UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
Adamas Construction and	)	**Docket No. CWA-07-2019-0262**
Development Services, PLLC, and	)	
Nathan Pierce,	)	
	)	
Respondents.	)	

ORDER ON COMPLAINANT'S MOTION FOR ADDITIONAL DISCOVERY AND MOTION TO COMPEL DISCOVERY, OR IN THE ALTERNATIVE, MOTION IN LIMINE

On June 23, 2022, Complainant filed a Motion for Additional Discovery seeking a written deposition. On June 24, 2022, Complainant filed a Motion to Compel Discovery, or in the Alternative, Motion in Limine concerning Respondents' ability to pay the proposed penalty in this matter. For the reasons discussed below, Complainant's Motion for Additional Discovery is denied and Complainant's Motion to Compel Discovery is granted. The hearing in this case is still set to begin at 9:00 a.m. on Monday, August 22, 2022, at the James F. Battin Federal Courthouse in Billings, Montana.

I. BACKGROUND

On September 6, 2019, the Director of the Enforcement and Compliance Assurance Division for Region 7 ("Complainant") of the United States Environmental Protection Agency ("Agency") filed a Complaint and Notice of Opportunity for Hearing against Adamas Construction and Development Services, PLLC, and Mr. Nathan Pierce ("Respondent Adamas" and "Respondent Pierce," respectively, or "Respondents," collectively) for alleged violations of the Clean Water Act ("CWA") associated with Respondents' role as a sludge removal contractor for the Northern Cheyenne Utility Commission ("NCUC") at the Lame Deer Lagoon Wastewater Treatment Facility ("Site"). On October 16, 2019, Respondents filed an Answer and Request for Hearing denying the charged violations and requesting a hearing on the matter. Answer at 1-2.

Pursuant to the Prehearing Order issued on October 18, 2019, and subsequent orders related to filing deadlines, the parties engaged in a prehearing exchange of information process. Specifically, Complainant filed its Initial Prehearing Exchange ("Complainant's Initial PHE") on November 26, 2019; Respondent Pierce filed an Initial Prehearing Exchange ("Respondent's

PHE") on January 24, 2020; and Complainant filed its Rebuttal Prehearing Exchange ("Complainant's Rebuttal PHE") on April 3, 2020.[1]

While the prehearing exchange process was underway, Complainant was also granted leave to amend the Complaint. Order on Complainant's Motion for Leave to Amend the Complaint and on the Parties' Motions for Extensions of Time for Prehearing Exchanges (Jan. 2, 2020), at 3. The Amended Complaint and Notice of Opportunity for Hearing was deemed to have been filed on January 2, 2020.

Thereafter, the parties engaged in motions practice, resulting in issuance of an Order on Complainant's Motion to Supplement its Prehearing Exchange and Respondents' Motions for Default and Attorneys' Fees on December 14, 2021, and an Order on Complainant's Motion for Accelerated Decision and Respondents' Requests for Dismissal and Additional Discovery on April 20, 2022. By Notice of Hearing Order dated May 23, 2022, I then scheduled the hearing in this matter to commence in Billings, Montana, on August 22, 2022, and set several deadlines for the parties, including a deadline for the parties to file any non-dispositive motions.

On June 23, 2022, Complainant filed an unopposed Motion for Video Testimony for James Courtney ("Motion for Video Testimony") and a Motion for Additional Discovery ("Motion for Written Deposition") seeking a written deposition of Ms. Sheri Bement. The following day, Complainant filed a Motion to Compel Discovery, or in the Alternative, a Motion in Limine ("Motion for Production of Documents") seeking the production of documents concerning Respondents' ability to pay Complainant's proposed penalty of $59,583. By Order dated June 28, 2022, I granted Complainant's Motion for Video Testimony and shortened the deadlines for responses and replies to Complainant's Motions for Written Deposition and Production of Documents.[2] Respondents filed a response in opposition to Complainant's Motion for Written Deposition ("Respondents' Response") on July 6, 2022.[3] Complainant then filed a reply to Respondent's Response ("Complainant's Reply") on July 8, 2022. To date, Respondents have not responded to Complainant's Motion for Production of Documents.

II. APPLICABLE LAW

Generally, this proceeding is governed by 40 C.F.R. Part 22, 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. §

[1] As part of the prehearing exchange of information process, the parties identified the exhibits they intend to introduce into evidence at a hearing in this matter and provided copies to this Tribunal and each other. The exhibits proposed by Complainant will be cited herein as "CX [proposed exhibit number] at [exhibit page number]." The exhibits proposed by Respondent Pierce will be cited herein as "RX [proposed exhibit number] at [exhibit page number]."

[2] Respondents were given until July 5, 2022, to respond to Complainant's Motions. Complainant, in turn, was given until July 8 to reply to any such responses.

[3] This Tribunal's electronic filing system recorded the Response as having been filed at 1:24 a.m. Eastern Time on July 6, 2022, less than two hours after the deadline elapsed. Because the delay was quite minor, and Complainant does not claim to have been prejudiced by it, the merits of Respondents' Response will still be considered.

22.1(a)(6) (stating that the Rules of Practice encompass proceedings for the assessment of Class II penalties under section 309(g)). Section 22.16 describes motions, with Subsection (b) specifying that "[a] party's response to any written motion must be filed within 15 days" of that motion's service, though it allows for a Presiding Officer to "set a shorter or longer time for response or reply." 40 C.F.R. § 22.16(b). It continues to provide that "[a]ny party who fails to respond [to a motion] within the designated period waives any objection to the granting of [that] motion." 40 C.F.R. § 22.16(b).

A. Motion for Written Deposition

In its Motion for Written Deposition, Complainant seeks to depose Ms. Sheri Bement by written questions, a form of discovery. Thus, this request is governed by Section 22.19 of the Rules of Practice, which details prehearing information exchange, prehearing conferences, and other discovery. 40 C.F.R. § 22.19. Subsection (e) allows parties to move for additional discovery after the prehearing information exchange and stipulates that such motions "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 (and, where relevant, the proposed time and place where discovery would be conducted)." 40 C.F.R. § 22.19(e)(1). It continues to state that the Presiding Officer of a proceeding can order such other discovery if it:

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

40 C.F.R. § 22.19(e)(1)(i)-(iii). Subparagraph (e)(3) provides that a Presiding Officer may order depositions by oral questions if such discovery meets the three requirements outlined above and either "[t]he information sought cannot reasonably be obtained by alternative methods of discovery" or "[t]here is a substantial reason to believe that relevant and probative evidence may otherwise not be preserved for presentation . . . at the hearing." 40 C.F.R. § 22.19(e)(3)(i)-(ii).

B. Motion for Production of Documents

In its Motion for Production of Documents, Complainant seeks an order requiring Respondents to produce certain documentation related to the issue of Respondents' ability to pay the proposed penalty, another form of discovery. Accordingly, it is also governed by 40 C.F.R. § 22.19(e), requiring that it (1) neither unreasonably delay the proceeding nor unreasonably burden Respondents; (2) seek information that is most reasonably obtained from Respondents and that Respondents have refused to provide voluntarily; and (3) seek information with significant probative value on a disputed issue of material fact relevant to liability or the proposed penalty. 40 C.F.R. § 22.19(e)(1). Complainant further requests that if Respondents fail to produce the financial information as ordered, then I grant an alternative motion in limine pursuant to 40 C.F.R. § 22.19(g) to preclude Respondents from raising any arguments related to their ability to pay at the hearing. That provision governs situations where "a party fails to provide information within its control as required." 40 C.F.R. § 22.19(g). In such situations, a Presiding Officer is

empowered to "(1) [i]nfer that the information would be adverse to the party failing to provide it; (2) [e]xclude the information from evidence; or (3) [i]ssue a default order under § 22.17(c)." 40 C.F.R. § 22.19(g)(1)-(3).

III. DISCUSSION

A. Motion for Written Deposition

In its Motion for Written Deposition, Complainant seeks to depose Ms. Sheri Bement, a former representative of the NCUC, by written questions, a copy of which it attached to the Motion. In their prehearing exchanges, Complainant and Respondent Pierce both indicated their intent to call a representative of the NCUC as a fact witness.[4] Complainant now explains that Ms. Bement "worked and communicated with Respondents during Respondents' contractual arrangement with [the] NCUC" and that "[s]he was personally familiar with many of Respondents' responsibilities, actions, and statements" at the Site. Motion for Written Deposition at 2. It then asserts that its request satisfies the requirements set forth in the Rules of Practices for motions for additional discovery inasmuch as (1) the discovery sought would neither unreasonably delay the proceeding nor unreasonably burden Respondents[5]; (2) the additional discovery would be most reasonably obtained from Respondents, but they have refused to provide the information[6]; and (3) the additional discovery would have significant probative value on a disputed issue of material fact.[7] Complainant then urges that its request satisfies the heightened threshold required for depositions by oral questions, arguing that the information sought from Ms. Bement cannot reasonably be obtained by alternative methods of discovery because of her "intimate[]" and "unique" relationship to the facts of the case[8] and there is a substantial reason to believe that her testimony may otherwise not be preserved for

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[4] In its Initial PHE, Complainant identified Ms. Bement as a former manager of the NCUC and stated that "a new witness [would] need to be identified" on account of her no longer working there. Complainant's Initial PHE at 4. Respondent Pierce also identified Ms. Bement as a former manager of the NCUC in his PHE, though he went on to state that she "[would] need to be compelled to testify as a fact witness" as she was intimately familiar with the facts of the case. More generally, both parties anticipated that a representative of the NCUC would provide valuable testimony regarding Respondents' actions, the contract between the NCUC and Respondent Adamas, and Respondents' role as an "operator" of the Site.

[5] In arguing that the requested discovery will not create an unreasonable burden for Respondents, Complainant contends that (1) it is not mandatory for Respondents to engage in the discovery; (2) if Respondents do elect to engage, it would require only the drafting and mailing of written questions to both Ms. Bement and Complainant, which is not unreasonable given the significance of her testimony; and (3) Respondents expressed an intention to subpoena Ms. Bement.

[6] To this point, Complainant claims that Respondents' representations as to the scope of their responsibilities at the Site "are directly contradicted by the evidence." Motion for Written Deposition at 4. Complainant also states that Ms. Bement's testimony would be helpful in obtaining "a fair and objective narrative as to the events at the treatment plant." *Id.*

[7] To this third point, Complainant asserts that Ms. Bement's testimony would help resolve the question of whether Respondents were an "operator" at the Site. As Complainant notes, such a determination is central to its charge that Respondents violated the recordkeeping requirements of Section 308 of the CWA, 33 U.S.C. § 1318.

[8] Here, Complainant highlights the filings submitted by Respondents seem to support this characterization.

presentation at the hearing because a physical illness impedes her ability to travel to the hearing, rendering her an "unavailable witness" as defined by Federal Rule of Evidence 804.

In response, Respondents argue, among other challenges,[9] that the requested discovery "could unreasonably delay the proceeding as the hearing has already been scheduled and there may not be sufficient time for both parties and Sheri Bement to complete the discovery requested[,] including follow-up or cross examination questions." Respondents' Response at 4. Respondents also argue that the discovery would create an unreasonable burden inasmuch as it would limit the ability of Respondents to cross-examine Ms. Bement and take time away from Respondents' preparation for the hearing. "Given the significance of the witness's testimony," Respondents urge that I deny the request. Respondents' Response at 4. Finally, Respondents dispute the unavailability of Ms. Bement, arguing that Complainant fails to demonstrate why Ms. Bement is unavailable to testify at the hearing by video, particularly as "[c]learly she can correspond with the Complainant via email or computer." *Id.* at 9-10.

In its Reply, Complainant reasserts that it has satisfied the requirements for other discovery outlined under Section 22.19(e)(1) and the additional requirements for an oral deposition under Section 22.19(e)(3). Specifically, it argues that granting its Motion for Written Deposition would neither unreasonably delay the proceeding because the Motion was filed in accordance with the timetable set forth in the Notice of Hearing Order nor unreasonably burden Respondents because Respondents have had sufficient time to prepare for the hearing and the requested discovery would arguably aid in that preparation. To support its assertion that Ms. Bement qualifies as unavailable, Complainant restates that she is stricken with a physical illness and also represents that it has had difficulty communicating with her thus far. As for the potential for Ms. Bement to testify by videoconference, Complainant argues that "having access to email does not mean a person also has access to reliable Wi-Fi, a camera, and a microphone, which are all required in order to provide any form of video testimony." Complainant's Reply at 6. Complainant also points to its difficulty with maintaining consistent communication with Ms. Bement as a source of concern about "her reliability in providing video testimony at a specified date and time." *Id.*

In considering Complainant's Motion for Written Deposition, I first note that other than its reference to depositions by oral questions, the Rules of Practice do not specifically name the methods of discovery that I am authorized to order but, as pointed out by Complainant in its Reply, broadly refer to "other discovery." However, discovery in the form of depositions by written questions was clearly contemplated when the Rules were amended in 1998. In Section 18 of its proposed revisions, the Agency described what would become 40 C.F.R. § 22.19. 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 ("Proposed Rules of Practice"), 63 Fed. Reg. 9,464, 9,471-74 (Feb. 25, 1998). In describing Subsection (e), the Agency defined "proposed discovery instruments" as

[9] In particular, Respondents assert that "the record is clear" as to the ownership and operation of the Site. However, as I wrote in the Order on Complainant's Motion for Accelerated Decision and Respondents' Requests for Dismissal and Additional Discovery issued on April 20, 2022, there remain genuine issues of material fact in this case as to whether Respondents served as an "operator" at the Site. Thus, resolution of that issue is appropriately left for hearing.

"the specific documents which would effectuate discovery if the Presiding Officer were to order the requested discovery (e.g., notices of deposition, *depositions upon written questions*, written interrogatories, … requests for admission)." *Id.* at 9,472 (emphasis added). Further, I may look to the Federal Rules of Civil Procedure ("FRCP") and related case law for guidance when our regulations do not specifically address an issue, *see, e.g.*, *Envtl. Prot. Servs, Inc.*, 13 E.A.D. 506, 560 n.65 (EAB 2008) (stating that "[a]lthough the [FRCP] are not directly applicable to administrative proceedings, the [EAB] has from time to time consulted the Federal Rules and court decisions interpreting them in order to aid … in the interpretation and application of the Part 22 Rules") (citing *J. Phillip Adams*, 13 E.A.D. 310, 326 n.19 (EAB 2007) and *Lazarus, Inc.*, 7 E.A.D. 318, 330 n.25 (EAB 1997)), and Rule 31(a) of the FRCP also provides for written depositions, Fed. R. Civ. P. 31(a).

As for whether Complainant has met the requirements set forth in the Rules of Practice for such additional discovery,[10] I am not persuaded that Complainant has satisfied that burden, particularly with respect to the first requirement that the requested discovery neither unreasonably delay the proceeding nor unreasonably burden Respondents. The method of discovery sought here could entail the transmission of multiple sets of written questions to Ms. Bement for her to answer and return to the parties, and Respondents would seemingly need to wait for Ms. Bement to respond to Complainant's questions before formulating their own in order to conduct effective cross-examination. Additionally, Complainant has already admitted to experiencing difficulties in communicating with Ms. Bement to date. Thus, I am dubious of any claim that delays to the upcoming hearing would not result from allowing depositions by written questions. Respondents' argument about the requested discovery hindering their ability to prepare for other aspects of the hearing is also compelling, particularly as Respondents are largely, if not altogether, representing themselves in this proceeding.[11] For these reasons, Complainant's Motion for Written Deposition is hereby **DENIED.**

B. Motion for Production of Documents

In its Motion for Production of Documents, Complainant seeks to compel Respondents to submit documents relevant to the issue of their ability to pay ("ATP") the proposed penalty in this matter. In the alternative, Complainant seeks to bar Respondents from raising their ATP as an argument going forward. To date, Respondents have not responded to these requests. As such, they have waived any objections to the granting of this Motion.

[10] Given that depositions by written questions were clearly contemplated when the Rules of Practice were amended in 1998 but not specifically named in the provision setting out the heightened threshold for depositions by oral questions, it appears as though that heightened threshold applies only to oral depositions, not written ones.

[11] The Headquarters Hearing Clerk was recently notified by the attorney who had been representing Respondents on a limited scope basis that he is no longer serving in that capacity, but he has yet to file a notice withdrawing his appearance.

Complainant asserts that it has requested ATP information from Respondents on several occasions. First, it claims that it solicited such information on October 15, 2019.[12] Second, it claims to have communicated with Respondents about their desire to demonstrate an inability to pay over the phone on June 1, 2022. Third, Complainant claims to have emailed Respondents again on June 10, 2022, to "request[] specific documentation needed . . . in order to calculate a new penalty based on [ATP]." Complainant represents that Respondents were still preparing the required documentation as of June 22, 2022. Complainant further asserts that it is trying to resolve the issue of ATP "[t]o avoid potentially lengthening and delaying the . . . hearing." Finally, Complainant provides a proposed discovery order as well as an ATP form for each Respondent.

In support of its Motion for Production of Documents, Complainant again argues (1) that the requested discovery would neither unreasonably delay the proceeding nor unreasonably burden the non-moving party, stating that Respondents would have time to complete the ATP forms well before the hearing if I ordered Complainant's requested discovery by July 8, 2022[13]; (2) that the information is most reasonably obtained from Respondents and that Respondents have refused to provide it voluntarily[14]; and (3) that the information has significant probative value on a disputed issue of material fact relevant to the relief sought, as "Respondents have communicated an interest in having their inability to pay evaluated but have failed to produce the requisite information to assess [it]." Motion for Production of Documents at 7. Alternatively, Complainant argues that I should bar Respondents from raising ATP as an argument at the hearing if they fail to comply with the proposed discovery order. It further claims that there are already sufficient grounds for me to determine that Respondents have waived their ability to make an ATP argument, though it acknowledges that Respondents are appearing *pro se* and asserts its belief that they should still be able to submit ATP documentation.

In considering Complainant's arguments, I note that my esteemed colleague, Chief Administrative Law Judge Susan Biro, recently considered a similar motion in *Greenbuild Design & Construction, LCC* ("*Greenbuild*"). *Greenbuild*, 2022 WL 1520283 (EPA ALJ) (Order Granting Complainant's Motion in Limine). In *Greenbuild*, the complainant brought an action against the respondent for alleged violations of the Toxic Substances Control Act ("TSCA").[15] *Id*. at *1. In her Prehearing Order, Judge Biro explained that the respondent should

[12] Here, Complainant points to CX 28, a copy of an email exchange between Complainant and Respondents in which an Agency representative wrote that "[the Agency] always considers a company's [ATP]. If you would like to make such a claim, we can forward you the information necessary to do so."

[13] Specifically, Complainant argues that if I were to order such discovery according to its proposed timeline, Respondents would have until August 8, 2022, to submit their ATP documentation. Complainant would then have two weeks to analyze those submissions before the hearing begins on August 22, 2022.

[14] Here, Complainant further highlights that I previously instructed Respondents to submit ATP information in my October 18, 2019 Prehearing Order. There, I directed Respondents to "provide a detailed narrative statement … and a copy of any and all documents upon which they intend to rely in support of such position" if they "take the position that the proposed penalty should be reduced or eliminated on any grounds, such as an inability to pay."

[15] I note that TSCA and CWA address penalties similarly, specifically requiring that the Agency consider, among other things, an alleged violator's ATP when setting penalties in administrative enforcement actions. 15 U.S.C. § 2615(a)(2)(B) (TSCA); 33 U.S.C. § 1319(g)(3) (CWA).

provide ATP documentation if it wanted to argue that the proposed penalty should be reduced or eliminated based on inability to pay. *Id*. After the respondent expressed that it had endured financial hardships during the COVID-19 pandemic, the complainant communicated that the respondent could "submit additional financial documentation to support a claim that it is unable to pay." *Id*. at *2. Though the respondent continued to express concerns about its ATP, it failed to produce supporting information for several months. *Id*. at 3. The complainant eventually filed a motion to compel discovery, or in the alternative, a motion in limine. *Id*.

After reviewing the standard for granting a motion to discovery and the complainant's arguments to those points,[16] Judge Biro found that granting the complainant's motion to compel was superfluous but also that it was appropriate to grant the complainant's motion in limine. *Greenbuild*, 2022 WL 1520283, at *6-10. In her analysis, Judge Biro cited *New Waterbury Ltd., A California Limited Partnership* ("*New Waterbury*") to support the proposition that "in any case where ability to pay is put in issue, the [Agency] must be given access to the respondent's financial records before the start of such hearing." *Greenbuild*, at *8 (quoting *New Waterbury*, 5 E.A.D. 529, 542 (EAB 1994)). She continued: "[w]hen a respondent raises [their] inability to pay, but 'fails to produce any evidence to support an inability to pay claim after being apprised of that obligation during the pre-hearing process, the [Agency] may properly argue and the presiding officer may conclude that any objection to the penalty based upon ability to pay had been waived[.]'" *Id*. (again quoting *New Waterbury*, 5 E.A.D. at 542). Judge Biro concluded her Order as follows: "consistent with Rule 22.19(g), I hereby infer from Respondent's failure to comply with the Prehearing Order, and subsequent entreaties by the Agency, that any information Respondent could produce would be adverse to its inability to pay claim. I thus exclude Respondent from entering any evidence relevant to inability to pay into evidence at hearing." *Greenbuild*, at *9 (internal citation omitted).[17]

Judge Biro's reasoning in *Greenbuild* is persuasive. I also agree with Complainant that my ordering the requested ATP discovery would neither unreasonably delay the proceeding not unreasonably burden Respondents. To the latter point, as Complainant points out, the production

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[16] In her analysis of 40 C.F.R. § 22.19(e)(1)(iii), the requirement that requested discovery have "significant probative value on a disputed issue of material fact," Judge Biro noted that the respondent's inability to pay was disputed by the complainant *because* it had not received any documentation to support the respondent's claims. *Greenbuild*, at *7.

[17] Judge Biro also cited to *Wisconsin Plating Works of Racine, Inc.* ("*Wisconsin Plating Works*"), in which she applied the EAB's reasoning from *New Waterbury* in a National Emission Standards for Hazardous Air Pollutants ("NESHAP") case. *Greenbuild,* at *8; *see Wisconsin Plating Works*, 2009 WL 1266817, at *13 (EPA ALJ) (Order on Complainant's Motion for Accelerated Decision on Liability, Motion for Partial Accelerated Decision on Ability to Pay or in the Alternative to Compel Discovery, and Motion to Supplement Prehearing Exchange). In the present proceeding, in addition to *New Waterbury* and *Wisconsin Plating Works*, Complainant cites several other cases in its Motion. *See JHNY, Inc.*, 12 E.A.D. 372, 398-99 (EAB 2005) (a Clean Air Act appeal in which the EAB stated "it is our view that [respondent], by not complying with the prehearing exchange requirement to provide documentary evidence demonstrating its inability to pay the proposed penalty, failed to raise its [ATP] as a cognizable issue"); *Vemco, Inc.,* 2003 WL 1919589 (EPA ALJ) (Order on Motions to Amend the Complaint and for Further Discovery) (in which Judge Biro applied *New Waterbury* in granting a motion concerning a company's financial information); *Spitzer Great Lakes Ltd.*, 9 E.A.D. 302 (EAB 2000) (a TSCA appeal in which the EAB upheld an Initial Decision that a respondent had waived its ability to raise an inability to pay claim based on *New Waterbury*).

of Respondents' ATP information can only serve to reduce the proposed penalty. This likely outweighs any administrative burden borne by Respondents as a result of my granting Complainant's Motion. Second, Complainant is correct that the requested ATP information is most reasonably obtained from Respondents and that, to date, Respondents have not provided the information voluntarily. Third, Complainant is correct that Respondents' ATP information has significant probative value on a disputed issue of material fact relevant to the relief sought. As such, it appears that Complainant has satisfied the requirements for other discovery outlined in 40 C.F.R. § 22.19(e).

As previously noted, Complainant is statutorily required to consider Respondents' ATP when calculating its proposed penalty. Further, the Rules of Practice require Complainant to bear the burden of demonstrating that the relief sought is appropriate. 40 C.F.R. § 22.24(a). However, as *New Waterbury* makes clear, Complainant must be given documentation on Respondents' prospective inability to pay in order to adjust its proposed penalty. Accordingly, its unopposed Motion for Production of Documents is hereby **GRANTED**. Respondents will have until **July 29, 2022**, to provide Complainant with documentation as to their ATP. Should they fail to comply with this Order, they will be barred from raising inability to pay as an argument at the hearing in accordance with 40 C.F.R. § 22.19(g).

SO ORDERED.

Christine Donelian Coughlin
Administrative Law Judge

Dated: July 11, 2022
Washington, D.C.

In the Matter of Adamas Construction and Development Services, PLLC, and Nathan Pierce, Respondents
Docket No. CWA-07-2019-0262

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Order on Complainant's Motion for Additional Discovery and Motion to Compel Discovery, or in the Alternative, Motion in Limine**, dated July 11, 2022, and issued by Administrative Law Judge Christine Donelian Coughlin, was sent this day to the following parties in the manner indicated below.

Mary Angeles
Paralegal Specialist

Original by OALJ E-Filing System to:
U.S. Environmental Protection Agency
Office of Administrative Law Judges
https://yosemite.epa.gov/OA/EAB/EAB-ALJ_Upload.nsf

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Dated: July 11, 2022
Washington, D.C.