UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	**)**	
	)	
Wisconsin Plating Works of Racine, Inc.,	**)**	**Docket No. CAA-05-2008-0037**
	)	
Respondent.	**)**	

Order on Complainant's Motion for Accelerated Decision on Liability, Motion for Partial Accelerated Decision on Ability to Pay or in the Alternative to Compel Discovery, and Motion to Supplement Prehearing Exchange

I. Background and Motion to Supplement Prehearing Exchange

On September 22, 2008, the United States Environmental Protection Agency Region 5 ("Complainant") filed a one-count Complaint against Wisconsin Plating Works of Racine, Inc. ("Respondent") for violating the National Emission Standards for Hazardous Air Pollutants ("NESHAP") for halogenated solvents, codified at 40 C.F.R. Part 63 Subpart T, which are regulations promulgated under Section 112(d), 42 U.S.C. § 7412(d) of the Clean Air Act. Specifically, the Complaint charges Respondent with failure to monitor and record the temperature of a freeboard refrigeration device in its vapor degreaser on six occasions between the weeks of February 26, 2007 and June 25, 2007, in violation of 40 C.F.R. §§ 63.463(e)(1) and 63.466(a). For the alleged violations, Complainant proposes a penalty of $ 72,683. Respondent filed an Answer to the Complaint on October 24, 2008, denying the alleged violations, and stating that it does not believe that it was using the freeboard refrigeration device during the weeks in question. Answer ¶ 17. Subsequently, the parties filed prehearing exchanges. This matter was set for hearing, and then was rescheduled to commence on July 21, 2009, pursuant to Complainant's request.

On March 18, 2009, Complainant submitted a Motion to Supplement Prehearing Exchange along with two proposed exhibits. On March 23, 2009, Complainant filed a Motion for Accelerated Decision on Liability. On March 30, Complainant filed a Motion for Partial Accelerated Decision on the Issue of Ability to Pay and Alternative Motion to Compel Discovery Related to Respondent's Ability to Pay. To date, Respondent has not file a response to either the Motion to Supplement or the Motion for Accelerated Decision on Liability. However, on April 24, 2009, Respondent did file a response to the Motion for Accelerated Decision on the Issue of Ability to Pay.

Complainant's Motion to Supplement Prehearing Exchange seeks to add two documents, marked as Complainant's Exhibits 17 and 18, to its Prehearing Exchange. Complainant represents that Exhibit 17 is a copy of Respondent's permit under Title V of the Clean Air Act, which provides information about Respondent's operations and methods of compliance with the NESHAP, and that Exhibit 18 is the Agency for Toxic Substances and Disease Registry Toxicological Profile for Trichloroethylene. Complainant points out that both documents are publicly available. Complainant quotes the Environmental Appeals Board in *CDT Landfill Corp*, 11 E.A.D. 88, 109-110 (EAB 2003), that "Administrative hearings are such that the rules allowing evidence into the record tend to be more liberal than in proceedings in other courts, and normally err toward over-inclusion rather than under-inclusion."

No objection having been filed by Respondent, and no reason otherwise apparent for excluding the proposed exhibits, Complainant's Motion to Supplement Prehearing Exchange is hereby **GRANTED**.

II. Undisputed Facts

At its facility located at 620 Stannard St., Racine, Wisconsin, Respondent owns and operates a "vapor degreaser" solvent cleaning machine. Complaint and Answer ¶¶ 3, 6, 14. The vapor degreaser, identified as Emission Unit P35, uses trichloroethylene in a concentration greater than 5% by weight as a solvent. Complaint and Answer ¶ 6. The vapor degreaser is subject to the requirements of the NESHAP for Halogenated Solvent Cleaning, codified at 40 C.F.R. Part 63 Subpart T, Sections 63.460-63.470. Complaint and Answer ¶ 6. On July 18, 2007, Respondent submitted its semi-annual report for the halogenated solvents under the NESHAP, indicating that there were six occurrences in which the temperature of the freeboard refrigeration device in its vapor degreaser was not recorded. Complaint and Answer ¶ 15.

On March 7, 2008, Complainant issued a Finding of Violation ("FOV") to Respondent for failure to monitor and record the temperature of the FRD for Emission Unit P35. Complaint and Answer ¶ 19. On March 26, 2008, Complainant and Respondent engaged in a conference to discuss the FOV. Complaint and Answer ¶ 20.

III. Relevant Regulatory Provisions

Subpart T of the NESHAP applies to each batch vapor, in-line vapor, in-line cold, and batch cold solvent cleaning machine that uses halogenated solvents in a total concentration of greater than 5% by weight as a cleaning and/or drying agent. Subpart T sets forth standards for batch vapor and in-line cleaning machines at 40 C.F.R. § 63.463, and sets forth monitoring procedures at 40 C.F.R. § 63.466. Subpart T provides at 40 C.F.R. § 63.463(b) that the owner and operator of a batch vapor cleaning machine shall employ one of the specified combinations of control devices, one of which is a freeboard refrigeration device ("FRD") unless it can demonstrate that the solvent cleaning machine can maintain an idling emission limit of 0.22

kilograms per hour per square meter. 40 C.F.R. §§ 63.463(b)(1)(i), 63.463(b)(2)(i). An FRD is defined as "a set of secondary coils mounted in the freeboard area that carries a refrigerant or other chilled substance to provide a chilled air blanket above the solvent vapor." 40 C.F.R. § 63.461.

The Complaint charges Respondent with violating 40 C.F.R. § 63.463(e)(1), which in pertinent part provides as follows:

> (e) Each owner or operator of a solvent cleaning machine complying with paragraph (b) [batch vapor cleaning machine], (c) [in-line solvent cleaning machine] , (g) or (h) of this section shall comply with the requirements specified in paragraphs (e)(1) through (e)(4) of this section.
>
> (1) Conduct monitoring of each control device used to comply with § 63.463 of this subpart as provided in § 63.466.

In turn, 40 C.F.R. § 63.466(a), with which Respondent is also charged with violating, provides in pertinent part as follows:

> (a) . . . each owner or operator of a batch vapor or in-line solvent cleaning machine complying with the equipment standards in § 63.463(b)(1)(i), [or] (b)(2)(i) . . . shall conduct monitoring and record the results on a weekly basis for the control devices, as appropriate, specified in paragraphs (a)(1) through (a)(5) of this section.
>
> (1) If a freeboard refrigeration device is used to comply with these standards, the owner or operator shall use a thermometer or thermocouple to measure the temperature at the center of the air blanket during the idling mode.

IV. Standard for Accelerated Decision

Section 22.20(a) of the Consolidated Rules of Practice ("Rules") states that –

> The Presiding Officer may at any time render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law.

40 C.F.R. § 22.20(a).

A motion for accelerated decision is analogous to a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure ("FRCP") and thus federal court rulings on

motions under FRCP 56 provide guidance in ruling on a motion for accelerated decision. *See Mayaguez Reg'l Sewage Treatment Plant*, 4 E.A.D. 772, 781-82, 1993 EPA App. LEXIS 32, *24-26 (EAB 1993), *aff'd sub nom., Puerto Rico Sewer Authority v. U.S. EPA*, 35 F.3d 600, 606 (1st Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995). Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of any material fact and that the moving party is entitled to a judgment as a matter of law." FRCP 56(c).

The moving party has the burden of showing there is no genuine issue of material fact. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). A "material" issue is one which "affects the outcome of the suit," *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1985), or "needs to be resolved before the related legal issues can be decided." *Mack v. Great Atlantic and Pacific Tea Co.*, 871 F.2d 179, 181 (1st Cir. 1989). A dispute is "genuine" if "there is sufficient evidence supporting the claimed factual dispute to require a choice between the parties' differing versions of truth at trial." *Garside v. Osco Drug, Inc.*, 895 F.2d 46, 48 (1st Cir. 1990). The party opposing the motion must demonstrate that the issue is "genuine" by referencing probative evidence in the record, or by producing such evidence. *Clarksburg Casket Company*, 8 E.A.D. 496, 502 (EAB 1999); *Green Thumb Nursery*, 6 E.A.D. 782, 793 (EAB 1997). The record must be viewed in a light most favorable to the party opposing the motion, indulging all reasonable inferences in that party's favor. *Griggs-Ryan v. Smith*, 904 F.2d 112, 115 (1st Cir. 1990); *Cone v. Longmont United Hospital Ass'n*, 14 F.3d 526, 528 (10th Cir. 1994) (citing *Boren v. Southwest Bell Tel. Co.*, 933 F.2d 891, 892 (10th Cir. 1991)). The finder of fact may draw "reasonably probable" inferences from the evidence. *Rogers Corp. v. EPA*, 275 F.3d 1096, 1103 (D.C. Cir. 2002) (citations omitted). Summary judgment is inappropriate where contradictory inferences may be drawn from the evidence or where there are unexplained gaps in materials submitted by the moving party, if pertinent to material issues of fact. *Id.; O'Donnell v. United States*, 891 F.2d 1079, 1082 (3rd Cir. 1989).

V. Motion for Accelerated Decision on Liability

A. Complainant's Arguments

In its Motion for Accelerated Decision on Liability ("Motion"), Complainant requests issuance of an order finding Respondent liable for the violations alleged in the Complaint pursuant to 40 C.F.R. § 22.20, on the basis that no genuine issue of material fact exists as to Respondent's liability for violating the regulations as alleged in the Complaint and that, therefore, it is entitled to judgment as a matter of law. Complainant states in the Motion that Respondent's counsel objects to the relief requested by the Motion.

In support of its assertion that there is no genuine issue of material fact as to Respondent's liability, Complainant alleges that, by lawful delegation, the Director of the Air and Radiation Division of the Environmental Protection Agency Region 5 had the authority to

file the action against Respondent under Section 113(d) of the Clean Air Act, 42 U.S.C. § 7413(d), which authorizes the Administrator of the Environmental Protection Agency (EPA) to assess a civil administrative penalty for violations of the Clean Air Act or permit issued or regulations promulgated thereunder. Complaint and Answer ¶¶ 1, 3. Complainant also claims that it met the condition in Section 113(d) for seeking civil penalties through an administrative action for violations which occurred more than 12 months prior to initiation of the action. Specifically, Complainant points to Exhibits 3 and 4 of its Prehearing Exchange ("C's Ex."), showing a determination by the Administrator and Attorney General that the violations of Respondent which occurred more than 12 months prior to the filing of the Complaint are appropriate for an administrative penalty action.

Further, Complainant directs this Tribunal's attention to the admissions in Respondent's Answer that Respondent owns or operates a solvent cleaning machine subject to Subpart T of the NESHAP and Exhibit 17 of its Prehearing Exchange, which is Respondent's permit under Title V of the Clean Air Act, on page 7 of which, Emission Unit P35 is identified as a halogenated open top vapor degreaser which is a batch vapor degreaser. Motion at 7. Complainant also points out that the permit states that P35 is controlled with a combination of a FRD and a freeboard ratio of 1.0 with a solvent/air interface of less than 13 square feet. *Id*.

Additionally, referring to Respondent's admission in its Answer that its semi-annual NESHAP report indicated six occurrences in which the temperature of the FRD was not recorded (Complaint and Answer ¶ 15), Complainant refers to the July 18, 2007 semi-annual report presented as Exhibit 1 of its Prehearing Exchange and Group Exhibit 5 of Respondent's Prehearing Exchange ("R's Group Ex."), indicating that the readings may have been missed and that no data was entered into the degreaser's compliance log for the weeks at issue. Motion at 7-8. As to Respondent's statement in its Answer that it does not believe that it was using the FRD during the weeks in question, Complainant asserts that the statement does not "clearly admit, deny or explain" the allegation that it failed to record the temperature of the FRD for the six weeks at issue. Complainant points out that under the Rules, failure to admit, deny or explain any material factual allegation in the Complaint constitutes an admission of the allegation. 40 C.F.R. § 22.15(d).

As to the alleged failure to *monitor* the FRD, Complainant refers to statements in Respondent's Prehearing Exchange Group Exhibit 6 to demonstrate that there is no genuine issue of material fact that Respondent failed to monitor the temperature of the FRD for the weeks in question.

B. Discussion and Conclusion

The Rules provide at 40 C.F.R. § 22.16(b) that a "response to any written motion must be filed within 15 days after service of such motion," and that "[a]ny party who fails to respond

within the designated period waives any objection to the granting of the motion." Complainant's Motion having been served on March 23, 2009, a response was due on April 13, 2009. Because no response was filed, under the Rules Respondent has waived any objection to the granting of the Motion, despite the fact that its counsel indicated, prior to receipt of the Motion, that it objected to the relief requested. On that basis, the Motion may be granted. Furthermore, the Motion may be granted on the basis that, as established by the Motion and documents in the case file, no genuine issue of material fact exists and Complainant is entitled to judgment as a matter of law as to Respondent's liability for the alleged violations.

Respondent admitted in its July 18, 2007 semi-annual report for the halogenated solvents NESHAP, that there were six occurrences in which the temperature of the FRD in its vapor degreaser was not recorded. Complaint and Answer ¶ 15. Specifically, the report states as follows:

> A maximum of six weekly temperature readings for the freeboard refrigeration device ***may*** have been missed during the reporting period. No data was entered in the degreaser's compliance monitoring log for the weeks listed below. There are instances when the degreaser is not in operation for an extended time period. However, it cannot be confirmed whether or not the degreaser was in operation for the weeks in question. It is possible that temperature readings were taken, but not recorded in the compliance monitoring log.

R's Group Ex. 5 (emphasis in original). In the Answer, Respondent stated that it does not "believe" it was using the FDR during the weeks in question. Answer ¶ 17.

The question is whether these statements in the report and the Answer raise a genuine issue of material fact with respect to liability. One of the regulatory provisions with which Respondent is charged, 40 C.F.R. § 63.466(a), provides in that the owner or operator "shall conduct monitoring and record the results on a weekly basis for the control devices, as appropriate, specified in paragraphs (a)(1) through (a)(5) of this section." Because this provision requires the results to be recorded, and there is no dispute that Respondent did not record monitoring results for the weeks in question, Respondent is liable for violating 40 C.F.R. § 63.466(a).

The next question is whether Respondent is also liable for failure to conduct monitoring during the weeks in question. In Respondent's Prehearing Exchange Group Exhibit 6, described as "Respondent's talking points and slides from March 26, 2008 meeting between Respondent and Complainant" (Respondent's Prehearing Exchange p. 4), some of the talking points are:

> From January - June 2007, the degreaser only operated 8 out of 21 Mondays.
> Maintenance Techs would typically take readings, not operators. Maintenance failed to take readings.
> Gap in taking readings on logsheets over over [sic] six mos. period discovered during semi-annual compliance review.

> No temperature exceedance . . . and NO notice of equipment malfunction was reported by the operators on the Mondays degreaser was in operation (but readings were taken).

These talking points indicate that not only were readings not recorded, but they were not *taken*, that is, the FRD was not monitored, on occasions during the period at issue. The talking points indicate that when the degreaser was in operation on Mondays, readings *were* taken, which does not negate that fact that readings were not taken on other occasions. The regulations require monitoring "on a weekly basis," and do not indicate that monitoring must be conducted only if the degreaser is "in operation." 40 C.F.R. § 63.466(a). Viewing the record in a light most favorable to Respondent, and even if an affirmative defense could be raised that the degreaser was not in operation during the weeks at issue, Respondent has indicated that it cannot support any such affirmative defense, as Respondent stated in the semi-annual report that "it cannot be confirmed whether or not the degreaser was in operation for the weeks in question." C's Ex. 1; R's Group Ex. 5.

Moreover, Complainant presented in its Prehearing Exchange (Exhibit 11) a Declaration of Constantinos Loukeris, dated January 14, 2009, who states therein that he is employed by EPA as an Environmental Engineer, and that he participated in the conference between Complainant and Respondent on March 26, 2008 and reviewed tables provided by Respondent of its vapor degreaser usage during the pertinent time period. In his Declaration, he states the days and number of hours that the vapor degreaser was used during each of the weeks at issue. Attached to the Declaration are several tables.

It is concluded that no genuine issue of material fact has been raised as to Respondent's liability, and that Complainant is entitled to judgment as a matter of law that Respondent is liable for violations of 40 C.F.R. §§ 63.463(e)(1) and 63.466(a) as alleged in the Complaint. *See, Garside v. Osco Drug, Inc.*, 895 F.2d at 48 (dispute is "genuine" if "there is sufficient evidence supporting the claimed factual dispute to require a choice between the parties' differing versions of truth at trial."); *Clarksburg Casket Company*, 8 E.A.D. 496, 502 (EAB 1999); *Green Thumb Nursery*, 6 E.A.D. 782, 793 (EAB 1997). Accordingly, Complainant's Motion for Accelerated Decision on Liability is hereby **GRANTED**.

VI. Complainant's Motions Regarding Ability to Pay

A. Background

Section 113((e)(1) of the Clean Air Act provides that one of the factors which must be considered in determining the amount of a penalty is "the economic impact of the penalty on the business." The Environmental Appeals Board stated that this factor "has traditionally been considered as a violator's 'ability to pay' in the Agency's assessment of penalties." *CDT Landfill Corp.*, 11 E.A.D. 88 n. 60, 2003 EPA App. LEXIS 5 (EAB 2003); *see also*, Clean Air Act Stationary Source Civil Penalty Policy, dated October 25, 1991, pp. 2, 20 (indicating that the Penalty Policy reflects the factors of Section 113(e), and discussing "ability to pay").

Respondent did not refer to "economic impact of the penalty on the business" or "ability to pay" in its Answer. The Prehearing Order issued in virtually all penalty proceedings before the undersigned, including the present proceeding, provides that if the respondent takes the position that it is unable to pay the proposed penalty, it shall submit a copy of all documents it intends to rely upon in support of such position. In response, in its Prehearing Exchange filed on February 20, 2009, Respondent included copies of its tax returns for 2005, 2006 and 2007, and stated, "Respondent will provide further documentation when available showing the 4th Quarter 2008 losses suffered by Respondent (See Exhibit 8), the approximately $20,000 loss for January 2009, and the fact that Respondent has recently laid off 40% of its employees." Respondent's Initial Prehearing Exchange ("R's PHE") p. 5. Exhibit 8 therein is a "Statement of Operations - Income Tax Basis for the Three Month Period October 1 through December 31, 2008" prepared by an accountant which states that it is unaudited and based on information represented by management of the corporation. R's Ex. 8. Respondent also states that its vice-president will testify at the hearing in this matter regarding "Respondent's financial state." R's PHE p. 1.

B. Complainant's Arguments

In the Motion for Partial Accelerated Decision on the Issue of Ability to Pay and Alternative Motion to Compel Discovery Related to Respondent's Ability to Pay ("ATP Motion"), Complainant's position is that Respondent has waived the issue of ability to pay and should be barred from introducing any evidence on this issue, but if such arguments are rejected, then Complainant's request for discovery should be granted in order to assess Respondent's ability to pay. Attached to the Motion is a Declaration of Gail B. Coad ("Declaration").

Complainant points out that the Respondent was required by 40 C.F.R. § 22.15 to include in its Answer the "basis for opposing the proposed relief," that inability to pay or economic impact of the penalty is a basis for opposing the penalty, and that Respondent failed to raise this issue in its Answer. Observing the provision of Section 22.15 of the Rules that a hearing may be held "upon the issues raised by the complaint and answer," Complainant argues that since Respondent did not raise inability to pay or economic impact of the penalty in its Answer, it "cannot be an issue for hearing." ATP Motion at 6.

Complainant argues further that even if the issue were raised in the Answer, Respondent "has failed to provide information that is essential to any analysis of its ability to pay a penalty." ATP Motion at 7. Complainant refers to the instruction of the Environmental Appeals Board ("EAB") in *New Waterbury, Ltd.*, 5 E.A.D. 529, 542 (EAB 1994), that the complainant "must be given access to the respondent's financial records before the start of [any] hearing" and that if respondent "fails to produce any evidence to support its claim [of inability to pay] after being apprised of that obligation during the pre-hearing process," it may be concluded that "any objection to the penalty based upon ability to pay has been waived under the Agency's procedural rules." Complainant argues that testimony of a corporate officer as to the financial condition of the corporation is merely conclusory, self serving and entitled to little or no weight, citing *Bil-Dry Corp.*, 9 E.A.D. 575, 614 (EAB 2001) and *Central Paint and Body Shop, Inc*., 2 E.A.D. 309, 315 (CJO 1987).

Complainant asserts that Respondent did not submit any financial documents in response to Complainant's notice of intent to file a complaint, which advised Respondent to submit financial information if it intends to claim inability to pay the proposed penalty, and that despite this advice, Respondent did not raise inability to pay in the Answer and has not specifically stated that it intends to raise its ability to pay as an issue in this case. ATP Motion at 2, 10; C's Ex. 15. To date, Respondent has only provided the limited and inadequate information pertaining to its ability to pay included with its Prehearing Exchange, Complainant avers, despite that fact that Complainant subsequently requested additional financial information. Motion at 3-4, 11. On these grounds, Complainant requests an order granting accelerated decision on the issue of ability to pay or economic impact of the penalty.

In the alternative, Complainant requests that its discovery motion be granted. Complainant lists ten requests for production of documents, and seeks an order compelling Respondent to provide such information within thirty days of issuance of the order, and, if the information is not provided within that time frame, barring Respondent from proffering any testimony or evidence as to issues of ability to pay or economic impact on Respondent's business, and granting accelerated decision on those issues. Motion at 4-5. Complainant explains how its motion meets the criteria of 40 C.F.R. § 22.19(e), including that the information sought has significant probative value on the issue of ability to pay or economic impact on the business. Complainant asserts that financial statements and tax returns for the past three years are necessary to assess accurately Respondent's current financial situation. Complainant emphasizes the relevance and importance of complete financial statements and the inadequacy of tax returns alone, citing to Ms. Coad's Declaration and to *Bil-Dry*, 9 E.A.D. 575, 613-614 (EAB 2001). Ms. Coad also states that the tax returns provided by Respondent did not include all supplementary schedules, which are needed to develop a complete understanding of the company's situation. Declaration ¶ 11. She also recommends requesting Respondent's financial projections for 2009 and 2010, internal financial summaries showing year-to-date performance relative to budget, more detail on assets and liabilities, and documentation regarding Respondent's contract with a significant new customer, "[i]n order to gain a thorough understanding of Wisconsin Plating's current and expected financial condition." Declaration ¶ 13.

C. Respondent's Response

On April 24, 2009, Respondent filed a Response to the ATP Motion served on it by first class mail on March 30, 2009 (Response). In that the response was filed past the 20 day regulatory deadline provided for at 40 C.F.R. §§ 22.16(b) and 22.5(c), and was unaccompanied by a request to file out of time, Respondent can be held to have waived any objection to the granting of the motion under 40 C.F.R. § 22.16(b). However, particularly where Complainant stated in the Motion (at 2) that Respondent objects to the relief requested in the Motion, and where Respondent has presented tax returns and a financial statement with respect to its ability to pay, it is not appropriate to simply grant accelerated decision on ability to pay as "unopposed."

In its Response, Respondent acknowledges that it did not raise the ability to pay in its Answer stating that "Respondent's financial condition and outlook has significantly changed for the worse since the Fall of 2008," when the Answer was filed. Response at 1. Further, it claims that "Respondent's economic hardships began in the final quarter of 2008 and became progressively more severe throughout the first quarter of 2009," and the financial statements provided previously with its Prehearing Exchange do not "accurately capture Respondent's current and foreseeable financial condition." *Id*. at 2. Thus, Respondent asserts it will be "greatly prejudiced" if it were precluded from pursuing an inability to pay defense and/or introducing its current financial statements in regard thereto. Additionally, Respondent represents that it has already advised Complainant of its intent to voluntarily produce the financial documents requested "well in advance of the trial of this matter." *Id*. As such, it asks that Complainant's Motions on ability to pay be denied or, alternatively, that it be allowed to file an amended answer. *Id.* at 2-3.

D. Discussion and Conclusion as to Ability to Pay

To grant accelerated decision as to ability to pay, Complainant must demonstrate that there is no genuine issue of material fact as to this issue, and that it is entitled to judgment as a matter of law on that issue. 40 C.F.R. § 22.20(a). The Rules provide that "the complainant has the burdens of presentation and persuasion that the . . . relief sought is appropriate." 40 C.F.R. § 22.24(a). The EAB has stated that, "[s]ince the Agency must prove the appropriateness of the penalty, it necessarily follows that 'ability to pay' is a matter that the Agency takes into consideration as part of its prima facie case." *New Waterbury, Ltd.*, 5 E.A.D. 529, 540 (EAB 1994). The EAB stated further that:

> for the Region [Complainant] to make a prima facie case on the appropriateness of its recommended penalty, the Region must come forward with evidence to show that it, in fact, considered each [statutory penalty assessment] factor and that its recommended penalty is supported its analysis of those factors. The depth of consideration will vary in each case, but so long as each factor is touched upon and the penalty is supported by the analysis a prima facie case can be made.

> * * * *
> Where ability to pay is at issue going into a hearing, the Region will need to present some evidence to show that it considered the respondent's ability to pay a penalty. The Region . . . can simply rely on some *general* financial information regarding the respondent's financial status which can support the *inference* that the penalty assessment need not be reduced.

New Waterbury, Ltd., 5 E.A.D. at 538, 542-43 .

Complainant asserts that it has "investigated all publicly-available sources of information concerning Respondent's financial condition, and has considered this information in its assessment of Respondent's ability to pay," referring to its Prehearing Exchange Exhibit 12, which is a Dun & Bradstreet report on Respondent. ATP Motion at 13-14.[1] Complainant does not provide in its ATP Motion any supporting statements or citations to documents in the case file, and does not provide any statement or assessment of Respondent's ability to pay. In Complainant's "narrative statement explaining in detail the calculation of the proposed penalty" in its Prehearing Exchange (at 7), Complainant merely lists the statutory factors, including economic impact of the penalty on the business, but does not otherwise mention this factor or ability to pay, and the Dun and Bradstreet report is only mentioned with reference to the factor of "size of the violator." The Declaration of Ms. Coad states that she was retained by EPA to provide an expert opinion regarding the financial status of Respondent, including the ability to pay a civil penalty for alleged violations, and that she has reviewed documents produced by Respondent and EPA and has collected publicly available information. Declaration ¶¶ 4, 5. However, her Declaration does not indicate that she has in fact has already considered Respondent's ability to pay or that the proposed penalty is supported her analysis of the factor. Even taking into consideration the tax returns and financial statement produced by Respondent, Complainant has not provided any argument or support for an inference to be drawn as to the economic impact on Respondent's business or as to Respondent's ability to pay the proposed penalty.

The documents in the case file must be viewed in light most favorable to Respondent, and reasonable inferences drawn in Respondent's favor. Where contradictory inferences may be

[1] This assertion appears in the arguments supporting the motion for discovery rather than in those supporting the motion for accelerated decision, although it is noted that a subheading for arguments in support of the motion for accelerated decision includes the words ". . . and Complainant has met its burden to consider Respondent's ability to pay/the economic impact of the penalty on the business." ATP Motion at 6.

drawn from the documents, and where Complainant acknowledges that there are gaps in the materials submitted regarding ability to pay, accelerated decision is not appropriate. *Rogers Corp. v. EPA*, 275 F.3d 1096, 1103 (D.C. Cir. 2002)*; O'Donnell v. United States*, 891 F.2d 1079, 1082 (3rd Cir. 1989). Therefore, Complainant has not established the absence of genuine issues of material fact or that it is entitled to judgment as a matter of law, with regard to economic impact on the business or ability to pay. Accordingly, Complainant's Motion for Partial Accelerated Decision on the Issue of Ability to Pay is **DENIED.**

As to the motion for discovery, Complainant seeks the following items, in sum:

(1) copies of the last three years of signed and dated tax returns of Respondent, with all associated scheduled and attachments;

(2) copies of complete financial statements for the past three fiscal years prepared on behalf of Respondent by an outside accountant, including all balance sheets, and statements of operations, retained earnings, cash flows, cover letter and notes to each financial statement.

(3) copies of internal financial statements prepared by Respondent for all months/quarters between the most recent fiscal year tax return and the date of hearing in this matter, including all balance sheets, and statements of operations, retained earnings, cash flows, analysis of performance, and notes to each financial statement;

(4) copies of all financial projections developed by Respondent for the years 2009 and 2010;

(5) copies of all documents reflecting the appraisal, fair market value or other valuation of all of respondent's corporate assets, and copies of all documents reflecting the existence and amounts, conditions and terms of all of Respondent's liabilities;

(6) copies of all documents regarding the contract Respondent has with American NTN Bearings, including terms of contract, correspondence subsequent to the initial agreement, modifications to the contract, and projected order volumes and revenues resulting from the contract for 2009 and 2010;

(7) copies of documents containing information on the operating facility at 1000 12th Street;

(8) copies of all insurance policies which may provide coverage or reimbursement of any penalties, attorneys' fees or other costs incurred in litigation related to violations alleged in the complaint;

(9) copies of the asset ledger for all assets owned by Respondent during the three

most recent tax years; and

(10) All other documents that Respondent feels is relevant and supportive of its claims of inability to pay the proposed penalty.

ATP Motion at 4-5. Complainant indicates in its APT Motion that it requested additional financial records from Respondent on March 19, 2009 and that as of the date of filing, March 30, 2009, Respondent had not indicated whether it would provide them. APT Motion at 3-4. In its Response filed on April 24, 2009, over a month after Complainant's record request, Respondent indicates that it has advised Complainant that it is willing to voluntarily produce the documents requested "well in advance of the trial of this matter," but does not provide a date certain in regard thereto. Response at 2.

A request to compel discovery may be granted after the prehearing exchange, if 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).

The EAB has stated that "in 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." *New Waterbury, Ltd.*, 5 E.A.D. at 542. While the EAB did not specify how far in advance of the hearing such documents should be provided, the timing of production of documents must ensure that the opposing party has sufficient time to review them and prepare for the hearing. The hearing in this matter, scheduled to commence on July 21, 2009, should not be unreasonably delayed by the requested discovery if it is due two months prior to the hearing.

As to the other criteria., in that Respondent has offered to produce the documents, it is clear that their production will not unreasonably burden Respondent and that such information can be most reasonably obtained from Respondent. Further, Respondent's Response acknowledges that the information has significant probative value on a disputed issue of material fact as to the relief sought, specifically Respondent's ability to pay or economic impact of the penalty on Respondent.

Thus, the only criterion of 40 C.F.R. § 22.19(e)(1) remaining for consideration is that "the non-moving party has refused to provide voluntarily" the information. In that regard it is noted that while Respondent represents that it is willing to "voluntarily" produce the information

requested by Complainant in the ATP Motion filed a month ago, it does not claim to have actually done so, even in small part. As its sole justification for such delay, Respondent explains that "it needed sufficient time to file the 2008 tax return and compile contemporaneous financial statements incorporating the Respondent's financial reports from the first quarter of 2009." Response at 2. Such explanation is insufficient in that it is clear that some of the documents requested by Complainant over a month ago do not pertain either to tax year 2008 and/or the first quarter of 2009. As such, Respondent's lack of timely production to date of any of the records requested belies the accuracy of its representation as to its willingness to voluntarily provide the information sought in a timely manner.

Accordingly, Complainant's Motion to Compel Discovery is hereby **GRANTED**.

ORDER

1. Complainant's Motion to Supplement Prehearing Exchange is **GRANTED**.

2. Complainant's Motion for Accelerated Decision on Liability is **GRANTED.**

3. Complainant's Motion for Partial Accelerated Decision on the Issue of Ability to Pay is **DENIED.**

4. Complainant's Motion to Compel Discovery Related to Respondent's Ability to Pay is **GRANTED.** Respondent shall submit the documents requested in the Motion **on or before May 20, 2009.** If Respondent fails to submit the requested documents on or before May 20, 2009, Complainant may renew its Motion for Accelerated Decision on the Issue of Ability to Pay, and/or request any other appropriate relief.

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Susan L. Biro
Chief Administrative Law Judge

Dated: April 30, 2009
Washington, D.C.