



UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:)
)
Timothy Wilson, d/b/a) Docket No. FIFRA-07-2023-0135
Wilson’s Pest Control,)
)
Respondent.)

**ORDER BARRING RESPONDENT
FROM PRESENTING CERTAIN EVIDENCE AT HEARING**

On June 21, 2024, Complainant, the Director of the Enforcement and Compliance Assurance Division of Region 7 of the United States Environmental Protection Agency (“EPA”), filed a Motion for Additional Discovery, or in the alternative, Motion in Limine (“Discovery Motion”). Complainant’s Discovery Motion requested that Respondent, Timothy Wilson, d/b/a Wilson’s Pest Control, be ordered to provide additional discovery relating to Respondent’s ability to pay the proposed penalty in this matter.¹ Disc. Mot. 1. As grounds for the request, Complainant noted that I had directed Respondent in the Prehearing Order dated March 20, 2024, to provide material in support of any inability to pay claim as part of the prehearing exchange. Disc. Mot. 5 (citing Prehearing Order at 5). Complainant also represented that it had advised Respondent on multiple occasions, both formally and informally, of the right to have Respondent’s ability to pay the proposed penalty considered and requested that Respondent provide information to support any claim of an inability to pay. Disc. Mot. 2 (citing CX 23 at 3; CX 24 at 1; CX 26 at 1; CX 25; Complaint ¶ 73). Yet, Complainant stated, Respondent had not provided any such information as of the date of the Discovery Motion, despite having disputed the appropriateness of the proposed penalty, prompting Complainant to request that I order the additional discovery. Disc. Mot. 2-3, 5, 6. Complainant further requested that I bar Respondent from offering any evidence relating to the ability to pay the proposed penalty or the proposed penalty’s potential economic impact on Respondent or his business at a hearing in

¹ Complainant is seeking the assessment of a civil penalty pursuant to Section 14 of the Federal Insecticide, Fungicide, and Rodenticide Act, which states that “[a]ny registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor who violates any provision of this Act may be assessed a civil penalty by the Administrator of not more than \$5,000 for each offense.” 7 U.S.C. § 136/(a)(1). The statute goes on to provide that “[i]n determining the amount of the penalty, the Administrator shall consider the appropriateness of such penalty to the size of the business of the person charged, the effect on the person’s ability to continue in business, and the gravity of the violation.” 7 U.S.C. 136/(a)(4).

this matter if Respondent failed to timely provide the requested discovery. Disc. Mot. 3. Respondent did not respond to the Discovery Motion.

By Order dated July 10, 2024, I granted Complainant's Discovery Motion, finding that Respondent had waived any objection to it by failing to respond, Order at 2 (citing 40 C.F.R. § 22.16(b); and that the discovery sought met the requirements for additional discovery set forth in the procedural rules governing this proceeding, Order at 2-3 (citing 40 C.F.R. § 22.19(e)(1)). Respondent was thus ordered to "file and serve on Complainant within 30 days of this Order true, accurate, and complete copies of the last three years of his filed, signed, and dated U.S. income tax returns, including all associated schedules and attachments, as well as the last three years of income statements and balance sheet reports for the business entity Wilson's Pest Control." Order at 3. Respondent was also advised that failure to produce the documents could result in a finding that Respondent had waived his right to raise the issue at hearing. Order at 3. Specifically, the Order stated that "[s]hould such documentary evidence not be fully and/or timely produced, this Tribunal may find that Respondent has waived its right to contest at hearing Complainant's proposed penalty based on an alleged inability to pay." Order at 3, 4.

To date, Respondent has not filed any documents responsive to the Order with this Tribunal. Additionally, counsel for Complainant advised staff for this Tribunal by email that Complainant also has not received any of the ordered discovery.

The procedural rules governing this proceeding state, in relevant part:

Where a party fails to provide information within its control as required pursuant to this section [providing for the prehearing exchange of information and additional discovery], the Presiding Officer may, in his discretion:

- (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).

40 C.F.R. § 22.19(g). Furthermore, in *New Waterbury Ltd.*, the Environmental Appeals Board held that "a respondent's ability to pay may be *presumed* until it is put at issue by a respondent" and "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 inability to pay claim after being apprised of that obligation during the pre-hearing process, the Region may properly argue and the presiding officer may conclude that any objection to the penalty based upon ability to pay has been waived" *New Waterbury*, 5 E.A.D. 529, 541-542 (EAB 1994).

Here, Respondent has not challenged the proposed penalty specifically on the basis of an inability to pay and has not provided any documentation or other information to support such a claim, despite having been afforded multiple opportunities to do so and having been ordered to do so by the July 10, 2024 Order on Complainant's Discovery Motion. Consistent

with the foregoing legal authorities, I thus find that Respondent has waived the right to contest the proposed penalty based on an alleged inability to pay and that Respondent is accordingly barred from entering any evidence at the hearing that relates to the inability to pay the proposed penalty or the proposed penalty's potential economic impact on Respondent or his business.

SO ORDERED.

A handwritten signature in black ink, appearing to read 'S. Biro', is written over a horizontal line.


Susan L. Biro
Chief Administrative Law Judge

Dated: November 8, 2024
Washington, D.C.

In the Matter of Timothy Wilson, d/b/a Wilson's Pest Control, Respondent
Docket No. FIFRA-07-2023-0135

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Order Barring Respondent from Presenting Certain Evidence at Hearing, dated November 8, 2024, and issued by Chief Administrative Law Judge Susan L. Biro, was sent this day to the following parties in the manner indicated below.



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Paralegal Specialist

Copy by OALJ E-Filing System to:

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Dated: November 8, 2024
Washington, D.C.