

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

In the Matter of:)	Docket No.
)	
Summit, Inc.)	Proceeding to Assess a Civil Penalty
6901 West Chicago Avenue)	Under Section 3008(a) of the Resource
Gary, Indiana)	Conservation and Recovery Act,
)	42 U.S.C. § 6928(a)
U.S. EPA ID #: INX 000 028 902)	
)	RCRA-05-2014-0006
Respondent.)	
_____)	

**MEMORANDUM OF LAW IN SUPPORT OF COMPLAINANT’S
MOTION TO EXCLUDE TESTIMONY AND OTHER EVIDENCE RELATED
TO RESPONDENT’S INABILITY TO PAY THE PROPOSED CIVIL PENALTY
AND TO DRAW AN ADVERSE INFERENCE.**

I. REQUESTED RELIEF AND JURISDICTION

Complainant requests that this Court grant its Motion to Exclude the Testimony or Other Evidence Related to Respondent’s Inability to Pay the Proposed Civil Penalty and to Draw an Adverse Inference (“Motion”) pursuant to the authority of Sections 22.16, 22.19(g) and 22.22(a) 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*, (“Consolidated Rules” or “CROP”), 40 C.F.R. §§ 22.16, 22.19(g) and 22.22(a).

II. PROCEDURAL BACKGROUND

Complainant filed the Complaint in this matter on March 17, 2014, alleging seven counts involving violations of section 3008(a) the Solid Waste Disposal Act, as amended, also known as the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6928(a). Respondent filed its Answer on or about April 18, 2014. On June 10, 2014, this Court issued a Prehearing Order which required the Parties to respond to specific questions and submit specific information. On October 21, 2014, the Complainant filed a Memorandum of Law and Motion for Accelerated Decision related to Respondent's liability for all seven counts presented in the Complaint. Respondent did not file a response. On July 24, 2015 this Court issued an Order on Complainant's Motion for Accelerated Decision. The Court granted and denied in part Complainant's Motion for Accelerated Decision. On September 9, 2015, this Court issued its Order Scheduling Hearing which established January 15, 2016, as the deadline for filing non-dispositive motions including motions in limine.

III. LEGAL STANDARD

Each party to an EPA administrative proceeding is required to file its prehearing information exchange in accordance with Presiding Officer's orders. 40 C.F.R. § 22.19(a). The Presiding Officer may allow into evidence information which has not been timely filed only if the moving party shows a good cause reason for not previously submitting the evidence and that party provides the information as soon as it had control of the information. 40 C.F.R. § 22.22(a). The Presiding Officer may draw an adverse inference, exclude the information or issue a default order to a party failing to comply her orders and sections 22.19(a) and 22.22(a). 40 C.F.R. § 22.19(g).

A Respondent has the burden of proof establishing its claim of inability to pay a proposed penalty. *In Re: Carroll Oil Co.*, 10 E.A.D. 635, 663 (EAB 2002). A Respondent must provide the financial information before the start of the hearing. *In Re: New Waterbury, Ltd.*, 5 E.A.D. 529, 542 (EAB 1994). If a Respondent fails to timely provide the financial information then the Presiding Officer may conclude that the Respondent has waived this defense. *Id.* The Presiding Officer may exclude such evidence, even where the Respondent has provided partial or incomplete information which does not comply with an Order of the Presiding Officer. *In re: Andrew B. Chase, a/k/a Andy Chase, et al.*, Docket No. RCRA-02-2011-7503, (ALJ Buschmann, May 11, 2012).

IV. ARGUMENT

Respondent has not raised ability to pay as a defense in either its Answer or its Prehearing Exchange and has consequently waived such defense. Respondent was clearly directed to identify the basis for opposing the proposed penalty. See, Complaint, Section entitled “Answer and Opportunity to Request a Hearing” and Prehearing Order at § IV.C.3. The Respondent’s Answer provided information and documentation related to its assertions that it was not liable for the alleged violations. It did not provide any other information.

The Prehearing Order required Respondent to submit a brief statement and supporting information, such as tax returns and/or certified financial statements, if it intended to make a claim that payment of the proposed penalty would have an adverse effect on its ability to continue to do business. Prehearing Order at § IV.C.3. Additionally, the Respondent was required to identify its proposed witnesses, provide a brief statement of their proposed testimony, and identify and provide specific information related to any affirmative defenses that it identified. Prehearing Order at §§ IV.A.1 and IV.C.1.

Respondent submitted its Prehearing Exchange on or about September 9, 2014, after having received an extension for such submission. Respondent's Prehearing Exchange, similar to its Answer, identifies witnesses and documents related primarily to liability and/or Respondent's attempts to comply. Respondent did not identify any witness or provide any documents related to its financial condition or its ability to pay the proposed penalty. Respondent has been on notice since the June 10, 2014, Prehearing Order that it had to identify witnesses and submit documents related to any ability to pay defense. The Respondent has not done that.

Section 22.22(a) of the CROP arguably provides the Respondents with a window of opportunity to submit, at this late date, financial documentation. That rule allows for introduction of evidence which was not previously provided only if the moving party has demonstrated: (1) good cause for failing to exchange the required information; and (2) has provided the required information as soon as it had control of the information or had good cause for not doing so. 40 C.F.R. § 22.22(a)(1).

In the interest of fair and efficient administration of these proceedings the Presiding Officer should not allow the Respondent to submit any evidence or arguments related to ability to pay. The hearing in this matter is scheduled to take place in approximately six weeks. Respondent has not submitted financial information even though it has had ample opportunity and the Presiding Officer has ordered production of such documentation. Respondent's actions indicate either a waiver of this claim or a disregard of the Presiding Officer's orders. Under either circumstance the Respondents should not be allowed to introduce financial information at this late date.

There is no apparent “good cause” justification for the Respondent’s failure to provide supporting documentation for an ability to pay defense. The financial information is uniquely within Respondent’s control. That information consists of tax returns and/or financial statements, balance sheets or similar information related to the existence and value of assets and liabilities of the Respondent. These are documents which are in the possession or control of the Respondent and could have been provided already.

Respondent’s failure to assert an ability to pay defense in its Answer or in its Prehearing Exchange appears to be a conscious waiver of this defense. Consequently, granting this Motion should not be controversial. However, if the Respondent intends to offer such information at this late date the Presiding Officer should bar such efforts. Financial information is complex and requires detailed and expert review. Providing the information at this late date will require the Complainant to obtain and identify witnesses to review and rebut any newly submitted financial information. The Complainant will have to direct its resources within a very short period of time to a new and potentially complex defense.

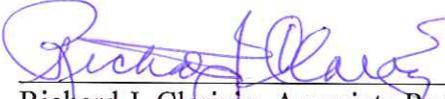
Respondent’s failure to provide supporting financial information in its Prehearing Exchange or subsequently should be sufficient, pursuant to 40 C.F.R. § 22.19(g)(2), to exclude evidence related to an ability to pay defense. Respondent’s failure to comply with the Presiding Officer’s Prehearing Order should be sufficient to infer that the information would be adverse to the Respondent pursuant to 40 C.F.R. § 22.19(g)(1) and that Respondent consequently has the ability to pay the proposed penalty.

V. CONCLUSION

For the above stated reasons the Complainant respectfully requests that the Presiding Officer grant its *Motion to Exclude the Testimony or Other Evidence Regarding Respondent's Inability to Pay the Proposed Civil Penalty and to Draw an Adverse Inference.*

RESPECTFULLY SUBMITTED,

January 17, 2016
Date


Richard J. Clarizio, Associate Regional Counsel

January 12, 2016
Date


Mark J. Koller, Associate Regional Counsel

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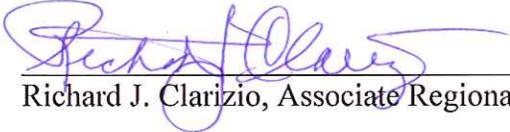
**MOTION
TO EXCLUDE TESTIMONY AND OTHER EVIDENCE RELATED TO
RESPONDENT'S INABILITY TO PAY THE PROPOSED CIVIL PENALTY
AND TO DRAW AN ADVERSE INFERENCE.**

Complainant respectfully moves this Court to issue an order, pursuant to Sections 22.16, 22.19(g) and 22.22(a) 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*, ("Consolidated Rules" or "CROP"), 40 C.F.R. §§ 22.16, 22.19(g) and 22.22(a), excluding the testimony or other evidence regarding Respondent's affirmative defense of inability to pay the proposed civil penalty and to draw an

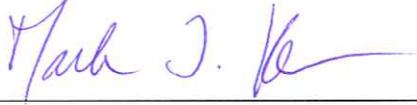
adverse inference that the Respondent has the ability to pay the proposed civil penalty.

RESPECTFULLY SUBMITTED,

January 13, 2016
Date


Richard J. Clarizio, Associate Regional Counsel

January 12, 2016
Date


Mark J. Koller, Associate Regional Counsel

**ENVIRONMENTAL PROTECTION AGENCY
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CERTIFICATE OF SERVICE

I certify that the Motion and Memorandum of Law in Support of Complainant's Motion to Exclude Testimony and Other Evidence Related to Respondent's Inability to Pay the Proposed Penalty and to Draw an Adverse Inference was sent this day to the addressees as listed below:

By email of original PDF to
OALJfiling@epa.gov and
Original and one copy by
Overnight delivery to:

Sybil Anderson
Headquarters Hearing Clerk
U.S. EPA, Office of Administrative Law Judges
1300 Pennsylvania Avenue, NW
Room M-1200
Washington, D.C. 20460

By email of original PDF to
OALJfiling@epa.gov and
One copy by Overnight delivery to:

M. Lisa Buschmann, Administrative Law Judge
U.S.EPA, Office of Administrative Law Judges
Mail Code 1900R
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Room M-1200
Washington, D.C. 20460

By causing a copy to be sent
UPS to:

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Dated: 1-14-16


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