UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
Summit, Inc.,	)	
	)	**Docket No. RCRA-05-2014-0006**
	)	
Respondent.	)	**Dated: February 10, 2016**

ORDER GRANTING COMPLAINANT'S MOTION TO EXCLUDE TESTIMONY AND OTHER EVIDENCE RELATED TO INABILITY TO PAY

Before me is the Complainant's motion in limine ("Motion") to exclude testimony and evidence related to the Respondent's ability to pay the proposed penalty in this case and to draw an adverse inference. This proceeding was initiated on March 17, 2014, by the Director, Land and Chemicals Division, Region 5 ("Complainant") of the United States Environmental Protection Agency ("EPA" or "Agency"), filing a Complaint against Summit, Inc. ("Respondent" or "Summit"), under Section 3008(a) of the Solid Waste Disposal Act, as amended, also known as the Resource Conservation and Recovery Act ("RCRA" or "the Act"), 42 U.S.C. § 6928(a). The seven-count Complaint charges Summit, an automobile scrap recycling business located in Gary, Indiana, with violating various provisions of Indiana's federally authorized regulations governing hazardous waste, used oil, and universal waste. The Complainant seeks a civil penalty of $263,375 and an order that Summit maintain and certify its compliance with the regulations cited in the Complaint.

On June 10, 2014, I issued a Prehearing Order that instructed Summit to file its prehearing exchange, including direct and rebuttal evidence. The Order stated that "[i]f Respondent believes that it is unable to pay the proposed penalty or that payment would have an adverse effect on its ability to continue to do business," then it should submit "a brief statement to that effect, and a copy of documents in support, such as tax returns and/or certified copies of financial statements." Prehearing Order at 3. The Order additionally advised the parties that "except in accordance with Section 22.22(a), any document not included in the prehearing exchange shall not be admitted into evidence, and any witness whose name and testimony summary are not included in the prehearing exchange shall not be allowed to testify." Prehearing Order at 4. Summit filed its prehearing exchange on September 8, 2014. It did not include any indication or evidence that Summit is unable to pay the proposed penalty, and Summit has not made any such claim during this proceeding.

On October 21, 2014, the Complainant moved for accelerated decision as to liability for all seven counts in the Complaint. Summit did not file any response to the motion. On July 24, 2015, I granted the Complainant's motion with regard to counts 1, 4, 5, 6, and 7, and denied the motion as to counts 2 and 3. The hearing was set for March 8, 2016, to address liability as to

counts 2 and 3, and a civil penalty assessment for all of the violations.

On January 14, 2016, the Complainant moved to exclude testimony and other evidence related to Summit's inability to pay the proposed penalty. The Complainant argues that Summit has waived any "ability to pay" defense by not raising the defense in its Answer or prehearing exchange. Mot. at 3. As the Complainant further observes, Summit provided information related only to liability in its Answer, and ignored directions in the Prehearing Order to submit a brief statement with supporting documents and associated witness list if it intended to argue that the proposed penalty would harm its ability to do business. Prehearing Order at 3; Mot. at 3. As a result, the Complainant asserts that Respondent's actions indicate either waiver of this claim or a disregard of the Prehearing Order, and that both are reasons to bar Summit from introducing financial information "at this late date." Mot. at 4. The Complainant adds that "[f]inancial information is complex and requires detailed and expert review," and any attempt by Summit to introduce financial information at this stage of the proceeding means the EPA will have to direct its resources "within a very short period of time" to such a new defense. Mot. at 5. Additionally, beyond barring evidence of Summit's ability to pay, the Complainant requests an inference to be drawn that such information would be adverse to Summit under 40 C.F.R. 22.19(g)(1) because of Summit's failure to comply with the Prehearing Order. Mot. at 5.

The deadline for Summit to respond to the Motion was January 29, 2016. As of the date of this Order, Summit has filed no response and has thus waived any objection to the granting of the Motion. *See* 40 C.F.R. § 22.16(b).

According to the applicable procedural rules set forth at 40 C.F.R. Part 22 ("Rules"), each party to this proceeding must file a prehearing information exchange as ordered. 40 C.F.R. § 22.19(a). The Rules additionally state that if a party:

> fails to provide any document, exhibit, witness name or summary of expected testimony required to be exchanged under §22.19(a) . . . to all parties at least 15 days before the hearing date, the Presiding Officer shall not admit the document, exhibit or testimony into evidence, unless the non-exchanging party had good cause for failing to exchange the required information and provided the required information to all other parties 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). When a party does not exchange information as ordered, the Administrative Law Judge has the discretion to "(1) Infer that the information would be adverse to the party failing to provide it; (2) Exclude the information from evidence; or (3) Issue a default order under §22.17(c)." 40 C.F.R. § 22.19(g).

Many statutes that the EPA enforces list "ability to pay" as a factor that the Agency must address in its prima facie penalty case. But under RCRA, the only statutory considerations the Agency must take into account when calculating penalties are "the seriousness of the violation and any good faith efforts to comply with applicable requirements." 42 U.S.C. § 6928(a)(3). "Considering 'ability to pay' is not part of the Agency's prima facie burden in determining a

penalty amount." *Joseph Oh and Holly Investment, LLC*, EPA Docket No. RCRA-10-2011-0164, 2012 EPA ALJ LEXIS 51, at *42 (ALJ, Nov. 13, 2012) (Order on Respondent's Motion to Reopen Case and Set Aside Default Order) (citing *Carroll Oil Co.*, 10 E.A.D. 635, 662 (EAB 2002)). "Therefore, under RCRA, the respondent has the burden of raising and proving 'ability to pay' as an affirmative defense." *Id.* (citing *Carroll Oil Co.*, 10 E.A.D. at 662-63); *see also* 40 C.F.R. § 22.24; *Bil-Dry Corp.*, 9 E.A.D. 575, 611-12 (EAB 2001); *Central Paint & Body Shop, Inc.*, 2 E.A.D. 309, 313-14 (CJO 1987). The respondent waives any affirmative defense it fails to raise in its answer to the complaint. *Lazarus, Inc.*, 7 E.A.D. 318, 331, 333 (EAB 1997). Consequently:

> where a respondent does not raise its ability to pay as an issue in its answer, or fails to produce any evidence to support an inability to pay claim after being apprised of that obligation during the pre-hearing process, the [Complainant] may properly argue and the presiding officer may conclude that any objection to the penalty based upon ability to pay has been waived.

New Waterbury, Ltd., 5 E.A.D. 529, 542 (EAB 1994).

In this case, I conclude that Summit has waived any "inability to pay" defense. Summit provided no indication of its inability to pay in its Answer, and in the nearly two years that have passed since that pleading was filed, Summit has not submitted any financial information to suggest an inability to pay. Moreover, Summit ignored express instructions in the Prehearing Order to provide this information if it intended to invoke an inability to pay defense. It is also too late for Summit to amend its Answer to assert an inability to pay, as a litigant's "ability to raise an affirmative defense outside of the answer will largely depend on the absence or presence of prejudice to the opposing party." *Lazarus, Inc.*, 7 E.A.D. at 332, 334. Here, the Complainant would be prejudiced because there is insufficient time before the hearing for it to rebut the detailed financial records that Summit must necessarily provide to support such a defense.

Therefore, and although there are more than 15 days before the hearing, any testimony or evidence as to Summit's inability to pay a penalty is properly excluded. With respect to the Complainant's request that an adverse inference be drawn as to Summit's ability to pay because it did not exchange information as ordered, I find it sufficient simply to exclude such evidence from the record and thereby eliminate from consideration Summit's financial condition as a factor in penalty calculation. There is no need, given that this is a case brought under RCRA, to draw inferences or adopt any conclusion as to the extent of Summit's financial resources.

Accordingly, the Complainant's Motion to exclude testimony and evidence related to inability to pay is **GRANTED**.

SO ORDERED.

Lisa Busch

M. Lisa Buschmann
Administrative Law Judge

In the Matter of *Summit Inc*, Respondent.
Docket No. RCRA-05-2014-0006

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **ORDER GRANTING COMPLAINANT'S MOTION TO EXCLUDE TESTIMONYAND OTHER EVIDENCE RELATED TO INABILITY TO PAY**, dated February 10, 2016, was sent this day in the following manner to the addressees listed below.

Chronnia L. Warren
Paralegal

Dated: February 10, 2016
Washington, D.C.

Original and One Copy by Hand Delivery and E-filing to:

Sybil Anderson
Headquarters Hearing Clerk
U.S. EPA, Mail code 1900R
1200 Pennsylvania Avenue, NW
Washington, DC 20460

One Copy by Regular Mail and E-Filing to:

Richard Clarizio, Esq.
Associate Regional Counsel
U.S. EPA, Region V, Mail code C-14J
77 West Jackson Blvd.
Chicago, IL 60604-3590
Clarizio.Richard@epa.gov

Mark A. Thiros, Esq
Thiros & Stracci, P.C.
200 East 90th Drive
Merillville, Indiana 46410-8102
mark@thiros.com

Mark J. Koller
Associate Regional Counsel
U.S. EPA, Region V, ORC
77 West Jackson Boulevard (C-14J)
Chicago, Illinois 60604
koller.mark@epa.gov