

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

BEFORE THE ADMINISTRATOR

In the Matter of)	
)	
Crest Industries Ltd.)	
)	Docket No. RCRA-05-2005-0024
Respondent)	
)	

**ORDER ON RESPONDENT’S MOTION FOR PARTIAL ACCELERATED DECISION
ON INABILITY TO PAY**

I. Introduction

In this proceeding under the Resource Conservation and Recovery Act, (“RCRA”), the United States Environmental Protection Agency, Region 5, (“Complainant” or “EPA”), alleges, in six counts involving tank systems used to store hazardous waste, various RCRA violations against Crest Industries, Ltd., (“Crest,” or “Respondent”). EPA seeks a proposed penalty of \$330,462 for the alleged violations.¹ Presently before the Court is Crest’s September 7, 2006 Motion for Accelerated decision, which motion seeks a ruling, in advance of the hearing that, because of its poor financial condition, Crest has no ability to pay any civil penalty. In response, EPA filed its own motion. This Order deals with the related motions and the responses which flowed from them. For the reasons which follow, the Court finds that Respondent misinterprets the appropriate legal standard and that it is premature to discuss issues of inability to pay prior to a determination of liability on the merits. Accordingly, Respondent’s motion is denied.

¹The Complaint, filed on September 30, 2005, arises under the authority of Section 3008(a) of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act. The action was also instituted pursuant to Sections 22.1(a)(4), 22.13, and 22.37 of the Environmental Protection Agency Rules of practice, which are applicable in this administrative enforcement proceeding, as set forth in 40 C.F.R. Part 22. On October 31, 2006, EPA filed a Supplemental Prehearing Exchange which set forth the penalty it is seeking.

II. Respondent's Motion

In its motion,² Respondent asserts that deciding the issue of inability to pay now is consistent with the appropriate legal standards and procedure and that the submitted evidence shows, as a matter of law, it is unable to pay any penalty. Respondent's Br. at 5-11. Respondent argues the Court may grant a decision in its favor because the "Presiding Officer may...render an accelerated decision...without further hearing or upon such limited additional evidence...as he may require, if no genuine issue of material fact exists³ and a party is entitled to judgment as a matter of law." 40 C.F.R. §22.20(a). Respondent also cites administrative case law to show that "inability to pay" is a valid affirmative defense and that such cases can be considered in a motion for accelerated decision. Respondent's Br. at 5, 6.

III. EPA's Motion, Respondent's Response and EPA's Reply

As mentioned, Complainant, in response to the Respondent's motion for accelerated decision, filed its own motion, a motion to strike, pursuant to 40 C.F.R. § 22.4(c)(10). That section gives the Presiding Officer authority to act "for the maintenance of order and for the efficient, fair and impartial adjudication of issues." Complainant also states that its motion is not meant to affect Respondent's right to plead the affirmative defense of inability to pay. Complainant's Br. at n.1. Complainant asserts that Respondent is incorrect in claiming that there is no genuine issue of material fact as to its claimed inability to pay because it contends that the issue of inability to pay cannot arise until after there is a finding of liability. Complainant's Br. at 5, 6.

²Along with its motion, Respondent submitted an accompanying memorandum, and several pieces of supportive evidence including sworn affidavits, tax information, and a report from a retained expert. In response, Complainant, on September 14, 2006, filed a motion to strike Respondent's motion and an accompanying memorandum. Respondent's response to Complainant's motion and Complainant's reply followed on September 29, 2006. These filings occurred prior to the parties submitting their Prehearing Exchange. While the motions remained outstanding, the Court reiterated that the October 16, 2006 Prehearing Exchange due date would remain unchanged. Order dated October 13, 2006. Both parties thereafter filed timely exchanges. Because of the ruling on Respondent's Motion, the Court need not address Complainant's motions for protective order and expedited extension of time to respond for they are now moot. Again, because the prehearing exchange has occurred, this Order takes that fact into account. However, it should be noted that the Order's conclusions regarding the issue of ability to pay would apply *a fortiori* to the same claim when asserted and ruled upon prior to any prehearing exchange.

³Respondent's contention that there are no material issues of fact with respect to its financial condition is based on the tax returns it submitted with its motion and the report of its financial expert, which report drew from those returns and used four separate methods of calculation, (three of which utilized EPA's own financial modeling software), to arrive at the conclusion that Respondent would be unable to pay any civil penalty in this matter. Respondent's Exhibit C and Respondent's Brief at. 8-11.

In response, Crest asserts that, under the procedural rules, as the judge may render an accelerated decision as to any or all parts of the proceeding and may take all measures necessary for the simplification of the issues or expedition of the proceedings, and because the Court is obligated to rule on all motions, there is full authority to address Crest's motion. Crest Response at 2. Crest also contends that, although inability to pay is not among the express statutory penalty factors, the Court may consider other factors in RCRA administrative enforcement cases. *Id.* at 3. Citing *In re Zaclon*, RCRA-05-2004-0019 (A.L.J., May 23, 2006), Crest asserts that "inability to pay is an affirmative defense that [it] is entitled to raise" *Id.*

While there is no real dispute that one may raise inability to pay as an affirmative defense, for now, the more important question to address is Crest's assertion that it is appropriate to raise such a defense at this stage of the proceedings. Crest states that it is not seeking a determination 'on the appropriateness of imposing a specifically-assessed penalty amount . . . [but] [r]ather . . . [that the Court] make a determination *only* with respect to the issue of Crest's inability to pay a penalty, regardless what penalty amount Complainant may ultimately demand." *Id.* at 4. Thus, Crest clearly is seeking a ruling that it is unable to pay *any* penalty at all, a position which, from Crest's perspective, would make whatever amount EPA proposes as a penalty irrelevant. As Crest puts it "[t]he relevant issue . . . is *Crest's inability to pay*, not whether a particular penalty amount demanded by the Complainant is appropriate." *Id.* On this basis, as Crest sees it, its inability to pay any penalty may be resolved prior to determining its liability, if any. Further, it sees ruling on its motion as consistent with the Court's authority "to simplify the issues and expedite the proceedings." *Id.* at 7. It is clear from its argument that Crest presumes that a ruling by the Court now that it is unable to pay any penalty would bring the proceeding to a close. As it expresses the issue, that resolution could "obviate the need to unnecessarily expend any more of either party's limited resources." *Id.* Under this view, Crest asserts that its motion for accelerated decision on the issue of its inability to pay a civil penalty is no different than any other motion for accelerated decision.

Respondent also takes issue with Complainant's assertion that because the Court has not determined the existence of liability, inability to pay is not ripe for review.⁴ Respondent asserts that the governing rules "do not dictate any particular order for addressing relevant issues in an administrative proceeding," and therefore ripeness is not an issue. *Id.* It also contends the timing of the motion is appropriate

⁴Although Crest cites *In re Goodman Oil Co.*, RCRA-10-2000-0113 (A.L.J., Aug. 22, 2001), a decision issued by another EPA administrative law judge, in which EPA was permitted to file motions to strike affirmative defenses prior to any finding of liability as authority for the assertion that "it is common practice for [EPA] to file various motions to strike affirmative defenses, including ability to pay defenses, prior to adjudication of and final determinations on liability issues," EPA correctly notes that *Goodman* involved a motion for accelerated decision on liability, and accordingly that it does not support the argument that penalty issues may be addressed prior to determining liability. Thus, the Court agrees with EPA that *Goodman* did not involve making a penalty determination prior to a finding of liability.

from the perspective of judicial efficiency. *Id.* Respondent concludes that its motion is consistent with the prehearing exchange process, as that process is not limited to a simultaneous exchange but rather is subject to the Presiding Officer's ultimate authority. *Id.* at 7.

In its reply, EPA acknowledges that inability to pay is an appropriate issue for Respondent to raise, but it contends that such a defense raises issues of fact which must be supported or disputed with evidence gathered during the prehearing exchange. Reply at 2, 3. Therefore, the dispute is not whether Respondent has the right to raise the issue, but the proper time to address it. Complainant also argues that a defense of inability to pay goes to the issue of whether a given penalty is appropriate; not to the legal determination of whether Respondent has the ability to pay any penalty at all. *Id.* at 3. Citing RCRA Section 3008(a)(3) and the 2003 RCRA Civil Penalty Policy, EPA asserts that its policy establishes that inability to pay is an adjustment factor that is addressed only after determining the existence of a violation, the seriousness of the violation, and whether there were any good faith efforts at compliance. *Id.* at 4.

IV. Discussion and Determination

Many of the contentions raised by the parties in their respective motions were tied to the fact that the prehearing exchanges had not occurred at the time they were made. These became moot once the exchanges occurred.⁵ Although the Court granted a brief extension of time from the original due date for the exchanges, it did not accede to a stay pending resolution of the existing motions, and required that the exchanges occur on October 16, 2006. That exchange occurred and consequently the issue before the Court has now become whether it is appropriate to render an accelerated decision on the issue of inability to pay prior to a finding of liability on the part of Respondent.

Initially, the Court notes that EPA's "motion to strike or for temporary stay and protective order; and for expedited extension of time to respond, pending decision" created unnecessary complexity to what should have been more easily handled. Instead of simply responding in a straightforward manner to the Respondent's motion, EPA, in a dizzying fashion, moved to "strike Respondent's Motion . . . or that [the] proceedings on Respondent's Motion, including Complainant's duty to respond, be stayed by *protective order* until after the

⁵EPA had asserted that the ability to pay issue could not be addressed until after EPA had presented a specific penalty proposal. This has now occurred. Similarly, EPA's argument that even if the Court has the authority to address inability to pay prior to the prehearing exchange, Respondent must still show that the Court has good cause to do so, has been transcended by the occurrence of the prehearing exchange. Other arguments raised by EPA hinged on the lack of a prehearing exchange at the time the arguments were made. Now, with the prehearing exchanges having occurred, these contentions have become moot. However, as noted earlier, the holdings in this Order would be the same even if the prehearing exchanges had not been made.

prehearing exchanges . . . and move[d] in addition that Complainant be granted an *expedited* extension of time to respond to Respondent’s Motion . . . pending decision on the instant motion.” EPA then augmented its “Rube Goldberg” creation with the idea that the Respondent’s motion was really a motion for discovery and on that imaginative, but unfounded, theory, it then sought a “protective order” from “untimely and hence inappropriate discovery.” Recognizing that the EPA procedural rules don’t envision protective orders, EPA then asserted that one should consult the Federal Rules of Civil Procedure, specifically Rule 26(c), to block the imagined discovery motion. EPA Memorandum at 1-3. (emphasis added). Although EPA asserted that its motion was made, in part, pursuant to 40 CFR § 22.4(c)(10), that provision is really directed to, driven by and a basis for, actions that *the judge* may elect to take, and thus it is not intended as a vehicle for *parties* to seek relief.

Once past these distractions, EPA acknowledges that the Respondent has the right to raise the issue of inability to pay “once liability has been determined,” and thus its contention is over the timing to raise the issue. EPA Reply at 2-3. Further, EPA agrees that “ability to pay” is an affirmative defense, but not to the issue of liability. However, EPA points out that, under its penalty policy the issue is addressed as an “adjustment factor,” which is considered after the statutory criteria of seriousness of the violation and good faith efforts to comply have been evaluated. EPA correctly observes that if the Respondent’s argument were adopted, the issue of liability would be side-stepped, overtaken by the issue of ability to pay. *Id.* at 5.

Section 3008 of RCRA (42 U.S.C. §6928) grants Complainant the authority to assess a civil penalty for a violation of the statute. Seriousness of the violation and any good faith efforts to comply are the only two criteria the statute considers with respect to penalty assessment. 42 U.S.C. §6928(a)(3). Complainant has issued a publicly available penalty assessment policy that provides its interpretation of Section 3008 of RCRA. This policy considers additional criteria to determine an appropriate penalty and ability to pay the proposed penalty is listed as one among many adjustment factors that EPA (and upon being litigated, the Court) may take into account after establishing a violation, but it is not a dispositive factor. 2003 RCRA Civil Penalty Policy at 38, 39. Additionally, Complainant “reserves the option, in appropriate circumstances, to seek penalties that might put a company out of business.” *Id.* at 38. Therefore, while Respondent’s motion asserts that its inability to pay should bar any penalty whatsoever, that is clearly not the accepted interpretation of the law. The Court also notes that, while there has been a tendency to blur the description of this affirmative defense, properly speaking it is about a respondent’s *ability to pay* a proposed penalty assessment, not about its inability to pay any penalty whatsoever.

Further, Respondent does not concede liability in this case and therefore the issue of evaluating one’s ability to pay a penalty, as proposed, is completely premature. Complainant must first establish liability and then the Court would have

to consider all the adjustment factors given in the statute and penalty policy.⁶ The Court recognizes the validity of ability to pay as a factual issue with legal implications for determining an appropriate penalty. If the Court determines Respondent is unable to pay any penalty at all, which is extremely unlikely for a going business, the Court must still take the statutory penalty criteria into account. Congress only articulated two factors for determining an appropriate penalty. Implicitly, it did not intend to give a free pass to RCRA violators facing financial hardship. If a court were to embrace the full extent of Respondent's argument, any financially impoverished company would be able to escape having to comply with environmental statutes and regulations.

Contrary to Respondent's assertions, most of the case law does not support its argument that it is appropriate for the Court to rule on the issue of ability to pay at this stage of the proceedings. For example, the Court agrees with EPA that *In re Barber*, CWA-05-2005-0004 (A.L.J., Apr. 12, 2006), is distinguishable because while that case involved a motion for accelerated decision prior to the prehearing exchange, it was based upon admissions contained in the Respondent's answer to the initial complaint. Although EPA initially filed a motion for accelerated decision based on the Respondent's admissions, later, after the prehearing exchanges had been completed, EPA filed a second motion for accelerated decision and it was that second EPA motion that was decided. While the Respondent cites *Greisz v. Household Bank*, 8 F. Supp. 2d 1031 (N.D. Ill. 1998) for the principle that judicial economy is one factor in deciding issues of partial summary judgment, for the reasons stated in this Order, there would be no genuine judicial economy realized here and in any event the ability to pay factor should not dominate the penalty evaluation process.

In another case cited by the Respondent, *In re Morgan Properties*, RCRA-UST-94-002 (A.L.J., July 28, 1997), EPA filed a motion for accelerated decision as to liability and it also sought a determination that the penalties it proposed were appropriate. The administrative law judge there denied an accelerated decision as to penalty amounts. Although that judge concluded in dicta that "[a]ny issue that could be considered by the judge in an administrative enforcement hearing can be considered in the context of a motion for accelerated decision," it was determined that there were issues of fact to be resolved, foreclosing the possibility of an accelerated decision on the question of "ability to pay."

Fairly, the Respondents have called to the Court's attention, the decision issued by another administrative law judge, *In the matter of Zaclon, Inc., et al.*, Dkt. No. RCRA 05-2004-0019. May 23, 2006, 2006 WL 1695609 (E.P.A.). As with this case, *Zaclon* involved alleged RCRA violations. There however, it was EPA that was seeking a motion for accelerated decision on the issue of ability to pay. Two counts

⁶ Even if Respondent had conceded liability, the issue would still be premature because the Court must still resolve issues of fact with respect to Respondent's ability to pay the penalty as proposed or consideration of that factor in imposing a different penalty than the amount proposed.

were involved and at the time the order on the motion was issued, EPA had already obtained a motion for accelerated decision as to liability for Count 1.⁷ In its motion for accelerated decision on the issue of ability to pay the proposed penalty, EPA, in the alternative, sought an order requiring disclosure of the Respondent's financial information. The court noted that ability to pay is an affirmative defense⁸ and that the issue has relevance as potentially mitigating the penalty but that it is not "a bar to the assessment of a penalty." Of greater significance is that the court *did* decide the issue of ability to pay prior to the hearing, ruling in favor of EPA's motion, and determining that the respondents had not sustained their burden on the issue. Based on that decision, it would seem that such a ruling in advance of a hearing would be available to respondents. However, apart from the fact that rulings of other administrative law judges have no precedential effect, there are reasons why a ruling on this issue should not be available to respondents until after liability issues have been resolved.

As mentioned, the statute does not contemplate consideration of ability to pay, providing only that "[i]n assessing . . . a penalty, the Administrator shall take into account the seriousness of the violation and any good faith efforts to comply with applicable requirements." 42 U.S.C. § 6928 (a)(3). However, the RCRA Civil Penalty Policy, while noting that it is not required to consider ability to pay, still views it as "mitigating factor," and accordingly provides that as EPA "generally will not assess penalties that are clearly beyond the means of the violator [it] should consider the ability of a violator to pay a penalty." June 2003 RCRA Penalty Policy at 38. That being said, in the same breath, EPA adds that it "reserves the option, in appropriate circumstances, to seek penalties that might put a company out of business." *Id.* Even in those circumstances where EPA does consider it appropriate to consider that factor, it speaks of this in terms of "adjusting," but not eliminating a penalty. Thus, the policy provides that where a violator cannot afford the "penalty prescribed by [the] Policy, or that payment of a portion of the penalty would preclude achieving compliance or would thwart remedial measures, the issue should be addressed by first considering an installment plan with interest, and secondarily, a

⁷Although Zaclon indicates that an order on cross motions for accelerated decision on the second count was issued on May 15, 2006, it does not state the outcome of that order. A check on that order revealed that indeed it was determined that material issues of facts in dispute and consequently that court denied the motion for accelerated decision for count 2. 2000 WL 1695610 (May 18, 2006).

⁸That court construed the respondent's answer that the penalty sought by EPA was "excessive, unreasonable, inequitable and not in compliance with the U.S. EPA's own penalty policy and matrix" as insufficient to raise the issue of ability to pay, but it construed the respondent's prehearing exchange as adequately raising the matter. Ultimately that court concluded that although unaudited financial statements of the company that owned the named respondents were submitted, but which company was not itself among the respondents listed in the complaint, as no financial information was submitted concerning the cited companies, the respondents had not sustained their burden on the issue of ability to pay.

delayed payment schedule.” Only if neither of those routes would work, as a last recourse, is a “straight penalty reduction[.]” then considered.

Beyond those observations, the Court notes that the ability *to rule out* the issue of one’s ability to pay by means of a motion for accelerated decision, does not mean that the obverse, that is, *to rule it in* through such a motion, is appropriate. For example, it may be shown that a strong, profitable entity could easily pay the penalty EPA has proposed but, for the reasons explained in this Order, a conclusion of an *ability to pay* a proposed penalty should await the determination of liability and consideration of that factor, along with *all* the other penalty considerations. Thus, when a respondent seeks a preemptive determination concerning its ability to pay the penalty proposed by EPA, such a determination should not be available until after liability has been established and the proposed penalty considered. Even then, a court should not factor into consideration one’s ability to pay the proposed penalty in isolation. Rather, it should be considered together with the other penalty factors.

As the statute contemplates consideration of only two penalty factors – the seriousness of the violation and any good faith efforts to comply with the RCRA requirements – the ability to pay becomes active under the EPA penalty policy only after the proposed penalty has been presented. Accordingly, ability to pay is only a factor, not an overriding factor, in determining a penalty. Further, the very unlikely scenario of a company, functioning as an ongoing operation, yet unable to pay *any* penalty at all, does not *require* that a penalty would be waived. Thus, if for the sake of argument, it were determined that payment of any penalty would cause severe hardship, threatening an enterprise’s continued existence, while that consequence would be considered, such a finding would not necessarily override the consideration of the other penalty factors, as it may be that a penalty, even a significant penalty, is still warranted under the circumstances. This is so because to rule otherwise and allow the assertion of an inability to pay any penalty to preempt the determination of liability or to control the imposition of a penalty, would create the potentially perverse situation in which a financially strapped organization would be effectively excused from compliance with environmental requirements, such as those under RCRA. Such a result would never be intended by Congress, and one need look no farther than the RCRA statutory penalty criteria to reach this realization.

As mentioned, ability to pay goes to the issue of the amount sought as a penalty. This means that there must first be a violation established and then claims of ability to pay may be considered as a component in determining whether the penalty proposed by EPA is appropriate. Respondent has not conceded liability and therefore the issue of ability to pay is not properly before the Court. Accordingly, the Court finds that it cannot grant Respondent’s motion because there has not been a finding that Respondent is liable.⁹

⁹ It is noted that nothing bars the parties from engaging in settlement discussions, which could include the issue of the Respondent’s ability to pay and the impact of that on EPA’s potential reevaluation of the amount it may accept in settlement. Absent that, the Court will fully consider

For the reasons set forth above, the Court **DENIES** Respondent's Motion for Partial Accelerated Decision on Inability to Pay. Consequently, EPA's Motion is also fully disposed of by this Order. The case will now be set for hearing.

SO ORDERED.

William B. Moran
United States Administrative Law Judge

Dated: January 10, 2007
Washington, DC

the issue of Crest's ability to pay the penalty EPA proposes. As counsel for Respondent is likely aware, a Court must consider EPA's application of its penalty policy, but it is free to depart from such policy, in whole or in part, if there is a rationale basis to do so.

In the Matter of Crest Industries, Ltd.,
Docket No. RCRA-05-2005-0024

CERTIFICATE OF SERVICE

I certify that the foregoing **Prehearing Order**, dated January 10, 2007 was sent this day in the following manner to the addressees listed below:

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Dated: January 10, 2007