce documents supporting their assertion that they are unable to pay the proposed penalty. Specifically, the EPA moves for an order requiring Respondents to submit statements concerning current income, assets owned or controlled, liabilities and related

maturities, current living expenses, ability to borrow and repay loans, and factors or other events that may influence their ability to pay a penalty. Additionally, the EPA requests that Respondents be directed to furnish a completed Financial Data Request form, true and signed copies of federal tax returns for the years 2002, 2003, and 2004, a substantive statement with supporting information describing the specific reason(s) why they are claiming an inability to pay the proposed penalty, and statements with relevant details indicating any litigation or financial settlements. If Respondents fail to provide the requested documentation within a reasonable period of time, the EPA requests that the undersigned, in accordance with Section 22.19(g) of the Rules of Practice, 40 C.F.R. § 22.19(g), preclude Respondents from offering any evidence at the hearing of inability to pay beyond that identified by Respondents in their prehearing exchange.

Respondents have not filed a response to the Motion for Discovery.^{1/}

Sections 22.19(a)-(f) of the Rules of Practice, 40 C.F.R. §§ 22.19(a)-(f), provide for the prehearing exchange of witness lists, documents, and information between the parties. Essentially, this exchange consists of discovery for the parties. "[A]dditional discovery" is permitted under Section 22.19(e) of the Rules of Practice only after motion therefor is filed and the Administrative Law Judge determines that the requested further discovery meets the specific criteria set forth in that subsection. In pertinent part, subsection (e)(1) provides for other 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

^{1/} A telephonic conference with the EPA and Respondents Colleen Tillion and Patricia Richards was conducted on September 8, 2005. Respondents Colleen Tillion and Patricia Richards were advised of the instant ruling on EPA's Motion for Discovery. Respondents Colleen Tillion and Patricia Richards stated that they intend to submit additional financial information no later than September 23, 2005. Additionally, Respondents are granted an extension of time until September 26, 2005 to respond to EPA's Motion for Accelerated Decision on Liability filed on September 1, 2005.

- (iii) Seeks information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought.

In support of its motion, the EPA argues that this discovery request satisfies the stated requirements for discovery under the governing regulation at Section 22.19 (e)(1) of the Rules of Practice. The EPA asserts that the requested discovery will neither unreasonably delay the proceeding nor unreasonably burden Respondents. In this regard, the EPA maintains that if Respondents provide the requested information promptly, the EPA will have adequate time to analyze the information and complete its preparations for the October 24-28, 2005, hearing. The EPA asserts that Respondents will not be unreasonably delayed because the requested information is readily available to them.

The EPA further maintains that the information sought is exclusively within the control of Respondents and is not otherwise obtainable. According to the EPA, Respondents have refused to provide the requested information despite its requests. Finally, the EPA submits that the financial information sought has significant probative value as to the disputed material fact of Respondents' ability to pay the proposed penalty.

The EPA persuasively argues that its motion for discovery is warranted under the governing Rules of Practice. First, I note that Respondents have not responded to EPA's Motion for Discovery. A party's failure to respond to a written motion within the designated period waives any objection to the granting of the motion under Section 22.16(b) of the Rules of Practice, 40 C.F.R. § 22.16(b).^{2/}

Moreover, as pointed out by the EPA, the Prehearing Order entered on October 7, 2004 directed Respondents to submit a statement explaining why the proposed penalty should be reduced or eliminated. If the Respondents took the position that they were unable to pay the proposed penalty or that payment would

^{2/} A party's response to any written motion must be filed within fifteen (15) days after service of such motion. 40 C.F.R. § 22.16(b). Where a document is served by first class mail or commercial delivery service, five (5) days shall be added to the time allowed for the filing of a responsive document. 40 C.F.R. § 22.7(c). A document is filed when it is received by the Regional Hearing Clerk. 40 C.F.R. § 22.5(a).

have an adverse effect on their ability to continue to do business, the Respondents were directed to furnish supporting documentation such as certified copies of financial statements or tax returns.

In Respondents' Answer to the Complaint, they raise the issue of their ability to pay the proposed penalty. In their prehearing exchange, Respondents state that all three Respondents will testify about their finances. Additionally, they describe Respondents' proposed Exhibits 16, 17, and 18 as proof of their finances. Respondents' proposed Exhibits 17 and 18 consist of photocopies of unsigned tax returns with attached W-2s for "Ivor B. Richards" for 1999 through 2003 along with a Social Security earnings record, two pay stubs for Ivor B. Richards from November 2004, three receipts for loan payments made in 2004, and a credit union deposit receipt. Respondents' proposed Exhibit 16 includes some wage and tax information, unemployment insurance claims, and food stamp determinations for Respondent Tillion during 2003 and 2004. Respondents have also provided photocopies of 2004 real estate tax bills for property owned by Colleen Richards and appraisal records from 2001-2004 for property owned by "Patrica" Richards. Respondents' Proposed Exhibit 2.

The evidentiary material provided by Respondents in their prehearing exchange is not adequate to document their financial position and does not provide the EPA with enough information to make an ability to pay determination. Much of the information provided by Respondents is not complete, is not signed, and does not sufficiently identify the parties.

The EPA, in its Motion for Discovery, seeks to compel Respondents to provide more complete and additional information concerning their financial status. The EPA further requests that if Respondents fail to provide such documentation within a reasonable period of time prior to the scheduled hearing that they be precluded from offering any evidence at the hearing of inability to pay beyond that submitted in Respondents' prehearing exchange.

Although Section 22.24(a) of the Rules of Practice places the burdens of presentation and persuasion on Complainant to prove that "the relief sought is appropriate,"^{3/} I agree with

^{3/} Each matter of controversy is adjudicated under the preponderance of the evidence standard. 40 C.F.R. § 22.24(b).

EPA's position that Respondents must produce evidence to support their claim of inability to pay as part of their prehearing exchange or they will be precluded from offering any evidence at the hearing of inability to pay beyond that submitted in Respondents' prehearing exchange.

Under Section 309(g) of the Clean Water Act, Complainant must consider, among other statutory penalty factors, the violator's "ability to pay" the penalty. In *In re New Waterbury, Ltd.* ("New Waterbury"), TSCA Appeal No. 93-2, 5 E.A.D. 529, 538 (EAB, Oct. 20, 1994), the Environmental Appeals Board ("EAB") found that in order for complainant "to make a prima facie case on the appropriateness of its recommended penalty, the Region [EPA] must come forward with evidence to show that it, in fact, considered each [statutory penalty] factor . . . and that its recommended penalty is supported by its analysis of those factors." However, complainant has no specific burden of proof as to any individual penalty factor, including ability to pay. Rather, its burden of proof "goes to the appropriateness of the penalty taking all factors into account." *Id.* (emphasis in original). Thus, a respondent's ability to pay is one of several statutory penalty factors that complainant must take into consideration in establishing the appropriateness of the proposed penalty.

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). Further, the EAB has found that "in any case where ability to pay is put in issue, the Region [EPA] must be given access to the respondent's financial records before the start of such hearing." *New Waterbury, supra*, at 542. Finally, the EAB has 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, the Region [EPA] may properly argue and the presiding officer [Administrative Law Judge] may properly conclude that any objection to the penalty based upon ability to pay has been waived."^{4/} *Id.*

^{4/} At the time a complaint is filed, a "respondent's ability to pay may be presumed until it is put at issue by a respondent." *New Waterbury, supra*, at 541. The mere allegation of an inability to pay in an answer is not sufficient to put ability to pay in issue. See *id.* at 542.

In the instant matter, Respondents' ability to pay is at issue and they have submitted "some" evidentiary materials to support this claim as part of their prehearing exchange. As such, at the hearing the EPA will need to present some evidence to show that it considered Respondents' ability to pay the proposed penalty. *Id.* However, as observed by the EAB in *New Waterbury*, the EPA "need not present any *specific* evidence to show that the respondent *can pay* or obtain funds to pay the assessed penalty, but can simply rely on some *general* financial information regarding the respondent's financial status which can support the *inference* that the penalty assessment need not be reduced." (emphasis in original) *Id.* at 543. If the EPA, as part of its *prima facie* case, produces some evidence concerning Respondents' general financial status from which it can be inferred that Respondents' ability to pay should not affect the penalty amount, then Respondents must present "specific" evidence to show that they "cannot pay any penalty." *Id.* Then, the EPA "as part of its burden of proof in demonstrating the 'appropriateness' of the penalty must respond either with the introduction of additional evidence to rebut the respondent's claim or through cross-examination it must discredit the respondent's contentions." *Id.* (citing *In re Kay Dee Veterinary Division of Kay Dee Feed Company*, FIFRA Appeal No. 86-1 at 10-11, see n.26 (CJO, Oct. 27, 1988)).

As previously noted, Respondents' ability to pay is at issue going into the hearing. If the EPA were to show that it considered Respondents' ability to pay a penalty, Respondents must present specific evidence that they cannot pay any penalty. As a caveat to Respondents, I observe that the evidentiary materials submitted by Respondents to date are not specific evidence showing that they cannot pay any penalty. The evidentiary material provided by Respondents in their prehearing exchange is not sufficient to document their financial position. I also observe that although Respondents are not precluded from testifying about their finances at the hearing, the probative value accorded their testimony may be significantly reduced because of the lack of corroborating evidence, especially as such evidence is within their control.

Finally, I point out to Respondents that Sections 22.19(a) and 22.22(a) of the Rules of Practice, 40 C.F.R. §§ 22.19(a), 22.22(a), provide that documents or exhibits that have not been exchanged and witnesses whose names have not been exchanged at least fifteen (15) days before the hearing date shall not be admitted into evidence or allowed to testify unless good cause is shown for failing to exchange the required information.

Accordingly, EPA's Motion for Discovery moving to compel Respondents to provide more complete and additional information concerning their financial status or be precluded from offering any evidence at the hearing of inability to pay beyond that submitted in Respondents' prehearing exchange is **Granted**. This financial information must be furnished to the EPA and filed with the Regional Hearing Clerk no later than September 23, 2005, to allow the EPA sufficient time to review the records and prepare for hearing.^{5/}

Barbara A. Gunning
Administrative Law Judge

Dated: September 9, 2005^{6/}
Washington, DC

^{5/} In addition, the Regional Hearing Clerk shall provide the undersigned Administrative Law Judge the name(s) of any person who has notified the Regional Hearing Clerk of his or her desire to participate in the proceedings as permitted under Section 309(g)(4) of the Clean Water Act. See Supplemental Rules Governing Public Notice and Comment in Proceedings under Sections 309(g) and 311(b)(6)(B)(ii) of the Clean Water Act and Section 1423(c) of the Safe Drinking Water Act, 40 C.F.R. § 22.45.

^{6/} The undersigned is not available from September 12 through 23, 2005.