UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region 2

In the Matter of: Advanced Recovery, Inc., Respondent. Proceeding Under Section 9006 of the Solid Waste Disposal Act, as amended.	**Hon. Christine D. Coughlin, Presiding Officer** Docket No. RCRA-02-2013-7106

MOTION TO COMPEL PRODUCTION/
TO CONDITIONALLY PRECLUDE

Complainant in this proceeding, the Director of the Division of Enforcement and Compliance Assistance, EPA, Region 2 (EPA or Agency), through counsel, moves this Court, pursuant to 40 C.F.R. §§ 22.16(a), 22.19(e) and 22.19(g), and also pursuant to the order of this Court, dated June 11, 2014,[1] for an order: **a)** compelling Respondent either to produce by no later than September 2, 2014, documentation and information related to Respondents's putative expert witness (as specified below), or, in the alternative, to inform Complainant and this Court that Respondent will not seek to introduce into the record of the upcoming hearing the testimony of any such expert witness and any expert report prepared by him/her; **b)** putting Respondent on notice that failure to provide the sought for documentation and information might result in an order precluding Respondent from introducing into the record of the upcoming hearing the testimony of the putative expert and any expert report prepared by him/her. As demonstrated

[1] The June 11, 2014, order was denominated, "NOTICE OF HEARING AND SCHEDULING ORDER."

below, Complainant submits that good cause exists for granting this motion, *i.e.* such relief against Respondent would be appropriate and warranted based upon an application of the law governing this proceeding to the circumstances (as detailed below). In addition, Respondent has indicated it does not oppose or object to this motion.[2]

This motion is divided into nine sections, as follows: **Section I**, "Documentation and Information EPA Seeks"; **Section II**, "History and Background"; **Section III**, "Prehearing Order Notice to Respondent"; **Section IV**, "Respondent's Raising the Issue of an Expert Witness/Expert Report"; **Section V**, "Governing Law in a CFR Part 22 Proceeding"; **Section VI**, "Respondent Should Be Compelled to Produce"; **Section VII**, "Part 22 Case Law Supports Compelling Production"; **Section VIII**, "The Appropriateness of Conditional Preclusion"; and **Section IX**, "Conclusion."

I. Documentation and Information EPA Seeks

Complainant seeks the following:

1) The name, business address and business/professional affiliation of the "environmental engineer or similar expert" referred to in Paragraph 2.4. of Respondent's May 14, 2014, Prehearing Exchange (fifth page therein);

2) The Curriculum Vitae of the "environmental engineer or similar expert" referred to in Paragraph 2.4.) of Respondent's May 14, 2014, Prehearing Exchange (fifth page therein) and also in Paragraph 3.F. of Respondent's May 14, 2014, Prehearing Exchange (sixth page therein);

3) The "more detailed account of [the] proposed testimony" of the "environmental engineer or similar expert" referred to in Paragraph 2.4. of Respondent's May 14, 2014, Prehearing Exchange (fifth page therein); and

4) The "Proposed Expert Report" referred to in Paragraph 3.F. of Respondent's May 14,

---

[2] Telephone conference conducted on August 14, 2014 among Respondent's counsel, lead counsel for Complainant (Melva Hayden) and co-counsel for Complainant (the undersigned).

2014, Prehearing Exchange (sixth page therein).

If Respondent does not intend to attempt to introduce into the record of the upcoming hearing the items enumerated above, Respondent should be compelled to so inform this Court and Complainant by no later than September 2, 1014.[3]

II. History and Background

For purposes of this motion, the history of this proceeding need not be documented in great detail. The discussion below represents a synopsis of the operative facts relative to the relief Complainant seeks.

Respondent, Advanced Recovery, Inc., owns and operates a recycling facility in Port Jervis, New York. Respondent is a for-profit corporation engaged in the business of recycling various types of wastes, including electronic wastes. These wastes include spent fluorescent light bulbs and spent cathode ray tubes (referred to as "CRTs"; these are the video display components of various electronic devices, most commonly older computer monitors or older television monitors). As part of its recycling operations, Respondent processes such wastes, *e.g.*, these operations include the crushing of spent fluorescent light bulbs and CRTs. In carrying out these operations, Respondent processes and handles hazardous waste.[4]

On or about July 25, 2012, EPA conducted an inspection of Respondent's Port Jervis

---

[3] With regard to any of the documents identified above, Complainant seeks complete copies, not drafts or incomplete versions. If Respondent were to provide the documentation sought (in whole or in part), any such production — any such filing with this Court (in addition to service upon Complainant) — should certify that the document(s) provided is/are complete.

[4] The facts in this paragraph are based mainly upon statements in Respondent's May 14, 2014, Prehearing Exchange. Respondent's Answer (discussed below) admits Respondent owns and operates the Port Jervis facility.

facility to ascertain Respondent's compliance with the applicable hazardous waste law. As a follow-up, in February 2013, EPA sent Respondent, pursuant to 42 U.S.C. § 6927, a "Notice of Violation" ("NOV") and an information request letter ("IRL"). Respondent provided its response to the NOV and IRL in March 2013.

Based on the information obtained through EPA's inspection and the NOV/IRL response, Complainant in October 2013 issued a "Complaint, Compliance Order, and Notice of Opportunity for Hearing" against Respondent. The Complaint alleges two overall violations: **1)** in Respondent's activities and its handling of the resulting wastes, it has failed "to maintain and operate its facility to minimize the possibility of fire, explosion, or any unplanned sudden release of hazardous waste or hazardous waste constituents into the air, soil, or surface water which could threaten human health or the environment..." and **2)** that Respondent unlawfully (*i.e.* without having obtained the requisite permit or without having "interim status") stored hazardous waste.[5] The Complaint alleged violations of the Solid Waste Disposal Act, as amended by various laws including the Resource Conservation Recovery Act and the Hazardous and Solid Waste Amendments of 1984 (collectively referred to as "RCRA"), 42 U.S.C. § 6901 *et seq.*, and applicable implementing regulations. The Complaint seeks a total civil penalty of approximately $67,000.

Respondent filed its Answer on or about January 14, 2014. While admitting a few predicate allegations, it mostly denied the allegations, disputed liability and asserted it "has terminated its fluorescent bulb recycling program. Therefore, the Compliance Order affiliated

---

[5] Paragraphs 40 and 41, paragraphs 53 and 54 of the complaint, respectively.

with this case should be considered satisfied."[6]

A number of pre-trial orders were issued: on March 10, 2014; on April 14, 2014; on May 21, 2014; on June 11, 2014; and on August 4, 2014. The March 10th order established the parameters of the proceeding, advising the parties about, *inter alia*, settlement matters, the requirements for prehearing exchanges, the deadlines for submission of prehearing exchanges, the opportunity for a hearing and motion practice. Subsequent orders extended the deadlines for the filing of the prehearing exchanges. The June 11th motion informed the parties, *inter alia*, that non-dispositive motions must be filed on or before August 15, 2014, and that the hearing in the matter would commence on September 23, 2014. The August 4th order denied Complainant's motion to extend the time to file dispositive motions and reaffirmed the deadlines set forth in the June 11th motion.

Prehearing exchanges have been submitted. Complainant filed her initial prehearing exchange on April 30, 2014. Respondent submitted its prehearing exchange on May 14, 2014, and Complainant then filed her rebuttal prehearing exchange on June 4, 2014. Pursuant to the June 11th order, "[a]ny addition of a proposed witness or exhibit to the prehearing exchange shall be filed with an accompanying motion to supplement the prehearing exchange." Page 3 (emphasis in original).

III. Prehearing Order Notice to Respondent

As noted above, the June 11th Prehearing Order informed the parties of what each must provide in the respective prehearing exchanges. Each party was required to submit to the Hearing Clerk at EPA Headquarters, to the Presiding Officer and to the opposing party the

---

[6] Paragraph 4 of the Answer.

following:

> [A] list of names of the expert and other witnesses intended to be called at hearing, identifying each as a fact witness or an expert witness, a brief narrative summary of their expected testimony, and a curriculum vitae or resume for each identified expert witness... [and]
>
> [C]opies of all documents and exhibits intended to be introduced into evidence....[7]

Further, Respondent was specifically enjoined to provide a number of items, including the following:

> [A] copy of any documents in support of the denials made in the Answer and the letter attached to the Answer [Respondent's response to the NOV/IRL];
>
> [A] copy of any documents in support of Respondent's defenses and an explanation of its argument in support of such defenses; [and]
>
> [A]ll factual information Respondent considers relevant to the assessment of a penalty and any supporting documentation.[8]

IV. <u>Respondent's Raising the Issue of an Expert Witness/Expert Report</u>

The crux of this motion and the concomitant relief Complainant seeks pertains to Respondent having listed a possible expert witness without having named him/her, without having given his/her academic or business credentials, his/her professional background, his/her area of specialty, his/her curriculum vitae (or resume), his/her professional affiliation, and without having provided the expert report said witness supposedly had prepared. Although Respondent indicated in its prehearing exchange of May 14, 2014 — over three months ago — it might call such a witness and produce such a report, Respondent has since never provided any

---

7 Page 2 of the June 11, 2014 Prehearing Order, paragraphs 1.(A) and 1.(b), respectively.

8 Pages 2 and 3 of the June 11, 2014 Prehearing Order, paragraphs 3.(A), 3.(B) and 3.(C), respectively.

subsequent information concerning this putative expert witness and/or the expert report such witness might have prepared. Nor has Respondent informed EPA (and presumably also not the Court) that it would not be calling such a witness and not attempting to introduce such a report.

In paragraph 4.) of Section 2. of Respondent's prehearing exchange, regarding the witnesses it "anticipates" calling, Respondent has written (fifth page of the Respondent's May 2014 prehearing exchange) that it anticipates calling:

> An environmental engineer or similar expert (not yet retained). The expert is expected to testify as to the extent that Advanced Recovery deviated from regulations, and the potential for harm arising out of any such deviation. Due to Advanced Recovery's limited funds, they have currently [sic] unable to retain an expert. However, as soon as an expert is retained, we will forward a copy of his Curriculum Vitae, and a more detailed account of his proposed testimony immediately upon receipt.

In Section 3. of Respondent's May 14, 2014 prehearing exchange, in the list of documentary evidence and exhibits Respondent anticipates offering into evidence at the upcoming hearing, paragraph "F." lists the "Proposed Expert Report and Curriculum Vitae. (Will be provided once expert is retained)" (last page of the document).

As more fully discussed below, at this point in time, slightly over five weeks prior to the start of the scheduled hearing, given that Respondent has introduced the issue of an expert witness testifying on its behalf and an expert report prepared on its behalf, Respondent should be compelled to identify with specificity who the putative expert is and his/her professional qualifications and credential and to produce any such report, or to certify to this Court and Complainant that it will not be utilizing the services of an expert witness and an expert report prepared by such witness. As discussed below, the rules of procedure governing this proceeding require such identification and production, as do this Court's prehearing orders and basic

principles inherent in a fair and partial adjudication.

V. Governing Law in a CFR Part 22 Proceeding

This proceeding is governed by 40 C.F.R. Part 22, and Part 22 authorizes an opponent to compel its adversary to produce its evidence. Unlike the provisions of the Federal Rules of Civil Procedure, pre-trial disclosure under Part 22 is effected primarily through the mechanism of the prehearing exchange process, 40 C.F.R. § 22.19. Sub-paragraph "a" of this provision establishes the contours of prehearing exchange, including what information must be exchanged. In sub-paragraph "f," a party is required to supplement its prehearing exchange in order to remedy matters that are incomplete, in order to correct errors and in order to keep the information provided up-to-date. The latter sub-paragraph provides:

> A party who has made an information exchange under paragraph (a) of this section, or who has exchanged information in response to a request for information or a discovery order pursuant to paragraph (e) of this section, **shall promptly supplement or correct the exchange when the party learns that the information exchanged or response provided is incomplete, inaccurate or outdated, and the additional or corrective information has not otherwise been disclosed to the other party pursuant to this section** [emphasis added].

Part 22 provides an additional mechanism for a party to seek documents beyond what its adversary has included in its prehearing exchange. To obtain discovery beyond what a party has provided in its prehearing exchange, its adversary must comply with 40 C.F.R. § 22.19(e)(1), which authorizes the Presiding Officer to order "other discovery" if such discovery:

> (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.

Where a party does not comply with a prehearing exchange requirement of 40 C.F.R. § 22.19, the Part 22 rules empower the Presiding Officer[9] to effect sanctions. Forty C.F.R. § 22.19(g) provides that, "[w]here a party fails to provide information within its control as required pursuant to this section, the Presiding Officer may, in his discretion" do any of the following:

(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).

Other provisions within the Part 22 rules provide ample authority for the Presiding Officer to enforce these provisions and overall to control events leading up to, and through, an administrative hearing. These provisions specifically provide the Presiding Officer with a wide array of powers to enable her to "conduct a fair and impartial proceeding, assure that the facts are fully elicited, adjudicate all issues, and avoid delay." 40 C.F.R. § 22.4(c). To effect these ends, a Presiding Officer is specifically empowered to, *inter alia*:

> (5) Order a party, or an officer or agent thereof, to produce testimony, documents, or other non-privileged evidence, and failing the production thereof without good cause being shown, draw adverse inferences against that party;
>
> (6) Admit or exclude evidence;
>
> ***
>
> (10) Do all other acts and take all measures necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues arising in proceedings governed by [40 C.F.R. Part 22].

---

[9] The Presiding Officer includes an Administrative Law Judge. 40 C.F.R. § 22.3.

The provisions establishing the powers to control the course of the litigation and to require litigants' compliance with the Presiding Officer's orders are further complemented by the reservoir of authority set forth in 40 C.F.R. § 22.1(c), which provides:

> Questions arising at any stage of the proceeding which are not addressed in these Consolidated Rules of Practice [40 C.F.R. Part 22] shall be resolved at the discretion of the Administrator, Environmental Appeals Board, Regional Administrator, or Presiding Officer, as provided for in these Consolidated Rules of Practice.

VI. Respondent Should Be Compelled to Produce

At least three independent grounds exists for Respondent to be compelled to produce the name and other identification of the putative expert witness (including production of his/her curriculum vitae) and to produce any expert report such witness has written with regard to this proceeding (or to certify to the Court and Complainant that Respondent will not utilize such an expert and will not produce such a report):

1) The Part 22 rules requires the production of such information;

2) The March 10th Prehearing Order requires such production; and

3) The holding of a fair adjudication requires such production.

These point will be addressed *seriatim:*

a. The Part 22 Rules

As noted above, 40 C.F.R. § 22.19(f) requires a party to supplement its prehearing exchange to provide complete information ("where the party learns that the information exchanged or response provided is incomplete"). There can be no reasonable argument or principled basis to maintain that listing an un-named and unidentified "environmental engineer or similar expert" is not incomplete; similarly referencing a "Proposed Expert Report" prepared by,

and a "Curriculum Vitae" listing the qualifications, achievements and background, such an un-named and unidentified person is far from complete. This regulatory provision obligates Respondent to identify with particularity (and not just with a name, but with his/her professional qualifications, affiliations, experience, etc.) any such witness it intends to call, and it also obligates Respondent to produce the expert report. If Respondent is not compelled to do so presently, with just a bit more than one month left to the *start* of the hearing, when would it be reasonable for Respondent to provide information as to any such expert witness and the expert report he/she presumably wrote?

In addition, this information should be provided under 40 C.F.R. § 22.19(e)(1). Respondent has been aware of this possibility of it calling an expert witness and using an expert report for at least three months, since mid-May. If it knows the name of such an expert, providing it to EPA, along with any report such person might have prepared, could not reasonably cause delay. And if no such person has been identified, and no such report to date prepared, Respondent should so inform the Court and EPA, at the least so that the latter can more properly focus on preparing for the upcoming hearing. As Respondent has raised this issue of an expert and his/her expert report, it should be self-evident that any such evidence is most reasonably and readily obtained from Respondent; this information is not something EPA could obtain independently, such as off the Internet and to date Respondent has kept EPA in the dark about any more information concerning this alleged expert and his/her expert report. Certainly the information is of significant probative value. The expert's anticipated testimony and the expert's report concern "the extent that Advanced Recovery deviated from the regulations, and the potential for harm arising out of any such deviation" (Respondent's May 14, 2014, prehearing

exchange, Section 2., paragraph 4. (fifth page). As Respondent itself explicitly recognizes, such information goes directly to the question of the appropriateness of the penalty EPA seeks (third page of Respondent's May 14, 2014 prehearing exchange):

> Complainant seeks $66,550 for these alleged violations. The Complaint indicated that the 'gravity based penalty matrix' indicated that the very highest possible penalty was to be utilized in both of these counts. The Complainant apparently contends that for these relatively minor deviations, that the potential for harm is the highest possible on the scale, and at [sic] the extent of deviation from regulation is also the highest possible on the scale.

As the above excerpt demonstrates, Respondent has beyond doubt established that the issue of whether EPA's use of the penalty matrix's potential for harm and extent of deviation is of "significant probative value on a disputed issue of material fact [an appropriate penalty amount] relevant to...the relief sought [the civil penalty EPA seeks]."[10]

Thus, under either 40 C.F.R. § 22.19(e)(1) or 40 C.F.R. § 22.19(f), Respondent should be compelled to produce the information herein requested or inform this Court and EPA that it has not retained an expert and thus will not be producing an expert report. The criteria set forth in each such provision are satisfied by circumstances of this proceeding.

b. The Court's March 10th Prehearing Order

Respondent should be compelled to produce the information sought pursuant to the directives of this Court's March 11th order. As previously detailed, each party was required thereunder to provide the names of any expert witness it intends to call at the hearing and a brief narrative summary of the expected testimony. Paragraph 1, page 2 of the March 10th order. The order specifically directed Respondent to provide a copy of "any documents in support of any

---

[10] 40 C.F.R. § 22.19(e)(1)(iii).

denials" set forth in the Answer, a copy of "any documents in support of Respondent's defenses," and otherwise "all factual information Respondent considers relevant to the assessment of a penalty and any supporting documentation." Paragraphs 3(A), 3(B) and 3(C) of the March 10th order, pages 2-3. The issue on which Respondent reports its expert is anticipated to testify and on which the expert report would focus — "the extent that Advanced Recovery deviated from the regulations, and the potential of harm arising out of any such deviation[]" — go directly to Respondent's denying and disputing the appropriateness of the penalty, and go directly to Respondent's core defense that the penalty is excessive and disproportionate to the nature and scope of the alleged violations. As such, the March 10th order requires that this Court compel Respondent to provide the information and documentation EPA seeks through this motion. Indeed, the order itself warns Respondent that a failure to comply with its provisions might result in serious consequences. On page 4 of the order, in underscored text, it states: "Respondent is hereby notified that its failure to either comply with the prehearing exchange requirements set forth herein or to state that it is electing only to conduct cross-examination of Complainant's witnesses, can result in the entry of a default judgment against it."

c. The need for a fair adjudication

One of the objectives underlying the Part 22 rules is to ensure that there be "the efficient, fair and impartial adjudication issues arising in proceedings governed by [40 C.F.R. Part 22]." 40 C.F.R. § 22.4(c)(10). It would be patently unfair for Respondent not to identify with particularity any expert witness whom it anticipates calling to testify and not to produce any expert report such a witness prepared. Without such knowledge, EPA could not properly prepare for a hearing and, the substance of any such testimony or the substance of any such report. For

example, while Respondent has stated it anticipates calling "[a]n environmental engineer," it further notes it might call a "similar expert." Section 2., paragraph 4 of the May 14th prehearing exchange, fifth page. What is a "similar expert"? Does it mean some other type of engineer, or does it mean some other (and totally unidentified) type of engineer? If the former, does it mean perhaps, for example, a chemical engineer, a civil engineer or a mechanical engineer? Might it mean one with specific qualifications and credentials (such as Ph.D.) in chemistry, physics or a related discipline? EPA needs to know, and to know specifically, in order to attempt to rebut and refute, or otherwise address, what such an unidentified expert might testify to — its potential scope, the areas of such testimony and the methods by which any such expert and/or export report reached its conclusions. This might involve utilizing Agency personnel or perhaps retaining an outside person with the requisite credentials, training, background and experience to dispute or discredit what any such expert/expert report might say. Properly preparing to do so necessarily consumes time and resources, if for no other reason than to find the appropriate response witness and to have him/her to digest, evaluate and analyze any expert report Respondent might present. In addition, depending upon whom Respondent lists as the expert witness, or the nature of the report such witness produces, Complainant might decide to attempt to obtain leave to amend or supplement her prehearing exchange in order to counter or address the expert's expected testimony/the assertions made in the expert report. Without knowledge of and about this expert witness and any report he/she might prepare for this proceeding, EPA would be hampered in deciding upon a definite litigation strategy.

All of these factors inexorably lead to but one conclusion: if there is to be a fair hearing, if EPA is to be provided with a full and fair opportunity to present its case and meets its requisite

burden of proof,[11] and if EPA is to be allowed to demonstrate flaws and shortcomings in evidence Respondent may present, it is imperative for EPA to know whether Respondent will utilize an expert witness (and if Respondent does, then information about that witness), and whether Respondent will offer an expert report. Anything less would fall short of the stated Part 22 goal to ensure that administrative adjudications thereunder are fairly conducted.

VII. Part 22 Case Law Supports Compelling Production

The importance of Respondent timely producing documentation cannot be over-emphasized: it is central to the adjudications envisioned under Part 22. This importance has been recognized by the Environmental Appeals Board (EAB). *See, e.g., In re Ag-Air Flying Services, Inc.*, FIFRA Appeal No. 06-01, Docket Number FIFRA-10-2005-0065 (2006), at 9[12]:

> [F]ederal administrative adjudications developed as a truncated alternative to Article III courts and are intended to provide expedition. The efficient and timely exchange of information pursuant to 40 C.F.R. § 22.19 is central to achieving timely administrative case resolutions. Further, the efficiency of administrative adjudications depends upon the ability of the ALJ to exercise her discretion n order to conduct proceedings in a fair manner that assures that facts are elicited and issues adjudicated without delay, as prescribed by 40 C.F.R. § 22.4(c) [citations omitted].

Against a backdrop of such unequivocal guidance from the EAB, EPA trial tribunals have regularly compelled respondents to provide evidence required otherwise to be submitted as part of the prehearing exchange process. The recent case of *In re Andrew B. Chase et al.*, Docket

---

[11] 40 C.F.R. § 22.24.

[12] Decisions of the EAB are available at www.epa.gov/eab. In addition, these are readily available through commercial the legal data bases WESTLAW and/or LEXIS.

Number RCRA–02-2011-7503, is instructive.[13] Respondent alleged an inability to pay but provided no supporting documentation. EPA moved to compel production approximately four months before the start of the scheduled hearing. By order dated May 11, 2012, ALJ Buschman ordered that the documents EPA requested by produced within 19 days of the order (May 30, 2012), which was nearly four months before the commencement of the hearing July 17, 2012). That decision explained:

> The question arises, whether the financial documents are relevant to the relief sought where Respondents have not submitted in its [sic] Prehearing Exchange any documentation as to inability to pay a penalty. ***
>
> At this point, however, the issue is relevant to the relief sought by virtue of Respondents having raised it. If Respondents present evidence on the issue and it is admitted into the record, it may be considered in assessing the penalty in this matter. On one hand it may be excluded if Respondents do not submit such evidence in a timely supplement to the prehearing exchange.... On the other hand, **if financial documents are submitted 15 days or more before the hearing, or fewer days with a showing of good cause, then potentially they could be admitted into evidence and Complainant may not have sufficient time for witnesses and analysts to review them and to prepare a rebuttal, which may result in prejudice to Complainant. Therefore, the Complainant's request to compel production of financial documents is granted, and Respondents will be required to provide the documents within the time period set forth below** [emphasis added].

Part 22 case law continually reaffirms the authority of the Presiding Officer to compel the production of evidence. *See, e.g., In re Joseph Oh and Holly Investment, LLC*, Docket Number RCRA-10-2011-0164 (2012), where Judge Buschmann granted an order compelling the production of evidence. Respondents, appearing *pro se*, had not raised an inability to pay defense, and EPA requested an affirmative statement from them whether they intended to raise

---

[13] Decisions of EPA Administrative Law Judges (ALJs) are available at www.epa.gov/oalj. These too may be obtained through WESTLAW or LEXIS.

such a defense. EPA moved for compelled production. The Court granted the motion, emphasizing the importance of "allow[ing] Complainant to have sufficient time for witnesses and analysts to review financial documents submitted and to prepare a rebuttal," specifying that the documentation be submitted "within the time period set forth below." While in this case, as is true in much of the case law, the object of the motion seeking to compel production involved financial documents, the overriding rationale is crucial and makes these rulings instructive for the instant proceeding. Where an issue is or might be in contention and on which a respondent predicates its defense, in whole or in part, on liability or on penalty, the ALJ tribunals consistently grant motions to compel production when the information sought "has significant probative value on an issue of material fact relevant to liability or the relief sought." *See, e.g., In re Doug Blossom*, Docket Number CWA-10-2002-0131, 2003 WL 22940544 (Judge Biro November 28, 2003), where respondent's prehearing exchange failed to provide documents relevant to his financial condition or upon which his listed expert witness might base his testimony. EPA moved to compel production of any such documentation. In granting that motion, the Court explained (page 2 of 3 of Westlaw opinion):

> The hearing of this matter is set to begin on January 6, 2004, about six weeks from now. Thus, prompt production of the discovery sought will not delay the proceedings. Specific, current information regarding Respondent's finances is solely within Respondent's possession and should not unreasonably burden Respondent, and was not provided voluntarily by Respondent. The information Complainant seeks is of significant probative value on the penalty issue. Respondent has not clearly put 'ability to pay' at issue, but it is suggested by the summary of proposed testimony by Mr. Moore [the listed expert witness]. To clarify whether Respondent intends to raise it as an issue for hearing, and to enable Complainant to address this issue, Respondent shall be required to produce the requested documents [citation omitted].

These cases are emblematic of the authority an ALJ possesses and frequently exercises in

order that a respondent produce evidence of an issue it has placed in contention. One case that is particularly revealing as to the different factors under Part 22 law that can justify an ALJ exercising her discretionary authority to compel a party to produce evidence is *In re Gerald Strubinger, Gregory* Strubinger, Docket Number CWA-3-2001-001 (Judge Gunning 2002), 2002 EPA ALJ LEXIS 44. EPA alleged respondents had unlawfully (without an appropriate permit) discharged pollutants from a point source into waters of the United States. The Agency moved to compel respondents to more particularly identify 22 witnesses, to describe the expected testimony of some of respondents' potential witnesses in greater detail and to identify the documents such witnesses were expected to introduce at the hearing. EPA also sought to compel the production of financial documents or, in the alternative regarding such documents, to preclude respondents from introducing such documents at a hearing. EPA asserted a number of deficiencies in respondents' prehearing exchange, specifically that respondents failed, *inter alia*:

> a) regarding four witnesses, to provide the location of their properties or the proximity of their properties to the site of the discharges;
>
> b) regarding one witness, to provide any description regarding the nature of her anticipated testimony or the connection of this witness to the site of the discharges;
>
> c) regarding eight witnesses, to provide their qualifications or the relevance of their anticipated testimony;
>
> d) regarding one witness, to provide information concerning his qualifications or his connection to the site of the discharges;
>
> e) to provide the names of the persons who are custodians of pertinent records; and
>
> f) for two witnesses, to identify the work they perform and the nexus between such work and the site of the discharges.

In granting the motion to compel production, or, in the alternative, the motion in limine, ALJ Gunning explained (at *7-*8):

> Complainant's argument that Respondent [the ALJ used the collective term for both respondents] should provide additional and more specific information concerning the 22 intended witnesses identified above and their expected testimony is persuasive. 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.

Similarly, in the instant proceeding, Respondent's reference to an un-named expert and a report such expert would prepare fail to inform EPA about crucial information about this alleged expert, information that could be used possibly to refute his testimony or otherwise impeach his credentials as an expert; similarly the exiguous reference to an expert report does not provide any meaningful information as to what such report might contain and how EPA might attempt to rebut what such report contains. Nor should providing this information be burdensome to Respondent, as presumably, at this point in time less than six weeks from the start of the hearing, Respondent should be well aware of those matters to which its alleged expert would be testifying.

Other cases further confirm the authority vested in the ALJs to compel production of evidence pertinent to issues in contention. *See also In re Vemco, Inc., d/b/a Venture Grand Rapids,* Docket Number CAA-05-2002-0012, 2003 WL 1919589 (Judge Biro March 28, 2003); *In re Compania Petrolera Caribe, Inc.*, Docket Number II-RCRA-UST-97-0310, 1999 WL 362882 (Judge Biro January 13, 1999).

There can be no doubt that this tribunal possesses the authority to compel Respondent to produce the name and other pertinent information concerning its putative expert witness and further to require production of any expert report. Under operative Part 22 case law and the circumstances in the instant proceeding, an exercise of this discretionary ALJ authority is not

only appropriate but warranted to ensure compliance with Part 22 provisions, with the terms of the Court's March 10th Prehearing Order and to carry out the Part 22 mandate that EPA administrative adjudications be fair adjudications. And, as the EAB has often pointed out, an ALJ is possessed of a vast reservoir of authority to control the all phases of the conduct of Part 22 administrative litigation.[14]

VIII. The Appropriateness of Conditional Preclusion

Under Part 22 case law, there is *de facto* precedent for this Court to issue a conditional order of preclusion.

In the aforementioned Chase proceeding, Complainant moved to compel production of evidence related to an issue respondents there had put in contention: their alleged financial hardship/inability to pay the civil penalty sought. In moving to compel respondents to produce their financial documents, EPA sought an order of preclusion. Rather than outright grant or deny EPA's motion, ALJ Buschmann directed respondents to provide specified documentation by a date certain (19 days after the date of the order, which was about 14 weeks prior to the start of the hearing), and, if they failed timely to comply with that order, respondents "may be...precluded from introducing any documentation or information relevant to such claim into the record of the proceeding...." *In re Andrew Chase et al.*, Docket Number RCRA-02-2011-7503 (order of May 11, 2012, at 8). The Court explained (at 7-8):

> The next question is whether to grant Complainant's request for an order

---

[14] *See, e.g., In re CDT Landfill Corp.*, CAA Appeal No. 02-02 (EAB 2003), at 107-08: the "provisions [of 40 C.F.R. Part 22] grant significant discretion to the presiding officer to conduct administrative proceedings.... In interpreting and applying these provisions, the Board has indicated on a number of occasions that our rules depend on the presiding officer to exercise discretion throughout an administrative penalty proceeding" (citations, internal alterations omitted).

> precluding Respondents, if they fail to comply, from introducing into the record documentation that may be relevant to inability to pay, and inferring that such documentation would be adverse to them. A sanction cannot be definitively imposed at this point in the proceeding as the condition therefor, the failure to provide the financial documents, has not yet taken place and may not occur. An automatic sanction set forth in advance is also not appropriate. In the event that Respondents timely submit some financial documents and Complainant finds that they are insufficient, a determination must be made as to whether the submittal is sufficient or whether it constitutes a failure under 40 C.F.R. § 22.19(g) to 'provide information within its control as required,' before a sanction may be imposed. Furthermore, there may be a question of appropriateness of imposing a sanction if there is a question of timeliness, such as documents being received after the deadline but purportedly submitted in advance thereof. **Therefore, an appropriate conditional statement of sanction is included below** [emphasis added].[15]

IX. Conclusion

For all the reasons set forth above, Complainant respectfully requests this Court issue an order that: **a)** compels Respondent either to produce and file with this Court by no later than September 2, 2014, documentation and information related to Respondents's putative expert witness (as specified in the discussion above, including his/her professional qualifications, experience and professional affiliation(s)), or, in the alternative, to inform Complainant and this Court that Respondent will not seek to introduce into the record of the upcoming hearing the testimony of any such expert witness and any expert report prepared by him/her; **b)** puts Respondent on notice that failure to provide the sought for documentation and information might

---

[15] Respondents failed to comply with the provisions of the May 11th conditional order of preclusion, and EPA moved for preclusion. By order dated June 28, 2012, ALJ Buschmann granted EPA's motion and precluded any evidence respondents might present as to inability to pay/financial hardship. Ultimately, the trial court, after granting EPA accelerated decision on liability for most of the counts, assessed a civil penalty (based upon written submissions). Respondents appealed (and EPA cross-appealed) to the EAB. The EAB upheld the ALJ's preclusion order, affirming her refusal to consider respondents' financial condition in assessing a penalty. *In re Andrew B. Chase et al.*, RCRA (9006) Appeal No. 13-14, Docket Number RCRA-02-2011-7503 (EAB, August 1, 2014), slip opinion at 27-32. In upholding the preclusion order of the ALJ, the EAB necessarily upheld her authority to issue the conditional preclusion order, as the former was predicated upon issuance of the latter.

result in an order precluding Respondent from introducing into the record of the upcoming hearing the testimony of the putative expert and any expert report prepared by him/her; and **c)** grants Complainant such other and further relief that under the circumstances of this proceeding this Court deems lawful, just and proper.

Dated: August 15, 2014
New York, New York

Respectfully submitted,

Lee A. Spielmann
Assistant Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 2
290 Broadway, 16th floor
New York, New York 10007-1866
212-637-3222
FAX: 212-637-3199
spielmann.lee@epa.gov

TO: Honorable Christine D. Coughlin
Administrative Law Judge
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Mail Code 1900R
Washington, DC 20460

Sybil Anderson, Headquarter Hearing Clerk
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Mail Code 1900R
Washington, DC 20460

Kirk O. Orseck, Esq.
Orseck Law Offices PLLC
Counsel for Respondent
1924 State Route 52
P.O. Box 469
Liberty, New York 12754

In re Advanced Recovery, Inc.
Docket No. RCRA-02-2013-7106

CERTIFICATE OF SERVICE

I certify that I have this day caused to be sent the foregoing "MOTION TO COMPEL PRODUCTION/TO CONDITIONALLY PRECLUDE," dated August 15, 2014, in the above-referenced proceeding in the following manner to the respective addressees listed below:

Original and one copy by
Pouch Mail:

Sybil Anderson, Headquarters Hearing Clerk
Office of Administrative Law Judges
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Mail Code 1900R
Washington, DC 20460-2001

Copy by Pouch Mail:

Honorable Christine D. Coughlin
Administrative Law Judge
U.S. Environmental Protection Agency
1200 Pennsylvani Avenue, N.W.
Mail Code 1900R
Washington, DC 20460

Copy by First Class Mail:

Kirk O. Orseck, Esq.
Orseck Law Offices PLLC
1924 State Route 52
P.O. Box 469
Liberty, New York 12754

I additionally certify that a PDF version, with signatures, of said motion and this certificate, was electronically sent to each of the following addresses:

anderson.sybil@epa.gov ///oaljfiling@epa.gov ///orsecklaw@yahoo.com

Dated: August 15, 2014
New York, New York

Lee A. Spielmann