UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
BARNSLEY SQUARE LP and	)	**DOCKET NO. CAA-03-2008-0363**
SELVAGGIO ENTERPRISES, INC.,	)	
	)	
	)	
RESPONDENTS	)	

Order on Complainant's Motion In Limine Or, In The Alternative, Motion To Compel And Motion For An Extension By Complainant United States Environmental Protection Agency

ORDER SCHEDULING HEARING

This proceeding arises under the authority of Sections 113(a)(3) and (d) of the Clean Air Act, 42 U.S.C. §§ 7413(a)(3) and (d), and 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. §§ 22.1-32. The Complaint issued in this matter charges Respondents with violating Section 112 of the CAA, 42 U.S.C. § 7412, and its implementing regulations at 40 C.F.R. §§ 61.145(b)(1),(c)(6)(i), (c)(8) and 61.150(b)(1). The Complainant proposes a total civil administrative penalty in the amount of $64,475.00 against Respondents.

The parties filed their prehearing exchanges in this matter pursuant to the undersigned's Prehearing Order entered on November 24, 2008. Respondents, who filed a joint Answer and are represented by the same counsel, filed a joint prehearing exchange. Respondents state that they intend to present arguments at hearing concerning Respondents' inability to pay the proposed penalty.

On February 23, 2009, the United States Environmental Protection Agency, Region III ("Complainant" or "the EPA"), filed Complainant's Motion In Limine Or, In The Alternative, Motion To Compel And Motion For An Extension By Complainant United States Environmental Protection Agency ("Motion in Limine"). The EPA

seeks an order barring Respondents from introducing any and all documents and/or testimony concerning the financial ability of Respondents to pay the proposed penalty or any adverse impact the proposed penalty will have on their respective abilities to continue in business. Alternatively, Complainant seeks an order directing Respondents to submit the financial information on which they intend to rely and that Complainant be granted three weeks from the submission of such proposed exhibits to respond to this information.

In response, Respondents filed Respondents' Answer To Complainant's Motion In Limine, Or, In The Alternative, Motion To Compel ("Response"). Respondents, claiming that they have attached relevant financial information, request denial of Complainant's Motion in Limine and that they be granted permission to introduce evidence, including testimony, concerning the financial ability of Respondents to pay the proposed penalty or any adverse impact the proposed penalty will have on their respective abilities to continue business. The financial documents proffered by Respondents consist of an income statement for Respondent Selvaggio Enterprises, Inc. ("Respondent Selvaggio") for the calendar year 2008 and a 2007 U.S. Income Tax Return for an S Corporation (Form 1120S) with accompanying Schedule K-1 and Federal Statements and Supplemental Information for Respondent Selvaggio.

Complainant has filed Complainant's Reply To Respondents' Answer To Complainant's Motion In Limine, Or, In The Alternative, Motion To Compel And Motion For Extension ("Reply"). Complainant asserts that the financial information submitted by Respondents as part of its Response does not comply with the requirements of the Prehearing Order (Paragraph 5) dated November 24, 2008, and that Respondents' claims of inability to pay the proposed penalty remain unsupported. Complainant proffers a Declaration of Harry R. Steinmetz ("Declaration"), who opines that, based upon the very limited financial documents submitted, Respondent Selvaggio does not appear to lack the ability to pay the proposed penalty and can pay the penalty without substantial risk to the viability of the ongoing business. Complainant asserts that additional information, which was ordered by the Court in its November 24, 2008 Order [1/] and requested previously by the EPA (attached to the Declaration as

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[1/] In the November 24, 2008 Order Respondent was advised: "If either Respondent intends to take the position that it is unable to pay the proposed penalty or that payment will have an adverse effect on its ability to continue to do business, that Respondent shall furnish supporting documentation such as certified copies of financial statements or tax returns."

Declarant's Exhibit 1)[2/], is necessary to perform a full and appropriate ability to pay analysis and is information, without which, a reasonable financial analyst could not conclude that an inability to pay was present.

Although Section 22.24(a) of the Rules of Practice, 40 C.F.R. § 22.24(a), places the burdens of presentation and persuasion on Complainant to prove that "the relief sought is appropriate,"[3/] I agree with the EPA's position that Respondents must produce more complete evidence to support their claim of inability to pay and that such proposed evidence and/or testimony must be furnished to the EPA to provide them sufficient time to perform an analysis. Otherwise, Respondents will be precluded from offering any additional evidence concerning their alleged inability to pay.

Under Section 113(e) of the Clean Air Act, 42 U.S.C. § 7413(e), Complainant must consider, among other statutory penalty factors, the size of the violator's business and the "economic impact of the penalty on the business." Although the terms "economic impact of the penalty" and "ability to pay" are not the same, the two factors are treated similarly.[4/] In *In re New Waterbury, Ltd. ("New*

[2/] The financial information requested by Complainant includes a "Financial Statement of Corporate Debtor," copies of Respondents' U.S. Corporate Income Tax Returns (Form 1120) for the last five years, and all financial statements for the last five years.

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

[4/] "Unlike certain other environmental statutes, such as the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2601, *et seq*., the CAA does not specifically use the terminology 'ability to pay' in describing its penalty assessment criteria. *Compare* 15 U.S.C. § 2615(a)(2)(B) (TSCA's penalty factors) *with* 42 U.S.C. § 7413(e)(1) (CAA's penalty factors). The CAA, however, does refer to 'the economic impact of the penalty on the business,' 42 U.S.C. § 7413(e)(1), which has traditionally been considered as a violator's 'ability to pay' in the Agency's assessment of penalties." *In re CDT Landfill Co*., 11 E.A.D. 88, 120, n. 60 (EAB 2003). *See* Civil Penalty Policy (July 8, 1980) at 14, 19-20; *see also In re Commercial Cartage Co*., 7 E.A.D. 784, 807 (EAB 1998) (concluding that "the 'ability to continue in business' factor from section 205(c)(2) of the Clean Air Act is analogous to the 'ability to pay' factor found in other statutory provisions").

(continued...)

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

The Rules of Practice require a respondent to indicate whether it will raise the issue of ability to pay, and if so, to submit evidence to support its claim as part of the prehearing exchange. *See* 40 C.F.R. §§ 22.15(a)-(b), 22.19(a)(3)-(4). Further, the EAB has found that "in any case where ability to pay is put in issue, the Region [EPA] must be given access to the respondent's financial records before the start of such hearing." *New Waterbury*, *supra*, at 542. Finally, the EAB has held that "where a respondent does not raise its ability to pay as an issue in its answer, or fails to produce any evidence to support an ability to pay claim after being apprised of that obligation during the pre-hearing process, the Region [EPA] may properly argue and the presiding officer [Administrative Law Judge] may properly conclude that any objection to the penalty based upon ability to pay has been waived."[5/] *Id*.

In the instant matter, Respondents' ability to pay is at issue and "some" evidentiary materials were proffered by them as

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[4/] (...continued)
Also, Complainant states that ability to pay is a factor considered under the EPA's Asbestos Demolition and Renovation Civil Penalty Policy and the EPA's Clean Air Act Stationary Source Civil Penalty Policy. Complaint at 14; Complainant's Prehearing Exchange at 16-17.

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

attachments to their Response in support of this claim. I note, as pointed out by Mr. Steinmetz in his Declaration, that the financial information proffered by Respondents pertains only to Respondent Selvaggio. No financial documents concerning Respondent Barnsley Square were submitted. If the Respondents are found to be liable for the alleged violations, both Respondents are jointly and severally liable. Further, I observe that the photocopy of the financial statement proffered is barely legible and appears to have had written material deleted from the document. Moreover, I agree with the EPA's assertion that the evidentiary material provided by Respondents as part of their Response is not adequate to document their financial position and does not provide the EPA with enough information to make an ability to pay determination. Finally, I agree with the EPA's argument that the proffered financial statement, along with the 2007 tax return, does not necessarily show a significant impact on Respondents' businesses or an inability to pay.

Nevertheless, as Respondents have put their ability to pay at issue, the EPA will need to present some evidence to show that it considered Respondents' ability to pay the proposed penalty. *Id.* However, as observed by the EAB in *New Waterbury*, the EPA "need not present any *specific* evidence to show that the respondent *can pay* or obtain funds to pay the assessed penalty, but 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." (emphasis in original) *Id*. at 543. If the EPA, as part of its *prima facie* case, produces some evidence concerning Respondents' general financial status from which it can be inferred that Respondents' ability to pay should not affect the penalty amount, then Respondents must present "specific" evidence to show that they "cannot pay any penalty." *Id*. Then, the EPA "as part of its burden of proof in demonstrating the 'appropriateness' of the penalty must respond either with the introduction of additional evidence to rebut the respondent's claim or through cross-examination it must discredit the respondent's contentions." *Id*. (citing *In re Kay Dee Veterinary Division of Kay Dee Feed Company*, FIFRA Appeal No. 86-1 at 10-11, *see* n.26 (CJO, Oct. 27,1988)).

As previously noted, Respondents' ability to pay is at issue going into the hearing. If the EPA were to show that it considered Respondents' ability to pay a penalty, Respondents must present specific evidence that they cannot pay any penalty. As a caveat to Respondents, I observe that the evidentiary materials submitted by Respondents to date are not specific evidence showing that they cannot pay any penalty. The evidentiary material provided by Respondents in their Response is not sufficient to document their

financial position. I also observe that although Respondents are not precluded from testifying about their finances at the hearing, the probative value accorded their testimony may be significantly reduced because of the lack of corroborating evidence, especially as such evidence is within their control.

Additionally, I point out to Respondents that Sections 22.19(a) and 22.22(a) of the Rules of Practice, 40 C.F.R. §§ 22.19(a), 22.22(a), provide that documents or exhibits that have not been exchanged and witnesses whose names have not been exchanged at least fifteen (15) days before the hearing date shall not be admitted into evidence or allowed to testify unless good cause is shown for failing to exchange the required information.

Finally, I find that the evidentiary material that Complainant seeks through its Motion in Limine satisfies the regulatory requirements for "additional discovery."[6/] The criteria for allowing additional discovery of documents are that such discovery will not unreasonably delay the proceeding or burden the non-moving party, that the discovery seeks information that is most reasonably obtained from the non-moving party who has failed to provide it voluntarily, and that the information has significant probative

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[6/] Sections 22.19(a)-(f) of the Rules of Practice, 40 C.F.R. §§ 22.19(a)-(f), provide for the prehearing exchange of witness lists, documents, and information between the parties. Essentially, this exchange consists of discovery for the parties. "[A]dditional discovery" is permitted under Section 22.19(e) of the Rules of Practice only after motion therefor is filed and the Administrative Law Judge determines that the requested further discovery meets the specific criteria set forth in that subsection. In pertinent part, subsection (e)(1) provides for other discovery only if it:

> (i) Will neither unreasonably delay the proceeding nor unreasonably burden the non-moving party;
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> (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
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> (iii) seeks information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought.

value as to a disputed issue of material fact relevant to liability or the relief sought. Section 22.19(e)(1) of the Rules of Practice, 40 C.F.R. § 22.19(e)(1). The hearing in this matter is set to begin on June 9, 2009, more than ten weeks from now. Thus, reasonably prompt production of the discovery will not delay the proceedings. Complete and current information concerning Respondents' finances is solely within Respondents' possession and should not unreasonably burden Respondents, and was not provided voluntarily by Respondents. The additional information that Complainant seeks is of significant probative value on the proposed penalty sought.

Accordingly, to the extent that the EPA moves to compel Respondents to provide more complete and additional information concerning their financial status or be precluded from offering any evidence at the hearing of inability to pay beyond that submitted in Respondents' Response, the EPA's Motion in Limine is **Granted**. This financial information must be furnished to the EPA and filed with the Regional Hearing Clerk no later than **May 6, 2009**, to allow the EPA sufficient time to review the records and prepare for hearing now scheduled to begin June 9, 2009.

Further, in preparation for the hearing, on or before **May 18, 2009**, the parties shall file a joint set of stipulated facts, exhibits, and testimony. *See* Section 22.19(b)(2) of the Rules of Practice, 40 C.F.R. § 22.19(b)(2). The time allotted for the hearing is limited. Therefore, the parties must make a good faith effort to stipulate, as much as possible, to matters which cannot reasonably be contested so that the hearing can be concise and focused solely on those matters which can only be resolved after a hearing.

The Hearing in this matter will be held beginning at 9:30 a.m. on Tuesday, **June 9, 2009** in Philadelphia,[7/] Pennsylvania, continuing if necessary on June 10, 11, and 12, 2009. The Regional Hearing Clerk will make appropriate arrangements for a courtroom and retain a stenographic reporter. The parties will be notified of the exact location and of other procedures pertinent to the hearing when those arrangements are complete. Individuals requiring special accommodation at this hearing, including wheelchair access, should contact the Regional Hearing Clerk at least five business days prior to the hearing so that appropriate arrangements can be made.

[7/] In Respondents' Prehearing Exchange, dated February 9, 2009, Respondents stated that they have no objection to Complainant's request to hold the hearing in Philadelphia.

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

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Barbara A. Gunning
Administrative Law Judge

Dated: March 27, 2009
Washington, DC