

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

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| In the Matter of: |) | DOCKET NO. FIFRA-07-2023-0135 |
| |) | |
| Timothy Wilson, d/b/a |) | |
| Wilson’s Pest Control |) | COMPLAINANT’S MOTION FOR |
| |) | ADDITIONAL DISCOVERY, OR IN |
| |) | THE ALTERNATIVE, MOTION IN |
| Respondent. |) | LIMINE |
| |) | |

I. INTRODUCTION

COMES NOW, the U.S. Environmental Protection Agency, Region 7 (“Complainant”), through its undersigned counsel, to respectfully request that this Court issue an Order compelling Timothy Wilson, d/b/a Wilson’s Pest Control¹ (“Respondent”) to submit certain documents relevant to the issue of Respondent’s ability to pay the proposed penalty of \$149,659.² If Respondent should fail to produce such documents within the required timeframe, Complainant also requests that this Court grant an Order in Limine preventing Respondent from raising its ability to pay the proposed penalty and finding that Respondent has waived any such arguments. Pursuant to this Court’s March 20, 2024 Prehearing Order, Complainant contacted Respondent’s counsel via email on May 30, 2024 and via phone on June 3, 2024 to inform him of this motion and asked if Respondent intends to object. As of the date of the filing of this Motion, Respondent has not responded.

¹ Complainant herein refers to Respondent as a sole proprietorship operating under the laws of the state of Missouri. Wilson’s Pest Control is not registered as a business entity with the state of Missouri but does have a fictitious name registered with the Missouri Secretary of State. According to the Missouri Secretary of State website, “Sole proprietorships and general partnerships can be formed or created without the involvement of the Secretary of State. In fact, the Secretary of State does not receive or accept filings related to the creation of these business types. However, Missouri law requires any person or business entity which transacts business in the state under a name other than their own ‘true name’ to register that business name with the Secretary of State’s Office as a Fictitious Name Registration.” <https://www.sos.mo.gov/business/startbusiness#:~:text=A%20limited%20liability%20company%20is,in%20the%20articles%20of%20organization>.

² Although FIFRA does not explicitly require EPA to take into consideration a Respondent’s ability to pay, it does require consideration of two similar factors: size of business and ability to continue in business. “In determining the amount of the penalty, the Administrator shall consider the appropriateness of such penalty to the size of the business of the person charged, the effect on the person’s ability to continue in business, and the gravity of the violation.” 7 U.S.C. § 136l(a)(4).

Complainant has requested documentation and information supporting an ability to pay claim several times but has received no substantive response from Respondent. Complainant's prefiling letter, dated April 13, 2023, advises Respondent of its right to have its ability to pay considered. CX23 at 3. On May 5, 2023, attorney for Complainant, Britt Bieri, emailed attorney for Respondent, Melvin Raymond, and explained how Respondent may make an ability to pay claim. CX24 at 1. Mr. Bieri's email also commemorates that the matter was discussed verbally with Mr. Raymond prior to the email. CX24 at 1. On June 21, 2023, Mr. Raymond emailed Mr. Bieri letting him know that Mr. Raymond discussed the prefiling letter with Respondent. CX26 at 1. Complainant's Complaint also notified Respondent of its right to have its ability to pay considered. Complaint para. 73. Respondent's Answer subsequently admits that "the EPA has notified Respondent of his right to submit or decline financial information relating to ability to pay the proposed civil penalty." Answer at 9. On April 3, 2024, attorneys for Complainant, Katherine Kacsur and Adam Hilbert, held a telephone conference with Respondent and Mr. Raymond, wherein Ms. Kacsur and Mr. Hilbert advised Respondent of the opportunity for Complainant to take into consideration Respondent's ability to pay in exchange for financial information from Respondent. On April 4, 2024, Ms. Kacsur and Mr. Hilbert held a telephone conference with Mr. Raymond wherein Ms. Kacsur and Mr. Hilbert advised Mr. Raymond again of the opportunity to have Respondent's ability to pay considered by Complainant, as well as Complainant's intention to file this motion. On April 16, 2024, Mr. Hilbert emailed Mr. Raymond requesting ability to pay information. CX25. As of the date of the filing of this Motion, Respondent has provided no substantive response to Complainant's communications regarding ability to pay.

Despite Respondent's failure to submit ability to pay information to date, Complainant anticipates that Respondent may bring up the issue of ability the penalty during the hearing. "[A]ny party to a suit, including the federal government, ought not to be sandbagged by evidence produced for the first time in the courtroom." *In the Matter of Sam Emani D/b/a Auto Stop of Godby Road, Respondent*, 1994 WL 601335, at *2. To avoid having to assimilate new information and/or records at

the hearing, and to address an issue that may be resolved efficiently before the hearing, Complainant proposes to resolve the issue of ability to pay as soon as possible.

Complainant wishes to provide Respondent this final opportunity to submit financial information in order to promote a fair and equitable calculation of the penalty. Therefore, Complainant respectfully requests that the Court issue the following discovery order:

II. ADDITIONAL DISCOVERY REQUESTED

Within 30 days of issuance of the discovery order, Respondent shall provide the following documents to the Court and to Complainant: true, accurate and complete copies of at least the last three years of filed and signed and dated U.S. income tax returns of Respondent, including all associated schedules and attachments; and the last three years of income statements and balance sheet reports.

If the information identified above is not provided to Complainant and the Court by the timeframe specified in the discovery order, Complainant requests that this Court issue an Order barring Respondent from proffering any testimony, documents, or other evidence relating to the issue of Respondent's ability to pay the proposed penalty or the proposed penalty's potential economic impact on Respondent or its business.

III. STANDARD FOR GRANTING A MOTION FOR OTHER DISCOVERY

Motions for additional discovery are governed by Section 22.19(e) of the Consolidated Rules of Practice. 40 C.F.R. § 22.19(e). 40 C.F.R. § 22.19(e)(1) requires that a motion for additional discovery shall specify the method of discovery sought, provide the proposed discovery instruments, and describe in detail the nature of the information and/or documents sought. The Presiding Officer may order such other discovery only if it: (1) will neither unreasonably delay the proceeding nor unreasonably burden the non-moving party; (2) seeks information that is most reasonably obtained from the non-moving party, and which the non-moving party has refused to provide voluntarily; and (3) seeks information that has significant probative value on a disputed issue of material fact relevant to liability or the relief

sought. As explained in Section IV, below, this Motion for Additional Discovery satisfies each of these elements.

IV. THIS COURT SHOULD GRANT COMPLAINANT’S MOTION FOR DISCOVERY

A. Method of Discovery Sought, Proposed Discovery Instruments, Nature of The Information Sought

The method of discovery sought is the production of documents. The proposed discovery instrument is included in this motion as a request for documents listed in Section II, above. The nature of the information sought relates to Respondent’s ability to pay the penalty listed in the Complaint.

B. The Prehearing Exchange Has Taken Place

Complainant and Respondent have both submitted their Initial Prehearing Exchanges, and Complainant filed its Rebuttal Prehearing Exchange on June 4, 2024. Further, this Court’s March 20, 2024 Prehearing Order allows for the parties to file non-dispositive motions, such as motions for additional discovery, no later than 60 days prior to the scheduled hearing. This Court has not yet scheduled a hearing date in this matter. Therefore, as the prehearing exchange has taken place and as this motion is filed presumably at least 60 days before a scheduled hearing, it is appropriate for Complainant to file this motion for additional discovery.

C. The Motion for Other Discovery Will Neither Unreasonably Delay the Proceeding Nor Unreasonably Burden the Non-Moving Party

This motion will not unreasonably delay the proceeding as the hearing has not yet been scheduled. Complainant estimates that it would require approximately two weeks to analyze and respond to any financial information that Respondent submits.

Further, production of the information sought will not unreasonably burden Respondent. As Wilson’s Pest Control operates as a business and Timothy Wilson is the sole proprietor of that business, Complainant anticipates that the information and records requested herein are kept in the ordinary course of operation by Mr. Wilson or his employees. Such information and records are presumably already created and include information that a company must keep organized in order to prepare annual

tax returns and meet its business obligations.

It is also in Respondent's best interest to supply the requested information so that both the Court and Complainant may accurately assess Respondent's ability to pay the proposed penalty. In the context of this proceeding, the production of this information could only serve to reduce the amount of the proposed penalty. As such, any burden imposed by this request is outweighed by the significant impact the information could have on these proceedings, and the benefit which may inure to Respondents.

D. The Motion for Other Discovery Seeks Information That is Most Reasonably Obtained From the Non-Moving Party, and Which the Non-Moving Party Has Refused to Provide Voluntarily

Complainant seeks financial information which is solely in the possession of Respondent. Complainant performed independent research into Respondent's financial condition via a Dunn & Bradstreet OneStop Report. CX18. However, Complainant is unable to obtain complete information—the information necessary to fully evaluate Respondent's ability to pay—from any source other than Respondent. Therefore, the information sought by this motion is most reasonably obtained from Respondent.

Further, Respondent has failed to provide the requested information voluntarily. This Court in its Prehearing Order has ordered Respondent to turn over any material regarding inability to pay in Respondent's Prehearing Exchange.³ In its May 24, 2024 Prehearing Exchange, Respondent neither raises the issue of its ability to pay nor provides any financial information. In summary, Respondent has not provided any information Complainant needs to analyze Respondent's ability to pay despite Complainant's repeated requests for such information (See Section I, paragraph 2 above).

E. The Motion for Other Discovery Seeks Information That Has Significant Probative Value on a Disputed Issue of Material Fact Relevant to the Relief Sought

³ March 20, 2024 Prehearing Order at 5 (“if Respondent takes the position that the proposed penalty should be reduced or eliminated on any grounds, such as an inability to pay, then provide a detailed narrative statement explaining the precise factual and legal bases for its position and a copy of any and all documents upon which it intends to rely in support of such position.”).

This motion seeks information that has significant probative value on a disputed issue of material fact. “[I]n any case where ability to pay is put in issue, the Region must be given access to the respondent's financial records before the start of such hearing.” *In Re: New Waterbury, Ltd., A California Limited Partnership*, 5 E.A.D. 529, 542.

Here, the proposed penalty is a disputed issue because the Respondent requests the assessment of no civil penalty in its Answer at 9. Complainant’s approach to evaluating Respondent’s purported ability to pay the proposed penalty in this case is precisely the approach that the EAB blessed in *New Waterbury*, 5 E.A.D. at 540. There, the EAB stated that “[s]ince the Agency must prove the appropriateness of the penalty, it necessarily follows that ‘ability to pay’ is a matter that the Agency takes into consideration as part of its prima facie case.” *Id.* Additionally, where a Respondent “fails to produce any evidence to support an inability to pay claim after being apprised of that obligation during the prehearing process, the Region may properly argue and the presiding officer may conclude that any objection to the penalty based upon ability to pay has been waived under the Agency’s procedural rules and thus this factor does not warrant a reduction of the proposed penalty.” *Id.* at 542. *See also, Spitzer Great Lakes Ltd.*, 9 E.A.D. 302, 2000 WL 893127 (EAB June 30, 2000) (citing *New Waterbury*, 5 E.A.D. at 541) (noting that “since EPA’s ability to obtain financial information about a respondent is limited at the outset of a case, a respondent’s ability to pay may be presumed until it is put at issue by a respondent. Then, as the party with control over the relevant records, the respondent must, upon request, provide evidence to show that it is not able to pay the proposed penalty”); *Wisconsin Plating Works of Racine, Inc.*, 2009 WL 1266817 (E.P.A., Apr. 30, 2009) (citing *New Waterbury* as ground for granting Complainant’s Motion to Compel Discovery of the same sort of financial records sought here); *Vemco, Inc.*, CAA-05-2002-0012, 2003 WL 1919589 (E.P.A. Mar. 28, 2003) (granting Complainant’s motion for discovery of information such as “complete and preferably audited financial statements and all corporate minutes for the last three years for Respondent”); *Mark Fastow and Fiberglass Specialties*,

Inc., EPCRA-09-97-0013, 1998 WL 422191 (E.P.A. June 24, 1998) (granting Complainant’s motion for discovery of respondent Fastow’s personal federal income tax returns for most recent five years).

Therefore, as Respondent has disputed the proposed penalty but have failed to produce any information to assess an ability to pay claim, and as this motion seeks information that is relevant to the assessment of a penalty, this motion seeks information that has significant probative value on a disputed issue of material fact.

V. SHOULD RESPONDENT FAIL TO COMPLY WITH THIS COURT’S ORDER FOR OTHER DISCOVERY, THIS COURT SHOULD GRANT COMPLAINANT’S MOTION IN LIMINE

Should Respondent fail to comply with the requested order for other discovery, this Court should grant Complainant’s alternative Motion in Limine preventing Respondent from raising its ability to pay the proposed penalty as an argument at the forthcoming hearing and find that Respondent have waived any such arguments. When a party fails to provide information within its control as required by the Consolidated Rules, this Court may, in its discretion, infer that the information would be averse to that party, exclude the information from evidence, or issue a default order. 40 C.F.R. § 22.19(g).

As this case sits today, there are already sufficient grounds for this Court to determine that Respondent has waived its ability to argue that it cannot pay the proposed penalty. In *New Waterbury*, the EAB instructed that where a respondent “fails to produce any evidence to support an inability to pay claim after being apprised of that obligation during the pre-hearing process, the Region may properly argue and the presiding officer may conclude that any objection to the penalty based upon an ability to pay has been waived.” 5 E.A.B. at 524. Similarly, in *JHNY Inc.*, the EAB held that “by not complying with the prehearing exchange requirement to provide documentary evidence demonstrating its inability to pay the proposed penalty, [the Respondent] failed to raise its ability to pay as a cognizable issue. Thus, the company waived its ability to contest the Region’s penalty proposal on this basis.” 12 E.A.D. 372, 2005 WL 2902519, at *19 (EAB Sept. 30, 2005). *See also Spitzer Great Lakes*, 9 E.A.D. at *13 (holding that “the Presiding Officer properly excluded consideration of ability to pay as a mitigating

factor in assessing the penalty . . . [because] when asked by the Region, and directed by the Presiding Officer, to substantiate that claim, [Respondent] failed to respond”).

Here, both Complainant and this Court have apprised Respondent of its right and opportunity to provide information regarding Respondent’s ability to pay. March 20, 2024 Prehearing Order, p. 4; CX23 at 3; CX24 at 1; CX26 at 2; Complaint, para. 73; Answer at 9; CX25. Respondent still has not submitted any evidence related to its ability to pay. *See generally* Answer; Respondent’s Prehearing Exchange. As such, adequate grounds exist for this Court to conclude that Respondent has failed to raise their ability to pay as a cognizable issue and thus waived their ability to do so at the hearing.

Nevertheless, recognizing that Complainant would still be able to analyze an ability to pay the proposed penalty were Respondent to provide the necessary information, Complainant believes that allowing Respondent to submit such information is still warranted. However, if Respondent were to fail to produce the information requested herein by the deadline set by this Court, then it would be reasonable for this Court to conclude that Respondent has waived its ability to contest Complainant’s proposed penalty based on an alleged inability to pay.

V. CONCLUSION

This Court should grant Complainant’s motion for additional discovery, due within 30 days of the date of the Order, because (1) doing so will not unreasonably delay the proceeding or unreasonably burden Respondent; (2) the information sought in this motion is most reasonably obtained from Respondent, who has refused to provide it voluntarily; and (3) the information sought in this motion has significant probative value on a disputed issue of material fact. Further, if Respondent fails to comply with the requested order for discovery, this Court should grant Complainant’s alternative Motion in Limine preventing Respondent from raising its ability to pay the proposed penalty as an argument at the forthcoming hearing and find that Respondent has waived any such arguments.

RESPECTFULLY SUBMITTED this 21st day of June 2024.

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In the Matter of *Timothy Wilson, d/b/a Wilson's Pest Control*, Respondent.
Docket No. FIFRA-07-2023-0135

CERTIFICATE OF SERVICE

I certify that the foregoing Complainant's Motion to Compel Discovery, or in the alternative, Motion in Limine, Docket No. FIFRA-07-2023-0135, has been submitted electronically using the OALJ E-Filing System.

A copy was sent via email to Mr. Melvin Raymond, counsel for Respondent, at *mraymondattorney1@att.net*.

Dated: June 21, 2024

Respectfully submitted,

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