



UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
GERALD STRUBINGER) DOCKET NO. CWA-3-2001-001
GREGORY STRUBINGER,)
)
)
RESPONDENTS)

ORDER ON COMPLAINANT'S MOTION TO COMPEL PRODUCTION
OR IN THE ALTERNATIVE, MOTION IN LIMINE

ORDER RESCHEDULING HEARING

This proceeding arises under the authority of Section 309(g) of the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act, as amended, 33 U.S.C. § 1319(g).^{1/} This proceeding is governed by 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. §§ 22.1-22.32.

The parties filed their prehearing exchange in this matter pursuant to the undersigned's Prehearing Order entered on May 24, 2001.^{2/} A hearing in this matter was scheduled previously for May 28 through 31, 2002 in Carbon County, Pennsylvania, but was cancelled when the parties indicated that they had reached a settlement in this matter. The parties now state that there is no settlement to resolve this matter. As such, the hearing is being rescheduled.

^{1/} The record before me now contains proof of the public notice of this action as provided under Sections 309(g)(4)(A) and (B) of the Clean Water Act and 40 C.F.R. § 22.45.

^{2/} Respondents, as common parties, filed a joint prehearing exchange. Respondents, collectively, are referred to as Respondent. Respondent, who was previously represented by counsel, is now appearing *pro se*.

Additionally, Complainant, on May 3, 2002, filed a Motion to Compel Production or in the Alternative, Motion in Limine, which is now before me for adjudication. In this Motion, Complainant moves to compel Respondent to more fully identify certain witnesses and to describe the expected testimony of these witnesses with greater specificity or in the alternative, to preclude Respondent from presenting the testimony of such witnesses at hearing. Complainant also moves to compel Respondent to provide financial documents if Respondent intends to put in issue its ability to pay the proposed penalty or in the alternative, to preclude Respondent from presenting such documents at hearing.

Specifically, Complainant notes that Respondent in its prehearing exchange states that intended witnesses Joseph Lesisko, Mary Louise Lesisko, Victor Izzo, and Carolyn Izzo will present testimony as to the storm water runoff that passes through their backyards and that of Respondent's property. Complainant submits that Respondent has not identified the location of these witnesses' properties or their proximity to the site in question and has provided no information concerning the qualifications of these witnesses and has not indicated whether these witnesses are appearing as fact or expert witnesses. Further, noting that the instant action is brought under Section 404 rather than Section 402 of the Clean Water Act, Complainant asserts that Respondent has failed to state the relevance of the intended testimony of these named witnesses.^{3/}

With regard to the intended witness Louise McClafferty, Complainant asserts that Respondent has given no information as to the nature of Ms. McClafferty's testimony or what her connection is to the site in question. Additionally, Complainant maintains that it is willing to stipulate to the authenticity of the documents provided in Respondent's prehearing exchange and that it will not dispute the authenticity of any documents that Respondent intends to introduce through this witness assuming that Respondent provides all documents to Complainant in a timely manner.

Concerning the intended witnesses Michael Sofranko, William McElmoyle, Vincent Gilotti, John Gallagher, William Huber, Author L. Guth, Jr., Leonard Raczowski, and Joseph Buchzynski, Complainant contends that Respondent has not identified these

^{3/} Complainant alleges that Respondent discharged pollutants from a point source into waters of the United States without a permit issued under Section 404 of the Clean Water Act in violation of Section 301(a) of the Clean Water Act. 33 U.S.C. §§ 1311(a), 1344.

witnesses' qualifications and has not indicated whether these witnesses are appearing as fact or expert witnesses. Again, Complainant, noting that the instant action is brought under Section 404 rather than Section 402 of the Clean Water Act, asserts that Respondent has failed to state the relevance of the intended testimony of these named witnesses.

According to Respondent's prehearing exchange, Ed Gula of the Jim Thorpe Borough is to testify as to the testing of fecal coliform. Complainant maintains that Respondent has provided no information as to Mr. Gula's qualifications, or what his connection is to the site in question, and has failed to state whether Mr. Gula is a fact or expert witness.

According to Respondent's prehearing exchange, intended witness Eugene Mulligan is the Jim Thorpe Borough Zoning Officer and will testify as to the issuance of a building permit for the site in question. Additionally, Respondent's prehearing exchange reflects that unnamed persons who are the custodians of records for Benchmark Analytics, Lehigh Engineering Associates, Inc., Palmerton Hospital, the Carbon County Recorder of Deeds, and the Carbon County Planning and Development Office, respectively, will present testimony to authenticate documents. Complainant maintains that it is willing to stipulate to the authenticity of the documents provided in Respondent's prehearing exchange. Further, Complainant states that it will not dispute the authenticity of any documents that Respondent intends to introduce through these witnesses assuming that Respondent provides all documents to Complainant in a timely manner.

Respondent's prehearing exchange reflects that Respondent intends to present the testimony of William Kee of Cowan and Associates who will testify as to his work for the Borough of Jim Thorpe and its impact on the site in question. Ronald Tirpak, P.E. will testify as to his work and knowledge of the subject and surrounding properties. Complainant submits that Respondent has not identified the type work that Mr. Kee and Mr. Tirpak perform or how their work is connected to the site in question. Complainant maintains that Respondent has provided no information as to Mr. Kee's or Mr. Tirpak's qualifications and has failed to state whether Mr. Kee or Mr. Tirpak is a fact or expert witness.

Finally, Complainant states that Respondent Gerald Strubinger, Sr. has been requested to provide information concerning his current financial status but he has failed to do so. Again, Complainant moves to compel the production of the requested information and documents or in the alternative, that such materials be excluded at hearing.

Respondent has not responded to Complainant's Motion to Compel Production or in the Alternative, Motion in Limine.

Sections 22.19(a) and 22.22(a) of the Rules of Practice, 40 C.F.R. §§ 22.19(a), 22.22(a), provide that documents or exhibits that have not been exchanged and witnesses whose names have not been exchanged at least 15 days before the hearing date shall not be admitted into evidence or allowed to testify unless good cause is shown for failing to exchange the required information. Further, Section 22.19(a)(2) of the Rules of Practice, provides that "[e]ach party's prehearing information exchange shall contain: (i) The names of any expert or other witnesses it intends to call at the hearing, together with a brief narrative summary of their expected testimony..."

Complainant contends that Respondent has failed to properly identify the 22 witnesses listed above and to identify the documents that these witnesses will be introducing at hearing and that such failure will seriously hamper Complainant's ability to prepare for hearing. Thus, Complainant moves that Respondent be compelled to produce the requested information and documents or in the alternative, that the witnesses and documents be excluded at hearing.

Complainant's argument that Respondent should provide additional and more specific information concerning the 22 intended witnesses identified above and their expected testimony is persuasive. See 40 C.F.R. §§ 22.19(a); 22.22(a). Respondent's narrative summaries of the expected testimony of these 22 witnesses contained in its prehearing exchange do not afford Complainant an adequate opportunity to prepare for hearing. The additional information concerning these witnesses requested by Complainant would not be unduly burdensome for Respondent to provide.

Next, Complainant moves to compel Respondent Gerald Strubinger, Sr. to produce information concerning his financial status.^{4/} As a preliminary matter, I note that Complainant proposes that Respondent be assessed a civil administrative penalty in the amount of \$27,500 for its alleged violation of Section 301(a) of the Clean Water Act. Complaint at 3, ¶1. Section 22.24(a) of the Rules of Practice places the burdens of presentation and persuasion on Complainant to prove that "the relief sought is appropriate." 40

^{4/} Financial records for Respondent Gregory Strubinger were submitted as part of Respondent's prehearing exchange.

C.F.R. § 22.24(a). Each matter of controversy is adjudicated under the preponderance of the evidence standard. 40 C.F.R. § 22.24(b).

Under Section 309(g) of the Clean Water Act, Complainant must consider, among other statutory penalty factors, the violator's "ability to pay" the penalty. In *In re New Waterbury, Ltd.* ("New Waterbury"), TSCA Appeal No. 93-2, 5 E.A.D. 529, 538 (EAB, Oct. 20, 1994), the Environmental Appeals Board "EAB" found that in order for Complainant "to make a prima facie case on the appropriateness of its recommended penalty, the Region [Complainant] must come forward with evidence to show that it, in fact, considered each [statutory penalty] factor . . . and that its recommended penalty is supported by its analysis of those factors." However, Complainant has no specific burden of proof as to any individual penalty factor, including ability to pay. Rather, its burden of proof "goes to the appropriateness of the penalty taking all factors into account." *Id.* (emphasis in original). Thus, Respondent's ability to pay is one of several statutory penalty factors that Complainant must take into consideration in establishing the appropriateness of the proposed penalty.

The Rules of Practice require a respondent to indicate whether it will raise the issue of ability to pay, and if so, to submit evidence to support its claim as part of the prehearing exchange. See 40 C.F.R. §§ 22.15(a)-(b), 22.19(a)(3)-(4). Further, the EAB has found that "in any case where ability to pay is put in issue, the Region [Complainant] must be given access to the respondent's financial records before the start of such hearing." *New Waterbury, supra*, at 542. Finally, the EAB has held that "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 ability to pay claim after being apprised of that obligation during the prehearing process, the Region [Complainant] may properly argue and the presiding officer [Administrative Law Judge] may properly conclude that any objection to the penalty based upon ability to pay has been waived."^{5/} *Id.*

As such, if Respondent Gerald Strubinger, Sr. wants to put his ability to pay the proposed penalty in issue, he must provide to Complainant the relevant financial records to support this claim.

^{5/} At the time a complaint is filed, a "respondent's ability to pay may be presumed until it is put at issue by a respondent." *New Waterbury, supra*, at 541. The mere allegation of an inability to pay in an answer is not sufficient to put ability to pay in issue. See *New Waterbury, supra*, at 542.

These records must be furnished to Complainant in sufficient time to allow Complainant to review the records and prepare for hearing.

Accordingly, Complainant's Motion to Compel Production or in the Alternative, Motion in Limine, is **Granted**.^{6/} As the hearing is now rescheduled for September 2002, Respondent must file promptly the additional information concerning the 22 witnesses identified above and their expected testimony and the relevant financial records for Respondent Gerald Strubinger, Sr., with service on Complainant. Respondent is reminded that documents that have not been exchanged and witnesses who have not been properly identified at least 15 days before the hearing date shall not be admitted into evidence or allowed to testify unless good cause is shown for failing to exchange the required information.^{7/}

In a letter dated July 3, 2002, Complainant requests that it be allowed until July 31, 2002 to file a Motion for Accelerated Decision. In this regard, I note that every motion filed in this proceeding must be served in sufficient time to permit the filing of a response by the other party and to permit the issuance of an order on the motion before the scheduled hearing.^{8/} Section 22.16(b) of the Rules of Practice, allows a 15-day period for responses to motions and Section 22.7(c) of the Rules of Practice, 40 C.F.R. § 22.7(c), provides for an additional 5 days to be added thereto when the motion is served by first class mail.

As previously noted, the hearing in this matter is being rescheduled because the parties' settlement negotiations have broken down. Thus, the parties shall strictly comply with the requirements of this Order and prepare for hearing. In connection therewith, on or before **September 12, 2002**, the parties shall file a joint set of stipulated facts, exhibits, and testimony. See 40

^{6/} Respondent has failed to respond to the Motion to Compel Production or in the Alternative, Motion in Limine. Pursuant to Section 22.16(b) of the Rules of Practice, 40 C.F.R. § 22.16(b), if no response to a written motion is filed within the designated period, a party may be deemed to have waived any objection to the granting of the motion.

^{7/} Additionally, I note that Section 22.22(a) of the Rules of Practice provides that only evidence "which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value," shall be admitted into the record at hearing.

^{8/} The undersigned will be unavailable from August 27, 2002 through September 9, 2002 and from September 16, 2002 through September 24, 2002.

C.F.R. § 22.19(b)(2). The time allotted for the hearing is limited. Therefore, the parties must make a good faith effort to stipulate, as much as possible, to matters which cannot reasonably be contested so that the hearing can be concise and focused solely on those matters which can only be resolved after a hearing.

The Hearing in this matter will be held beginning at 9:30 a.m. on Monday, September 30, 2002, in Carbon County, Pennsylvania, continuing if necessary on October 1, 2, 3, and 4, 2002.^{9/} The Regional Hearing Clerk will make appropriate arrangements for a courtroom and retain a stenographic reporter.^{10/} The parties will be notified of the exact location and of other procedures pertinent to the hearing when those arrangements are complete. Individuals requiring special accommodation at this hearing, including wheelchair access, should contact the Regional Hearing Clerk at least 5 business days prior to the hearing so that appropriate arrangements can be made.

IF EITHER PARTY DOES NOT INTEND TO ATTEND THE HEARING OR HAS GOOD CAUSE FOR NOT BEING ABLE TO ATTEND THE HEARING AS SCHEDULED, IT SHALL NOTIFY THE UNDERSIGNED AT THE EARLIEST POSSIBLE MOMENT.

Barbara A. Gunning
Administrative Law Judge

Dated: July 12, 2002
Washington, DC

^{9/} If an appropriate courtroom is not available, the hearing will be moved to the closest location having an available courtroom.

^{10/} In addition, the Regional Hearing Clerk shall provide the undersigned Administrative Law Judge the name(s) of any person who has notified the Regional Hearing Clerk of his or her desire to participate in the proceedings as permitted under Section 309(g)(4) of the Clean Water Act. See Supplemental Rules Governing Public Notice and Comment in Proceedings under Sections 309(g) and 311(b)(6)(B)(ii) of the Clean Water Act and Section 1423(c) of the Safe Drinking Water Act, 40 C.F.R. § 22.45.

In the Matter of Gerald Strubinger & Gregory Strubinger, Respondent
Docket No. CWA-3-2001-001

CERTIFICATE OF SERVICE

I certify that the foregoing Order On Complainants's Motion To Compel Production Or In The Alternative, Motion In Limine And Order Rescheduling Hearing, dated July 12, 2002, was sent this day in the following manner to the addressees listed below.

Mary Keemer
Legal Staff Assistant

Dated: July 12, 2002

Original and Copy by Pouch Mail to:

Lydia A. Guy
Regional Hearing Clerk (3RC00)
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