



**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR**

In the Matter of:)
)
Joseph Oh)
)
and) **Docket No. RCRA-10-2011-0164**
)
Holly Investment, LLC)
) **Dated: July 16, 2012**
Respondents.)

ORDER
ON COMPLAINANT’S MOTION TO COMPEL DISCOVERY OR, IN THE
ALTERNATIVE, MOTION IN LIMINE

I. Background

This proceeding was initiated on September 28, 2011, with the filing of a Complaint, Compliance Order, and Notice of Opportunity for Hearing (“Complaint”) by the Director of the Office of Compliance and Enforcement for EPA Region 10, (“Complainant”), against Joseph Oh and Holly Investment, LLC (“Respondents”). On October 27, 2011, Respondents filed an Answer denying each allegation of the Complaint for lack of knowledge or information, and denying that Respondents owned an/or operated the facility at issue.¹ The hearing in this matter is scheduled to commence on August 14, 2012.

A Prehearing Order was issued December 7, 2011, directing the parties to submit a prehearing exchange of information and establishing a series of deadlines by which the exchanges were to occur. The parties were directed to provide “a list of the names of any witnesses the party intends to call at hearing” and “copies of all documents, records, and other exhibits the party intends to introduce into evidence.” Prehearing Order at 2. Respondents were also specifically ordered to provide “a narrative statement, and a copy of any supporting documents, explaining in detail the legal or factual bases” for the denials of Complainant’s

¹ Although the Answer indicated it was submitted only by Respondent Joseph Oh, the latter stated that the Answer and Prehearing Exchange were submitted on behalf of both Respondents, and indicated that he is the “FBO” of Holly Investment, LLC.

factual allegations. Prehearing Order at 3. Furthermore, Respondents were instructed that if they intended to take “the position that the proposed penalty should be reduced or eliminated on any grounds, such as an inability to pay,” they must “provide a detailed narrative statement explaining the precise factual and legal bases for [their] position and a copy of any and all documents upon which [they] intend[] to rely in support of such position.” *Id.* Respondents were required to file their prehearing exchange no later than February 17, 2012.

Respondents filed their Prehearing Exchange on March 1, 2012. In the list of witnesses in the Prehearing Exchange, Respondents stated that they intend to call as a witness an unnamed “Representative of Northwest Tank and Environmental Services, Inc.” Respondents’ Prehearing Exchange at 2. Respondents did not submit any proposed exhibits, but merely indicated that they will use all of the documentary evidence identified in Complainant’s Prehearing Exchange. They stated that they also have “other evidence to present,” that they expected “to receive reports from Northwest Tank and Environmental Services within” 20 days, and that such reports would be forwarded to Complainant upon receipt. *Id.* Respondents did not provide any narrative statement in their Prehearing Exchange.

On June 29, 2012, Complainant filed a Motion to Compel Discovery or, in the Alternative, Motion in Limine (“Motion”). To date, no response to the Motion has been received from Respondents.

II. Complainant’s Motion

In the Motion, Complainant requests under 40 C.F.R. § 22.19(e)(1) “an order compelling Respondents to file written responses” by July 23, 2012 to the Prehearing Order’s requirements to submit a narrative statement explaining in detail the legal or factual bases for the denials in the Answer and for any position that the proposed penalty should be reduced or eliminated. Motion at 4. Complainant also seeks an order compelling Respondents to specifically identify the unnamed representative of Northwest Tank and Environmental Services, Inc. listed as a potential witness, and a more detailed narrative of each witnesses’s testimony. Motion at 4.

Complainant states that while Respondents have not formally claimed that they would be unable to pay the proposed penalty, Respondents have raised this issue during discussion, and therefore it is relevant to the penalty. *Id.* at 7. Complainant therefore seeks an order compelling Respondents to formally indicate whether they intend to claim an inability to pay and to provide copies of any and all documents that Respondents intend to offer in support of that claim. *Id.* at 4, 7. At a minimum, Complainant requests that Respondents submit financial information described in Exhibits A and B attached to the Motion. Attachment A is an “Initial Information Request,” seeking, *inter alia*, Respondents’ individual and corporate federal tax returns for 2010 and 2011, a list of all entities Respondents control or are affiliated with and shareholders and annual financial statements thereof, and information as to any litigation, investigations and financial settlements. Attachment B is a form for “Individual Ability to Pay Claim.”

Complainant argues that the discovery order it seeks will prevent delay by clarifying the issues in actual dispute and avoiding the difficulties that would result if Respondents were allowed to produce surprise evidence or raise novel issues at hearing. Motion at 6. Complainant also argues that the information being sought is necessarily in Respondents' control and is not otherwise obtainable, and that it has requested financial information from Respondents. *Id.* at 6, 7. Respondents have had ample time to provide the information requested, Complainant points out, and asserts that it needs time to review the information before hearing, and that it would be at a distinct disadvantage at the hearing if Respondents are allowed to proffer financial evidence at the hearing without having provided it to Complainant before the hearing.

In the alternative, Complainant requests under 40 C.F.R. § 22.19(g)(1) that if Respondents fail to file the information requested in the Prehearing Order, adverse inferences be drawn against Respondents that they “admit the allegations in paragraphs 2.1 through 2.12 and 3.2 through 3.11 of the Complaint and they do not take the position that the proposed penalty should be reduced or eliminated” *Id.* at 8–9. Complainant also requests that if Respondents fail to provide the requested information, any testimony or exhibits concerning Respondents' denials or arguments that the penalty be reduced be excluded from evidence at the hearing.

III. Relevant Regulatory Provisions

The procedural rules governing this proceeding (“Rules”) allow a party to move for additional discovery after the prehearing information exchange. 40 C.F.R. § 22.19(e)(1). The moving party must “specify the discovery sought, provide the proposed discovery instruments, and describe in detail the nature of the information and/or documents sought” *Id.* The Rules provide in 40 C.F.R. § 22.19(e) that the Administrative Law Judge (ALJ) may order such additional discovery only if it:

- (i) Will neither unreasonably delay the proceeding nor unreasonably burden the non-moving party;
- (ii) Seeks information that is most reasonably obtained from the non-moving party, and which the non-moving party has refused to provide voluntarily; and
- (iii) Seeks information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought.

The Rules further provide that if a party fails to provide information within its control as required for the prehearing exchange or by order granting a motion for additional discovery, the ALJ may in her discretion “[i]nfer that the information would be adverse to the party failing to provide it,” or “[e]xclude the information from evidence.” 40 C.F.R. § 22.19(g).

IV. Discussion and Conclusion

Respondents were served with the Motion by overnight mail and email on June 29, 2012,

and have not filed a response to the Motion. The Rules provide that at 40 C.F.R. § 22.16(b) that a response to a motion must be filed within 15 days after service of the motion, and that “[a]ny party who fails to respond within the designated period waives any objection to the granting of the motion.” Therefore, Respondents have waived any objection to the Motion. Nevertheless, the merits of the Motion are addressed herein.

In regard to the Prehearing Exchange, the Environmental Appeals Board has stated that “[t]he efficient and timely exchange of information pursuant to 40 C.F.R. § 22.19 is central to achieving timely administrative case resolutions.” *Ag-Air Flying Services, Inc.*, FIFRA Appeal No. 06-01, at 9 (EAB, Sept. 1, 2006) (Final Decision and Order).

There is no indication that Respondents have provided the requested documents to Complainant. Considering the first criterion under 40 C.F.R. § 22.19(e), there is a period of four weeks before the start of the hearing on August 14, 2012, and Respondents have been aware of their obligation to produce the information requested in the Prehearing Order for seven months, since it was issued in December 2011. Respondents have been aware of the request to provide the name of the proposed witness from Northwest Tank and Environmental Services, Inc. and of the financial information requested at least since it was served with the Motion two weeks ago. Complainant reasonably requests information and documents which Respondents should have in their possession or control. As to the second criterion under Section 22.19(e), the information and documents sought are not publicly available, and Respondents failed to provide the information required by the Prehearing Order and have not supplemented their Prehearing Exchange to provide it. Respondents also have not supplied Complainant with financial information despite having being requested to do so by Complainant.

Regarding the third criterion, the information sought by Complainant’s Motion does not clearly constitute “information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought” because Respondents have not demonstrated any disputed issue of material fact as to liability or the penalty. Respondents denied each and every allegation of the Complaint, including denying for lack of knowledge or information the allegation that “Holly Investment, LLC is a limited liability company registered to do business in the State of Washington.” Complaint and Answer ¶ 2.3. Respondent also have not stated their position as to proposed penalty. The Rules provide that an answer “shall . . . state: [t]he circumstances of arguments which are alleged to constitute the grounds of any defense; the facts which respondent disputes; [and] the basis for opposing any proposed relief” 40 C.F.R. § 22.15(b). Respondents have not complied with this requirement of the Rules, and have not submitted any proposed documentary evidence. Furthermore, Respondents have submitted only cursory descriptions of the subject of testimony of its three proposed witnesses, which do not indicate any grounds for Respondents’ defenses, facts in dispute, or any basis for opposing the proposed penalty. Such descriptions also do not constitute a “brief narrative summary of their expected testimony” as required by the Rules at 40 C.F.R. § 22.19(a)(2)(i). In the circumstances of this case, where Complainant essentially seeks to compel Respondents’ compliance with the Prehearing Order and Rules, the third criterion of 40 C.F.R. § 22.19(e) is deemed to be met.

As to the financial documents, the criteria set forth in the applicable statute, the Resource Conservation and Recovery Act (“RCRA”), for assessing a penalty are “the seriousness of the violation” and “good faith” efforts to comply. Therefore, “because it is not part of the Agency’s required proof, ‘ability to pay,’ in order to be considered, must be raised and proven as an affirmative defense by the respondent.” *Carroll Oil*, 10 E.A.D. at 663. In that there is no obligation on Complainant to prove that Respondents are able to pay the proposed penalty, the instant proceeding differs from proceedings under other environmental statutes. If Respondents do not offer any evidence to prove inability to pay, then it will not affect the assessment of the penalty, and Complainant need not address the issue.

Where Respondents have not raised the issue of inability to pay in this proceeding, any evidence offered on the issue at the hearing would be excluded from evidence. However, perhaps considering that Respondents are appearing pro se, Complainant seeks an affirmative statement from Respondents as to whether they intend to raise an inability to pay defense, giving them another opportunity to raise the issue. Therefore, in these circumstances, Complainant’s request to compel production of financial documents is granted. Nevertheless, to allow Complainant to have sufficient time for witnesses and analysts to review any financial documents submitted and to prepare a rebuttal, Respondents will be required to provide the documents within the time period set forth below. Respondents will be required to send a copy to the undersigned and to Complainant by email or facsimile to ensure timely receipt, given that the hearing is scheduled to commence only three weeks from the due date.

The next question is whether to grant Complainant’s request for an order drawing adverse inferences and excluding testimony and exhibits. While Respondents could be subject to sanctions under 40 C.F.R. § 22.19(g) for failure to comply with the Prehearing Order, Complainant has not requested such relief, perhaps considering that Respondents are appearing pro se. An automatic sanction cannot be imposed at this point in the proceeding for failure to provide the information and documents pursuant to this Order. If Respondents timely submit some information, a determination must be made as to whether the submittal is sufficient or whether it constitutes a failure under 40 C.F.R. § 22.19(g) to “provide information within its control as required,” before a sanction may be imposed. Furthermore, a question of appropriateness of imposing a sanction may arise if there is a question of timeliness, such as documents being received after the deadline but purportedly submitted in advance thereof. Therefore, an appropriate conditional statement of sanction is included below.

ORDER

1. Complainant's Motion to Compel Discovery is **GRANTED**. Accordingly, Respondents shall file and serve the following items on Complainant and the undersigned ALJ, with a copy by facsimile or email to Complainant's counsel and to the undersigned to ensure timely receipt on or before July 23, 2012:

(a) For each of paragraphs 2.1 through 2.12 and 3.2 through 3.11 of the Complaint, state in detail the reasons for denying the allegations in the paragraph, or state that Respondents no longer deny the allegations in the paragraph. Respondents shall include the facts and/or legal arguments, and a copy of any documents, in support of their reasons for denying each such paragraph.

(b) State the name of the proposed witness from Northwest Tank and Environmental Services, Inc.

(c) For each of Respondents' proposed witnesses, describe in detail the testimony, including specific facts, expected to be presented at the hearing.

(d) Submit copies of any and all document(s) that Respondents intend to offer into evidence during the hearing.

(e) State a list of reasons why the proposed penalty should be reduced or eliminated. For each reason, state specific facts and/or legal arguments in support. Submit copies of any and all documents Respondents intend to offer at the hearing in support of these reasons.

(f) State whether any Respondent claims that it is unable to pay the proposed penalty. If any Respondent claims that the penalty should be reduced or eliminated because of an inability to pay, submit the information and documents identified in Exhibits A and B to Complainant's Motion.

2. If Respondents fail to timely submit all of the information listed above, they may be deemed to have admitted allegations of violation in the Complaint, they may be precluded from introducing documentation or information into the record in this proceeding, and/or an inference may be drawn that any such information would be adverse to them.

3. Complainant's alternative Motion in Limine is **DENIED** at this time, but may be renewed as necessary.

M. Lisa Buschmann
Administrative Law Judge