UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
1836 REALTY CORPORATION,	)	DOCKET NO. CWA-2-I-98-1017
	)	
	)	
	)	
RESPONDENT	)	

ORDER GRANTING THE COMPLAINANT'S MOTION IN LIMINE TO EXCLUDE WITNESSES AND DOCUMENTS LISTED IN RESPONDENT'S PREHEARING EXCHANGE

ORDER GRANTING THE COMPLAINANT'S MOTION TO STRIKE RESPONDENT'S DEFENSE OF ABILITY TO PAY

ORDER DENYING THE COMPLAINANT'S MOTION FOR EXTENSION OF TIME ON HEARING

Introduction

This civil administrative penalty proceeding arises under Section 311(b)(6)(B)(ii) of the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act, as amended, 33 U.S.C. § 1321(b)(6)(B)(ii). This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits (the "Rules of Practice"), 40 C.F.R. §§ 22.01-22.32.

The United States Environmental Protection Agency ("EPA" or "Complainant") has filed a Complaint against 1836 Realty Corporation ("Respondent"), charging the Respondent with three counts of violating the Clean Water Act and its

implementing regulations at 40 C.F.R. Parts 110 and 112.[(1)] The EPA proposes a civil administrative penalty of $54,133 for these alleged violations.

On December 8, 1998, the Complainant filed a Motion In Limine To Exclude Witnesses And Documents Listed In Respondent's Prehearing Exchange. Specifically, the EPA objects to the Respondent calling the EPA's Regional Administrator for New England John DeVillars, EPA Media Specialist Peyton Fleming, and Rhode Island Department of Environmental Protection ("RI DEM") attorney Brian Wagner as witnesses. The EPA moves for exclusion of these witnesses. In addition, the EPA objects to the Respondent's proposed Exhibits numbers 8 through 19. The Respondent opposes the motion in limine.[(2)] For the reasons discussed below, the Complainant's motion in limine to exclude certain witnesses and documents will be granted.

On February 11, 1999, the Complainant filed a Motion To Strike Respondent's Defense of Ability To Pay. The Respondent opposes the motion to strike. For the reasons discussed below, the Complainant's motion to strike the Respondent's defense of ability to pay will be granted.

The Complainant's unopposed Motion For Extension of Time On Hearing filed on March 26, 1999, will be denied.

Motion in Limine to Exclude Certain Witnesses

Mr. DeVillars

The EPA notes that in its prehearing exchange the Respondent lists John DeVillars as a proposed witness. The EPA states that Mr. John DeVillars is the Regional Administrator of the EPA's New England office. According to the EPA, Mr. DeVillars, as the Regional Administrator, is responsible for overseeing the implementation of the many environmental programs conducted under federal law throughout New England. In addition, he is formally delegated the authority to initiate administrative penalty actions in New England under various federal environmental statutes, including the Clean Water Act. Section 311 of the Clean Water Act; EPA Headquarters Delegation No. 2-52-A. The EPA argues that as a result of the large number of matters with which the Regional Administrator is

involved, he is not able to be familiar with the details of each particular matter, including the instant action. Rather, the EPA maintains that the Regional Administrator must, of necessity, rely upon his staff in the Region.

The EPA argues that Mr. DeVillars should be excluded as a witness because he lacks first hand knowledge of the instant case and the Respondent has not presented any extraordinary circumstances that would overcome a presumption against having the Regional Administrator, a high level EPA official, testify at hearing. In support of this proposition, the EPA cites the case of Simplex Time Recorder Co. v. Secretary of Labor, 766 F. 2d 575, 586 (D.C. Cir. 1985), wherein the court upheld an Administrative Law Judge's order to strike four top Department of Labor officials from a witness list. Relying on U.S. v. Morgan, 313 U.S. 409, 422 (1941), the court in Simplex found that "top executive department officials should not, absent extraordinary circumstances, be called to testify regarding their reasons for taking official actions." See also Peoples v. United States Department of Agriculture, 427 F. 2d 561, 567 (D.C. Cir. 1970).

The EPA also cites the case of StanChem, Inc., Docket No. CWA-2-I-95-1040 (October 14, 1998, Order Granting In Part Renewed Motion for Discovery), wherein an Administrative Law Judge, citing U.S. v. Morgan, supra, U.S. v. Wheeling-Pittsburgh Steel Corporation, Civil No. 79-1194 (D.C.W.D. Pa., Nov. 1984), and U.S. v. Tenneco Chemicals, Inc., Civil No. 80-4141 (D.N.J. 1981), found that "there is a presumption that agency heads and other high level government officials are immune from deposition."

In response, the Respondent argues that the Simplex case is factually distinguishable from the matter at hand because the Respondent has not listed Mr. DeVillars as a witness to inquire into prosecutorial discretion but rather he is listed because he has personal knowledge of the facts in this case. In support of this position, the Respondent proffers a March 19, 1998, EPA press release wherein Mr. DeVillars is quoted several times making statements concerning developments that occurred at the Respondent's facility. Further, the Respondent avers that the statements made by Mr. DeVillars directly influenced his staff to ignore the penalty factors listed in Section 311 of the Clean Water Act and assess a penalty that would symbolize the sentiment expressed by Mr. DeVillars. The Respondent argues that in order to prove that the penalty was influenced by Mr. DeVillars and, thus, improperly calculated, the Respondent must be allowed to elicit testimony from Mr. DeVillars.

I disagree with the Respondent's position, and I find the EPA's arguments to be persuasive. In particular, I do not find the Simplex case to be significantly distinguishable from the facts in the instant matter. The fact that Mr. DeVillars, in his official capacity as the EPA Regional Administrator for New England, was quoted in an EPA press release concerning the alleged violation in this matter does not demonstrate that he has sufficient knowledge of the facts to warrant calling him as a witness.

Moreover, the Respondent's stated purpose for calling Mr. DeVillars as a witness is to show his alleged influence on the proposed penalty, which is not material to the matter before me and is not probative of the Respondent's defense. As correctly pointed out by the EPA, the deliberative processes of high Government officials generally are privileged, thereby excluding them as witnesses at hearing. The Respondent's memorandum indicates that it wishes to question this EPA official on purely discretionary decisions concerning enforcement of the Clean Water Act. It is emphasized to the Respondent that in order for the EPA to prevail as to its proposed penalty, the EPA must carry its burden of presentation and persuasion to establish that the proposed penalty is appropriate and meet its statutory and regulatory mandates that the penalty be determined in accordance with the penalty factors set forth in Section 311(b)(8) of the Clean Water Act and the penalty guidelines issued under the Act. Sections 22.14(c), 22.24, 22.27(b) of the Rules of Practice, 40 C.F.R. §§ 22.14(c), 22.24, 22.27(b).

Accordingly, the Complainant's motion to exclude Mr. DeVillars as a witness is granted.

Mr. Fleming

The EPA objects to having Mr. Peyton Fleming testify in this case on the grounds that any testimony he would provide would be irrelevant, immaterial, and of little probative value within the meaning of Section 22.22(a) of the Rules of Practice, 40 C.F.R. § 22.22(a), and would also unnecessarily prolong the hearing. The EPA states that Mr. Fleming is an EPA Media Specialist assigned to the New England Regional Press Office and his duties primarily concern the preparation of press releases on EPA actions, including the initiation of enforcement cases. The EPA maintains that Mr. Fleming does not investigate violations and has no decision- making authority concerning EPA enforcement actions. Previously, Mr. Fleming worked for the RI DEM as a media

specialist and acted as the spokesperson for the spill event at the 1836 Realty Corporation. The EPA asserts that Mr. Fleming had nothing to do with the EPA's decision to initiate the instant case. In support of the foregoing, the EPA has proffered the December 1, 1998, affidavit of Mr. Fleming attesting to the above information.

In response, the Respondent contends that the testimony of Mr. Fleming is imperative to its defense. Specifically, the Respondent avers that Mr. Fleming "was more than a person who just 'developed a press release for the case'" but rather he "was a conduit of misinformation between the RI DEM and the EPA." The Respondent further claims that this misinformation had a direct influence on the assessment of an exceptionally high penalty in this case. In support of this position, the Respondent points to the fact that Mr. Fleming sent a copy of the EPA's March 19, 1998, press release concerning the EPA's issuance of a Complaint against the Respondent to the prosecuting state attorney.

In Mr. Fleming's December 1, 1998, affidavit proffered by the EPA in support of its motion in limine to exclude certain witnesses, Mr. Fleming states that he sent a copy of the final March 19, 1998, press release to Mr. Brian Wagner of the RI DEM because he had been involved in the RI DEM's investigation of the gasoline spill from the Respondent's facility.

The Respondent's insinuation of some improper and/or conspiratorial relationship between the RI DEM and the EPA or Mr. Fleming and Mr. Wagner, as allegedly demonstrated by the forwarding of a press release, cannot reasonably provide the basis for the Respondent calling Mr. Fleming or Mr. Wagner as witnesses. Bald assertions concerning Government officials acting in their capacities as officials cannot be used to unnecessarily delay the hearing process or to obfuscate the issues to be adjudicated. The information attested to by Mr. Fleming in his December 1, 1998, affidavit supports the EPA's objection to the Respondent calling Mr. Fleming as a witness on the grounds that his testimony would be irrelevant, immaterial, and of little, if any, probative value. As such, the EPA's objection is sustained.

Mr. Wagner

Third, the EPA objects to the Respondent calling Mr. Wagner as a witness without further clarification on the Respondent's purpose in calling him and the EPA reserves its right to seek an order excluding his testimony at hearing.

Again, I agree with the EPA's position. As discussed above, the Respondent's speculative reason for calling Mr. Wagner does not provide adequate reason to call him as a witness. Thus, unless further elucidation on the Respondent's reason for calling Mr. Wagner as a witness is provided, the EPA's objection to Mr. Wagner's testimony would be sustained if renewed at hearing.

Motion In Limine To Exclude Certain Documents

The EPA objects to several documents listed in the Respondent's prehearing exchange being introduced into evidence on the ground that these documents have no significant probative value to this case. Specifically, the EPA objects to the Respondent's proposed Exhibits Numbers 8 through 19 which are administrative complaints and one consent agreement and final order that the EPA previously filed in Clean Water Act Section 311 cases involving parties unrelated to the Respondent.

First, the EPA points out that the Respondent has not included all the Clean Water Act Section 311 administrative penalty actions initiated by the EPA in the New England region. Second, the EPA argues that the information about other Clean Water Act cases does not have significant probative value and that it is inappropriate to compare settled cases to adjudicated cases when determining whether proposed penalties are excessive and contrary to Agency policies and procedures. See Chautauqua Hardware Corporation, 3 EAD 616, 626-627 EPCRA Appeal No. 91-1 (CJO, June 24, 1991) (the Chief Judicial Officer ("CJO") rejected a discovery request in a Section 313 Emergency Planning and Community Right-To-Know Act ("EPCRA") case for settlement agreements, final orders, etc. on ground that the requested materials as well as other EPCRA cases can not be used to show that the penalty is inappropriate); Briggs & Stratton Corporation, 1 EAD 653, 665 (JO, Feb. 4, 1981) (the Judicial Officer ("JO") recited the Presiding Officer's rejection of arguments that the proposed penalties were inconsistent with the EPA's policy favoring uniform penalties for like violations as evidenced by complaints filed in other cases and also found it inappropriate to compare settled cases to adjudicated cases).

The Respondent counters that the two cases cited by the EPA do not support its objection to the proposed exhibits concerning the administrative complaints.[(3)]

Asserting that the Chautauqua case relies on the reasoning in the Briggs case, the Respondent then goes on to argue that in Briggs the respondent attempted to compare settled cases to adjudicated cases but the JO found that comparisons based on penalties assessed after hearing with penalties assessed after negotiation are difficult. In the instant matter, the Respondent argues that it is attempting to introduce complaints for the "exact same" violation to compare the penalties sought in order to show that the penalty proposed in the instant matter is excessive and inconsistent with the EPA's policy favoring uniform penalties for like violations.

The Respondent's argument is unavailing. First, the Respondent ignores that part of the JO's decision in the Briggs case which quotes the Presiding Officer's reasoning for rejecting the respondent's argument that penalties proposed and/or assessed against other violators of the PCB regulations were relevant to the PCB case before the Presiding Officer. The Presiding Officer rejected the respondent's arguments in Briggs because it was found that each case cited by the respondent varied extensively and that the "criterion" for a similar case "defied definition." The JO, in light of his prefatory comments concerning the Presiding Officer's decision and by extensively quoting the Presiding Officer's reasoning, impliedly adopts the Presiding Officer's reasoning as his own. The JO then went on to add that comparisons of penalties assessed by the Presiding Officer after a hearing with penalties assessed after negotiation with the enforcement staff are difficult, if not impossible, to make. In the instant matter, the Respondent attempts to rely only on the additional reasoning employed by the JO in rejecting the respondent's arguments in the Briggs case, ignoring the thrust of the JO's ruling which is contained in the quoted language of the Presiding Officer.

Moreover, I find that the CJO's and JO's rulings in the Chautauqua and Briggs cases support the EPA's argument in the instant case. The proposed exhibits consisting of the administrative complaints filed by the EPA in other Section 311 Clean Water Act cases are of little, if any, probative value. As observed by the Presiding Officer in the quoted language recited by the JO in Briggs, "... if uniformity is to be achieved, it must be reached by the consideration of the factors in the Act [Toxic Substances Control Act] and each of them, in light of the record evidence presented at a hearing. Placing a price tag on a violation without adequate consideration of the factors pertaining to the violation as well as the violator is not only contrary to express provisions of the Act, but tends to defeat rather than advance the purpose of the Act in prescribing the assessment of civil penalties..." Briggs, supra, at 665-666. Penalties proposed or assessed in other cases generally are not relevant to the

penalty proposed or assessed in the instant matter. See also Butz v. Glover Livestock Commission Co., 411 U.S. 182, 187 (1973). As such, pursuant to Section 22.22(a) of the Rules of Practice, 40 C.F.R. § 22.22(a), these proposed exhibits are inadmissible as evidence. Accordingly, the Complainant's motion to exclude these documents is granted.

Motion To Strike Respondent's Defense Of Ability To Pay

By motion filed on February 9, 1999, the EPA requests the issuance of an order finding that the Respondent failed to comply with the November 11, 1998, Order Granting Complainant's Motion for Issuance of a Discovery Order ("Discovery Order") and precluding the Respondent's defense of ability to pay a penalty. It is noted by the EPA that the Discovery Order required the Respondent to answer interrogatories and produce documents concerning the corporate and financial status of the 1836 Realty Corporation and its related entities. The EPA contends that the Respondent failed to comply with the Discovery Order by submitting incomplete, inaccurate, and/or contradictory answers. It is asserted by the EPA that there are so many discrepancies in the Respondent's answers to the EPA's interrogatories that the veracity of the entire response is called into question. Based on the Respondent's alleged failure to comply with the Discovery Order, the Respondent argues that the undersigned should infer that the financial information requested is adverse to the Respondent under the provisions of Section 22.19(f)(4) of the Rules of Practice, 40 C.F.R. § 22.19(f)(4). Further, the EPA argues that pursuant to Section 22.04(c)(10) of the Rules of Practice, 40 C.F.R. § 22.04(c)(10), the Respondent should be sanctioned and barred from asserting any defense on the ground of ability to pay.

In support of its motion, the EPA has proffered the February 9, 1999, affidavit of Mr. John L. Shanahan, Jr., a financial analyst for the EPA. In this affidavit, Mr. Shanahan states that the majority of the Respondent's answers to the EPA's interrogatories (attachment A) were incomplete, inaccurate, and/or in contradiction to other answers that the Respondent provided in its response or to other documents in the EPA's possession. Mr. Shanahan details numerous examples of the alleged deficiencies in the Respondent's answers.

For example, Mr. Shanahan points out that in response to question 34 relating to the disposition of any real property owned by 1836 Realty and related entities, the Respondent's response is "none" which contradicts at least the one transaction between 1836 Realty and 1850 Realty referred to in the proposed Exhibits 5 and 6 of the Complainant's prehearing exchange. Mr. Shanahan notes that the tax returns for the related entities of 1836 Realty Corporation, including those for Mr. Robert S. Potter, Pro Oil Co. for year 1998, Rosemere Realty, Inc. for years 1993 and 1994, and Lyttle Realty, Inc. for year 1994, were not provided as requested pursuant to the Discovery Order. Shanahan Affidavit, par. 26. Mr. Shanahan states that another example of the Respondent's failure to provide the information requested under the Discovery Order is found in its response to Question 3(d) of the Interrogatories concerning all inter-entity transactions between 1836 Realty and the Related Entities. The Respondent's answer to Question 3(d) was that "1836 has no relationship with the 'related entities' with respect to the question asked" even though the tax returns provided show inter-company loans between 1836 Realty and Pro Oil and Potter Oil. Mr. Shanahan notes that the tax returns for 1850 Realty Corporation and Pro Oil, Inc. also list inter-company loans which may include 1836 Realty. Shanahan Affidavit par. 13.

The Respondent opposes the Complainant's motion to strike its defense of ability to pay.[(4)] First, the Respondent argues that the Discovery Order "simply allowed the Complainant to send the Respondent discovery questions" and that the Discovery Order did not eliminate the Respondent's right to object to the scope of the discovery questions. It is maintained that the Respondent should not be denied its constitutional right to due process and privacy based on the Complainant's determination that the answers were not sufficient. According to the Respondent, the EPA has sought financial information of private entities that are not named respondents, are not liable for the assessed fines, and are private independent corporations, and that such discovery is an "incredible invasion of privacy."

Specifically, the Respondent asserts that the tax returns for Mr. Robert S. Potter are irrelevant and immaterial as the EPA has not provided evidence to pierce the corporate veil. The Respondent further asserts that the EPA's request for Mr. Potter's tax returns is another attempt to harass Mr. Potter and to delve into his personal finances under the guise that the financial information is "necessary to determine 1836 Realty Corporation's ability to pay." The Respondent points out that it has provided the tax returns for the other corporations as requested. The Respondent argues that Mr. Shanahan's affidavit does not address the Respondent's filed objections to the Discovery

Order. Further, the Respondent argues that the alleged deficiencies or inconsistencies noted in the affidavit are trivial and do not relate to the Complainant's stated purpose to determine whether 1836 Realty Corporation has the ability to pay the assessed fine.(5)

Finally, the Respondent argues that there are no facts that substantiate a finding that the Respondent willfully and intentionally failed to respond to the Discovery Order and, therefore, there is no justification for the remedy sought by the EPA. Specifically, the Respondent maintains that First Circuit case law requires willful or deliberate misconduct for the preclusion of evidence. See Yang v. Brown University, 149 F.R.D. 440 (D.R.I. 1993); Jackson v. Harvard University, 900 F.2d 464 (1st Cir. 1990); Freeman v. Package Machinery Co., 865 F.2d 1331 (1st Cir. 1988).

When the Discovery Order was issued in this matter, the Respondent's objections were noted and ruled upon. The Respondent is not satisfied with the scope of discovery under the Discovery Order and continues to object. As a result, the Respondent knowingly and willfully has not fully complied with the Discovery Order. This determination is made exclusive of the Respondent's refusal to provide the tax returns for Mr. Potter. To date, the EPA has not established its entitlement to Mr. Potter's individual tax returns.

Pursuant to the governing Rules of Practice, at Section 22.19(f)(4), failure to comply with a discovery order issued under Section 22.19, may lead to the inference that the information to be discovered would be adverse to the party from whom the information was sought. Such is the case here. The record before me, including the affidavit of Mr. Shanahan and the Respondent's objection to the EPA's motion to strike, supports a finding that the Respondent has chosen not to comply fully with the Discovery Order. Pursuant to the EPA's motion, I find that an adverse inference may be drawn as to the information to be discovered concerning the issue of the Respondent's ability to pay the proposed penalty and, accordingly, that the Respondent is precluded from raising the defense of ability to pay.

Motion For Extension Of Time On Hearing

The EPA moves for extension of time on hearing on the ground that it would be difficult to prepare for hearing until its motion in limine to exclude certain witnesses and documents listed in the Respondent's prehearing exchange and motion to strike Respondent's defense of ability to pay are ruled upon. The Respondent has not responded to the motion for extension. In view of the foregoing adjudication of the Complainant's two motions, the motion for extension of time on hearing is denied. It is noted that the hearing is scheduled to begin on June 8, 1999, which provides sufficient time for the parties to prepare for hearing.

Order

The Complainant's Motion In Limine To Exclude Witnesses and Documents Listed In Respondent's Prehearing Exchange is Granted.

The Complainant's Motion To Strike Respondent's Defense Of Ability To Pay is Granted.

The Complainant's Motion For Extension Of Time On Hearing is Denied.

Original signed by undersigned

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Barbara A. Gunning
Administrative Law Judge

Dated: 4/8/99
Washington, DC

1. The Complaint was amended by Order on March 17, 1999, upon motion by the EPA.

2. The Respondent's Motion for an Extension of Time to Respond to Complainant's Motion in Limine to Exclude Witnesses and Documents Listed in Respondent's Prehearing Exchange was granted by Order entered on January 12, 1999.

3. The Respondent withdraws its proposed Exhibit Number 18 that references a consent order and final order.

4. The Respondent's request for oral argument on this motion is denied.

5. The Respondent states that it agrees with the EPA's assertion that the Respondent's answer to question number 11 is inaccurate and that the information sought will be forwarded to the EPA as soon as practicable.