UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
MIKE VIERSTRA	)	DOCKET NO. CWA-10-2010-0018
d/b/a VIERSTRA DAIRY,	)	
	)	
	)	
	)	
	)	
RESPONDENT	)	

ORDER ON COMPLAINANT'S MOTION FOR ADDITIONAL DISCOVERY ON ABILITY TO PAY

The United States Environmental Protection Agency, Region 10, Office of Compliance and Enforcement ("Complainant"), filed a Complaint against Mike Vierstra, doing business as Vierstra Dairy ("Respondent"), on October 16, 2009, pursuant to Complainant's authority under Section 309(g)(2)(B) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(g)(2)(B). The Complaint alleges violations of Section 301(a) of the CWA, 33 U.S.C. § 1311(a), and seeks a civil administrative penalty in an amount not to exceed $16,000 per violation for each day during which the violation continues, up to the statutory maximum penalty allowed by Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B). The Complaint further alleges that, based on the information then available to Complainant, Respondent appeared able to pay such a penalty.

On December 15, 2009, Respondent filed an Answer to Complaint ("Answer"), in which Respondent denies the allegations and claims that he lacks the ability to pay a civil penalty.

The parties subsequently filed their initial prehearing exchanges pursuant to a Prehearing Order issued by the Honorable William B. Moran on January 13, 2010.[1/] Shortly thereafter,

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[1/] Judge Moran was designated to preside in this case on (continued...)

Complainant submitted Complainant's Brief Regarding Proposed Penalty, in which Complainant proposes the imposition of a civil penalty of $30,000 against Respondent. As support for this proposed penalty, Complainant cites, in part, the lack of any financial information in Respondent's initial prehearing exchange.

On May 24, 2010, Complainant submitted Complainant's Motion for Additional Discovery on Ability to Pay ("Motion"). Complainant asserts that it has yet to receive any information from Respondent supporting his claim that he lacks the ability to pay a civil penalty. Consequently, Complainant requests that Respondent provide in advance of the hearing[2/] "all financial information upon which [Respondent] intends to rely to show inability to pay the proposed penalty." Motion at 4. At a minimum, Complainant requests that Respondent provide no later than 15 days prior to the hearing (1) copies of his federal and state tax returns for the last three years; (2) any audited and unaudited financial statements for the last three years that he has for the dairy and other affiliated businesses he owns or controls; (3) current balances in all bank and investment accounts; (4) a list of all assets, including but not limited to, livestock, real estate, equipment, stocks, bonds, mutual funds, money market accounts, or other financial assets that he owns and their respective estimated market values; (5) terms and conditions of principal debts, including bank loans, lines of credit, personal notes, and the name and relationship of the lender of each of the debts identified; and (6) copies of Respondent's divorce decree and associated court rulings regarding distribution of marital assets.

On May 26, 2010, Respondent submitted a Notice of Non-Opposition to Motion for Additional Discovery ("Notice of Non-Opposition") stating that he does not oppose the Motion.

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. Under the Rules of Practice, discovery, as it is typically thought of under the

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[1/] (...continued)
January 12, 2010. Because of Judge Moran's subsequent departure from the Office of Administrative Law Judges, this case was reassigned to the undersigned Administrative Law Judge on May 13, 2010.

[2/] Pursuant to the Order Scheduling Hearing issued by the undersigned on May 20, 2010, the hearing is scheduled to commence on July 13, 2010.

Federal Rules of Civil Procedure, occurs through a prehearing exchange of information in accordance with Section 22.19(a), 40 C.F.R. § 22.19(a). Subsequent to the prehearing exchange, a party may move for "additional discovery" pursuant to Section 22.19(e)(1) of the Rules of Practice, 40 C.F.R. § 22.19(e)(1). The presiding ALJ may order the requested discovery only if he or she finds that it:

> (i) Will neither unreasonably delay the proceeding nor unreasonably burden the non-moving party;
> (ii) Seeks information that is most reasonably obtained from the non-moving party, and which the non-moving party has refused to provide voluntarily; and
> (iii) Seeks 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).

Complainant argues that the discovery sought in its Motion satisfies the foregoing criteria. Should the undersigned grant the Motion but Respondent fail to produce the information identified therein, Complainant requests that the undersigned exclude the information from evidence and infer that the information would support a finding that Respondent has the ability to pay the entire assessed civil penalty, pursuant to Section 22.19(g) of the Rules of Practice, 40 C.F.R. § 22.19(g). Complainant cites *In re New Waterbury, Ltd.*, 5 E.A.D. 529 (EAB 1994) ("New Waterbury"), as support for its requests.

As Complainant observes, the Environmental Appeals Board ("EAB") states in *New Waterbury*:

> [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 the hearing. The rules governing penalty assessment proceedings require a respondent to indicate whether it intends to make an issue of its ability to pay, and if so, to submit evidence to support its claim as part of the pre-hearing exchange....[W]here 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 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.

5 E.A.D. at 542.

In light of this language and the Notice of Non-Opposition submitted by Respondent, Complainant's Motion is granted. By claiming in his Answer that he lacks the ability to pay a civil penalty in this case, Respondent put his ability to pay at issue and, thus, has an obligation to provide information in support of his claim in advance of the hearing. Accordingly, Respondent is hereby directed to provide no later than 15 days prior to the hearing the six sets of documents enumerated above. Should Respondent fail to submit these documents, Respondent is deemed to have waived his claim of inability to pay and any information offered by Respondent at the hearing in support of this argument will be excluded from evidence.

Barbara A. Gunning
Administrative Law Judge

Dated: June 2, 2010
Washington, DC

In the Matter of *Mike Vierstra, d/b/a Vierstra Dairy,* Respondent.
Docket No. CWA-10-2010-0018

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Order On Complainant's Motion for Additional Discovery,** dated June 2, 2010, was sent this day in the following manner to the addressees listed below.

Mary Angeles
Legal Staff Assistant

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Dated: June 2, 2010
Washington, D.C.