

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 6

In the Matter of	§	Docket Nos.	CWA-06-2012-2710
	§	and	CWA-06-2012-2712
Paco Swain Realty, L.L.C.,	§		
a Louisiana Corporation,	§		
	§	Motion to Compel Production of	
Respondent	§	Financial Ability to Pay Information	

**MOTION TO COMPEL PRODUCTION OF  
FINANCIAL ABILITY TO PAY INFORMATION**

COMES NOW COMPLAINANT, the Director of the Compliance Assurance and Enforcement Division, United States Environmental Protection Agency, Region 6, by and through its attorney, in accordance with the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. §§ 22.1–22.52, hereby moves the Presiding Officer to order Respondent to produce information regarding Respondent’s asserted inability to pay a penalty in the above-captioned matters. In support of its Motion to Compel Production of Financial Ability to Pay Information, Complainant states the following:

**BACKGROUND**

1. In its Prehearing Exchanges for both of the above-captioned matters, Paco Swain Realty, L.L.C. (“Respondent”) asserted an inability to pay a penalty. On September 6, 2013, Complainant filed a Motion for Accelerated Decision in each matter. On September 26, 2013, Respondent provided Complainant with tax returns for the years 2005 through 2012. The Administrative Law Judge (“ALJ”) issued Orders on Complainant’s Motion for Accelerated Decision in the above-captioned matters on July 23, 2014 and September 9, 2014. In these

Orders, the ALJ noted that a genuine issue of material fact exists as to Respondent's ability to pay a penalty. Shortly after receiving the rulings on its motions, Complainant contracted with Industrial Economics, Inc. ("IEc") to analyze Respondent's financial information and perform an ability to pay analysis. On October 3, 2014, Respondent, through its attorney, consented to release of its financial information to IEc.

2. IEc has analyzed all financial information provided by Respondent to date, consisting of Respondent's tax returns for 2005 through 2013.

3. IEc noted that the unsigned tax returns provided by Respondent are incomplete in that numerous parts of the tax returns are missing, and the incomplete tax returns are insufficient for IEc to perform a comprehensive ability to pay analysis. Letters documenting the missing information are attached to this Motion as "Attachment A" (October 24, 2014 letter from IEc to Tucker Henson) and "Attachment B" (November 10, 2014 letter from IEc to Tucker Henson). Both letters have been provided to Respondent. Additionally, the attachments to the October 24, 2014 letter were updated to include additional detail and were provided to Respondent on November 5, 2014. These updated attachments are attached to this Motion as "Attachment C."

4. In the October 24, 2014 letter (Attachment A), IEc provided a summary of the missing parts of Respondent's tax returns from 2005 to 2012. IEc also included (as Attachment C to the letter) an "INDIVIDUAL ABILITY TO PAY CLAIM Financial Data Request Form" ("ATP Form") that is utilized by IEc to gather information that is not reflected in tax returns but is necessary to complete the ability to pay analysis. Complainant provided this letter and the ATP Form to Respondent on October 24, 2014.

5. On October 24, 2014, Respondent provided its tax return for 2013 and agreed to complete the ATP form and return it to Complainant. At the time of this filing, Respondent has not

returned the completed form to Complainant. Respondent also objected to IEC's conclusions from its October 24, 2014 letter, including conclusions that the tax returns are missing required forms or schedules and that a signature or proof of electronic signature is necessary for IEC's analysis. An email documenting Respondent's objections is attached to this Motion as "Attachment D." In response to Respondent's objections, Complainant provided updated attachments including additional detail regarding the missing information (Attachment C).

6. In the November 10, 2014 letter (Attachment B), IEC updated its analysis to include a list of the missing information from Respondent's 2013 tax return. IEC again concluded that the information provided by Respondent, consisting solely of incomplete tax returns, is insufficient for IEC to perform an ability to pay analysis. In this letter, IEC specifically identified (A) missing forms that correspond to a line in a tax return and (B) forms that may be missing, contingent upon information included in the forms in category A (hereinafter, "contingent forms").<sup>1</sup>

7. Although Complainant and Respondent have engaged in substantial dialogue regarding production of Respondent's financial information, Respondent has not, as of the date of this filing, provided additional information other than the incomplete 2013 tax return. Complainant cannot adequately consider Respondent's asserted inability to pay solely on the basis of these incomplete tax returns.

8. Although Respondent's attorney, in his October 24, 2014 email (Attachment D), suggests that Respondent sign an IRS Form 4506 to have the signed and complete tax returns sent directly to Complainant, this is not a practical solution absent a substantial postponement of the hearing

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<sup>1</sup> For example, Respondent's 2013 tax return is missing Schedule E, which corresponds to Line 17 of the tax return. If Schedule E contains certain entries (such as depreciation expenses), Schedule K-1, Form 4562 and/or Form 8582 would be required to be filed with Schedule E and would be necessary for the financial analysis. If Schedule E does not contain information corresponding to Schedule K-1, Form 4562 or Form 8582, only Schedule E is necessary for the financial analysis.

schedule set forth by the ALJ. IRS Form 4506 notes that “it may take up to 75 calendar days for [the IRS] to process your request.” Based upon IEC’s experience with Form 4506 requests, a similar delay is common. Respondent did not provide Complainant with its most recent (and arguably most important) *incomplete* tax return until October 24, 2014; therefore, even if Respondent provided Complainant with a signed Form 4506, which it has not, it is highly unlikely Complainant will be able to obtain the tax returns with sufficient time to perform its analysis before the deadlines set forth in the Order Scheduling Hearing.

9. IEC requires complete copies of tax returns and completion of the ATP Form to conduct the ability to pay analysis. Respondent has the ability to obtain and provide complete copies of its tax returns, and Respondent alone is capable of completing the ATP Form.

10. IEC requires, at minimum, two to three weeks to conduct a complete ability to pay analysis. Considering the deadlines in the Order Scheduling Hearing and potential unavailability of key personnel at the end of December due to the holiday season, Complainant would need to receive the necessary financial information no later than the week of December 1, 2014 to ensure the analysis may be completed in time.

#### MOTION

11. Complainant moves the ALJ to order Respondent

- a. to complete and return to Complainant the ATP Form included with IEC’s October 24, 2014 letter (Attachment A to this Motion); and
- b. to provide to Complainant complete copies of its tax returns, including all information outlined in the attachments to IEC’s November 10, 2014 letter (Attachment B to this Motion).

12. Complainant requests that the ALJ order Respondent to produce all information referenced in Paragraph 11 by December 3, 2014.

13. If this Motion is granted as to production of information referenced in Paragraph 11 and Respondent fails to timely produce the information as required by an order, Complainant moves the ALJ to strike from the record any incomplete tax return previously provided by Respondent and prohibit the introduction of any evidence or testimony at the hearing relating to Respondent's inability to pay a penalty in these matters.

DATED this 13th day of November, 2014.

RESPECTFULLY SUBMITTED,

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**CERTIFICATE OF SERVICE**

I certify that on the 13th day of November, 2014, the original of the foregoing MOTION TO COMPEL PRODUCTION OF FINANCIAL ABILITY TO PAY INFORMATION was filed electronically with the **Headquarters Hearing Clerk** of the Office of the Administrative Law Judges (“OALJ”) via the OALJ E-Filing System, and a true and correct copy was sent to the following on this 13th day of November, 2014, via email and UPS next day mail to:

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Tucker Henson