UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
City of St. Charles, a Municipal Corporation	)	**Docket No. CAA-05-2008-0003**
Operating as St. Charles Wastewater	)	
Treatment Facility,	)	
	)	
Respondent.	)	

ORDER DENYING MOTION TO VACATE

I. Background and Argument

On December 11, 2007, the United States Environmental Protection Agency, Region 5 ("Complainant"), initiated this action against the Respondent, the City of St. Charles, under Section 113(d) of the Clean Air Act, 42 U.S.C. § 7413(d). On January 17, 2008, Complainant filed an Amended Administrative Complaint and on April 11, 2008, Complainant filed a Second Amended Administrative Complaint ("Complaint"). In its Answer, filed on May 13, 2008, as well as in its Answer to the Amended Complaint, Respondent set forth several defenses, but did not assert that it was unable to pay the proposed penalty. On May 22, 2008, a Prehearing Order was issued, which identified several items for each party to submit as part of its prehearing exchange. Specifically relevant here, Paragraph 3(B) of the Prehearing Order provided that "if Respondent takes the position that [it] is unable to pay the proposed penalty, a copy of any and all documents it intends to rely upon in support of such position . . . ."

On June 2, 2008, Complainant filed a Motion to Vacate and memorandum in support ("Motion to Vacate") requesting that Paragraph 3(B) of the Prehearing Order be vacated, on the basis that Paragraph 3(B) is "in derogation of the law governing these proceedings." Motion at 1. Respondent has not filed any response to the Motion.

In support of its argument, Complainant points out that the Consolidated Rules of Practice, 40 C.F.R. Part 22 ("Rules") provide at Section 22.15(b) that in its Answer, a respondent "shall . . . state. . . the basis for opposing any proposed relief" and at Section 22.15(c) that "[a] hearing upon the issues raised by the complaint and the answer" may be held. Complainant asserts that in *New Waterbury, Ltd.*, 5. E.A.D. 529, 541-542, 1994 EPA App. LEXIS 15 (EAB 1994), the Environmental Appeals Board ("EAB") set out the following procedures in regard to the issue of ability to pay: specifically, that when a complaint is issued, a respondent's ability to pay the proposed penalty may be presumed until the respondent raises in its answer the issue of its ability to pay, and if the respondent does not raise the claim in its answer or fails to produce

evidence in support of its claim, then it may be concluded that any objection to the penalty based on ability to pay has been waived under the Rules. Motion at 6. Complainant argues that in *New Waterbury*, the EAB recognized that the Rules require that a respondent raise a claim of inability to pay the penalty in its answer and submit financial records to EPA before a hearing to preserve such a claim for hearing, and if it fails to do so, by rule it may be deemed to have waived its claim. Motion at 6-8. Complainant emphasizes the impact that a decision of the EAB has on the Administrative Law Judge ("ALJ"), stating that an ALJ is subject to the agency's policies as iterated in published decisions of the agency. Motion at 2-5.

Complainant points out that the Complaint notified Respondent of the requirements in the Rules for an answer and of the proposed penalty, and stated that in considering the statutory penalty factor of "economic impact of the penalty on the business," Complainant has presumed that Respondent has the ability to pay the penalty. Respondent in its Answer raised specific objections to the proposed penalty amount, but did not claim inability to pay it. Therefore, Complainant argues, the presumption that Respondent is able to pay the penalty remains in effect, the issue of ability to pay is not at issue in any hearing in this matter, and "documentation regarding Respondent's finances is not material for any pre-hearing exchange." Motion at 9.

Paragraph 3(B) of the Prehearing Order indicates that Respondent has an opportunity to raise the issue of its ability to pay the penalty by merely submitting documents in its prehearing exchange, Complainant argues, yet "under the applicable statutes, rules and published decisions, a respondent does not 'support' its claim of 'inability to pay,'" but instead, the complainant must meet its burden of proof "after being provided with access to the respondent's financial records." Motion at 10. The Rules provide that issues for hearing must be "raised in the complaint and answer," and if the issue of ability to pay is not raised in the answer, the ability to pay "is not an issue for hearing." Motion at 11. Under rules of statutory construction, a statutory limitation on a procedure to be done in a particular mode includes the negative of any other mode, Complainant asserts, citing to *Botany Worsted Mills v. United States*, 278 U.S. 282, 288 (1929). Thus, Complainant argues, and any "other mode" to address the ability to pay issue "is negated by the Administrator's Rules and published decisions." Motion at 11.

In a footnote, Complainant also raises concerns over the amount of time needed to evaluate financial documents regarding ability to pay after a respondent raises the issue. Notice in the answer that a respondent is raising the issue enables Complainant to immediately make a written demand of financial information from respondent, which is submitted to a financial analyst. On the other hand, if a respondent first provides notice that it is raising the issue in a prehearing exchange, then Complainant has only 13 days to provide a rebuttal prehearing exchange. Extensive discovery may be required, which may require delaying the hearing date, or if the hearing date is not delayed, a haphazard and incomplete review would result.[1]

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[1] It is noted that this Motion is not the first time this Complainant has made this argument. In a case before another ALJ, Complainant similarly moved to vacate a provision in a prehearing order for the respondent to submit documents regarding any claim of inability to pay.

(continued...)

II. Discussion and Conclusion

The Rules provide at 40 C.F.R. § 22.15(b) that --

> The answer shall also state: The circumstances or arguments which are alleged to constitute the grounds for any defense; the facts which respondent disputes, the basis for opposing any proposed relief; and whether a hearing is requested.

The Rules also provide that "[t]he respondent may amend the answer to the complaint upon motion granted by the Presiding Officer." 40 C.F.R. § 22.15(e).

Thus, in the event a respondent does not raise the claim in its answer that it is unable to pay the proposed penalty, the respondent may later raise the claim by filing a motion to amend its answer. This is not an unlikely occurrence, despite the fact that a copy of the Rules is enclosed with the Complaint initially served on the respondent, given that some respondents are unrepresented by counsel at the point at which an answer is filed, that many attorneys who represent respondents have little or no experience with EPA administrative enforcement proceedings, that there is very limited time within which to assess ability to pay before the answer must be filed, and that a respondent's financial status may change in the course of a proceeding. Similarly, EPA from time to time deems it necessary to amend its initial pleadings, as in the case at hand, in which Complainant has already amended the Complaint twice, and the Prehearing Exchange process is not yet complete.

Indeed, the Complaint itself could have led Respondent to believe it was not necessary to raise the issue in its Answer. The Complaint states that, "failure to admit, deny or explain any material factual allegation in the Complaint will constitute an admission of the allegation." Complaint at 18, citing 40 C.F.R. § 22.15(d). Notably, it does not state that failure to raise the issue of ability to pay will constitute an admission that Respondent is able to pay the proposed penalty, or a waiver of any claim of inability to pay. The issue here is not whether Respondent failed to admit, deny or explain a "factual allegation," but rather whether Respondent must make an explicit affirmative statement in its answer in response to the presumption of ability to pay. The factual allegations and conclusions of law (entitled "General Allegations" and "Statement of Violations") are set out in numbered paragraphs on pages 3 through 14 of the Complaint. These are the allegations which are to be admitted, denied or explained in an answer. Following the numbered paragraphs is the narrative portion of the Complaint, beginning with the section

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[1] (...continued)
Although the ALJ ultimately denied the motion as moot, he explained in his ruling thereon his rationale for rejecting Complainant's argument, noting that pleadings are easily amended and that waiver of a defense on the basis it was not raised in the answer would not easily be found absent prejudice to the opposing party, which would tend to occur in later stages of the proceeding. *Anthony I. Forster*, CWA-05-2002-0005, 2002 EPA ALJ LEXIS 58, *1-4 (ALJ, Sept. 18, 2002). Undaunted, Complainant pursues the present Motion.

entitled "Proposed Penalty Amounts" setting out the proposed penalty and authorities and factors for penalty assessment. In that narrative, the Complaint states that --

> Complainant has presumed that Respondent does have the ability to pay the penalty amount. However, should Respondent make available to Complainant relevant and credible financial records which demonstrate that it does not have an ability to pay the amount of penalty proposed, Complainant will set aside the presumption and reduce the amount of penalty proposed . . . .

Complaint at 15. This statement does not put Respondent on notice of a requirement to deny the presumption or to state explicitly in its Answer that it is unable to pay the proposed penalty, but instructs Respondent merely to make available its financial records in an effort to have Complainant set aside the presumption. Despite the recitation on page 17 of the Complaint of the requirements in the Rules for an answer, including to state the "basis on which you dispute the proposed relief," the Complaint provides no support for deeming a respondent to have waived any claim of inability to pay if it is not stated in the answer. A complaint drafted as such increases the likelihood that a respondent may later move to amend its answer to raise an issue of inability to pay.

The EAB has adopted a policy of liberal amendment of pleadings. *Lazarus, Inc.*, 7 E.A.D. 318, 331-333 ,1997 EPA App. LEXIS 27, *32-*37 (EAB 1997) (citing *Foman v. Davis*, 371 U.S. 178, 181-82 (1962)); *see also Wego Chem. & Mineral Corp.*, 4 E.A.D. 513, 525 n.11, 1993 EPA App. LEXIS 6, *29 n.11 (EAB 1993). This policy follows the long tradition in the Federal courts that "[t]he Federal Rules [of Civil Procedure] reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Conley v. Gibson*, 355 U.S. 41, 48 (1957). Allowing pleadings to be amended furthers the goals of administrative proceedings by allowing adjudication of disputes on their merits. *Lazarus*, 7 E.A.D. at 333, 1997 EPA App. LEXIS 27, *37; *Asbestos Specialists, Inc.*, 4 E.A.D. 819, 830 (EAB 1993). Thus, motions to amend an answer are generally granted, under the standards for amending pleadings set forth in *Foman v. Davis, supra*, and the principle that mere delay is generally insufficient reason to deny a party an opportunity to raise a defense. *Lazarus*, 7 E.A.D. at 332, 1997 EPA App. LEXIS 27 at *34. A respondent may file a motion to amend its answer at any time until the motions deadline, which is after the prehearing exchange is complete and generally a few weeks before the hearing is scheduled to commence.[2]

Clearly, amendment of the answer to assert inability to pay at such a point in the proceedings would reduce EPA's opportunity to review and evaluate a respondent's financial documents, and/or delay the hearing, much more than if the respondent first provided notice of an inability to pay claim in its prehearing exchange. Even a claim of inability to pay stated in an

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[2] Motions may be filed even after the motions deadline if accompanied by a motion for leave to file out of time.

answer, enabling Complainant to promptly request relevant documents from Respondent (*see*, Motion to Vacate n.7), does not necessarily result in more efficient proceedings than a claim of inability to pay first raised in a prehearing exchange, as there would be no enforceable due date for respondent to submit documents requested from Complainant until it files a motion for additional discovery or to compel responses to discovery, which is not granted until *after* the prehearing exchange. 40 C.F.R. § 22.19(e). Thus, Complainant cannot assume that it would lose preparatory time. In addition, a respondent's failure to assert any claim of inability to pay in the prehearing exchange when prompted to do so by a prehearing order could provide a basis for concluding that such a claim has been waived. On the other hand, not ordering Respondent to submit documents related to inability to pay in the prehearing exchange may result in the very delay that Complainant seeks to avoid.

Therefore, to prompt a respondent in a Prehearing Order to assert any such claim early in the proceeding is in the best interest of the parties and the tribunal in order to ensure fair and efficient proceedings. The Administrative Law Judges'(ALJ's) authority to do so may be found in the Rules which authorize the ALJ to "issue all necessary orders, . . .order a party . . . to produce testimony, documents, or other non-privileged evidence . . . [and] [d]o all other acts and take all measures necessary for the maintenance of order and for efficient, fair and impartial adjudication of issues arising in proceedings governed by these Consolidated Rules of Practice." 40 C.F.R. §§ 22.4(c)(2), (c)(5), and (c)(10). The EAB in *New Waterbury* did not abrogate this authority, and did not address the issue of whether an ALJ may order a respondent to submit documents in the prehearing exchange in support of any inability to pay argument not raised in the answer.[3] One purpose of the Rules is to promote efficiency and avoid undue delay in proceedings. *See Lazarus*, 7 E.A.D. 318, 334, 1997 EPA App. LEXIS 27, *38-39 (EAB 1997). The ALJ is required by the Rules to "conduct a fair and impartial proceeding, assure that all facts are fully elicited, adjudicate all issues, and avoid delay." 40 C.F.R. § 22.4(c). A provision in a Prehearing Order directing a respondent to produce documents in support of any claim of inability to pay the proposed penalty, even where it is not raised in the answer, ensures that a respondent not only makes such claim early in the proceeding but also that it immediately provides documents in support of the claim, which avoids delay, encourages the full elicitation of facts and adjudication of all issues, and allows both parties sufficient time to prepare for a hearing.

Complainant appears to advocate an automatic waiver of a claim of inability to pay, by arguing that if it is not raised in the answer, "the respondent's 'ability to pay' . . . is not an issue for hearing," and "any 'other mode' of procedure that might be employed to address the 'ability to pay' issue is negated by the Administrator's Rules and published decisions." Motion at 11. To the extent that "any 'other mode'" would include a motion to amend an answer, any argument

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[3] In *New Waterbury*, the respondent raised the issue of inability to pay the proposed fine in its answer, and the EAB examined whether the presiding officer erred in reopening the hearing in order to allow additional evidence on respondent's ability to pay to be admitted, among other issues. 5 E.A.D. at 531, 536.

that such a motion should be denied on the basis that a claim for inability to pay has been waived for failure to raise it in the original answer is contrary to decisions of the EAB. The EAB acknowledged that waiver is not applied automatically even for affirmative defenses, and that the ALJ has discretion as to whether to conclude that a respondent waived a claim of inability to pay, considering the factors for amending pleadings. *Lazarus*, 7 E.A.D. at 331, 334. As the EAB stated, "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 under the Agency's procedural rules . . . ." *New Waterbury*, 5 E.A.D. at 542 (emphasis added) (citing 40 C.F.R. §§ 22.19(b), 22.15(d), 22.19(f)(4)).

The Rules and EAB case law also do not support Complainant's argument that Paragraph 3(B) of the Prehearing Order is an "other mode" of procedure contrary to the principle that a respondent does not "support" its claim of "inability to pay" but instead the complainant must meet its burden of proof on the issue after having been provided "access to the respondent's financial records" (Motion to Vacate at 10 (quoting *New Waterbury* at 542)). The Rules provide that in the prehearing exchange, the respondent "shall explain . . . why the proposed penalty should be reduced or eliminated" and submit "[c]opies of documents and exhibits it intends to introduce into evidence at the hearing." 40 C.F.R. § 22.19(a)(2) and (a)(3). The EAB in *New Waterbury* referred to an "inability to pay claim" and stated, "[t]he rules . . . require a respondent to indicate whether it intends to make an issue of its ability to pay, and if so, to submit evidence to *support* its claim *as part of the pre-hearing exchange*." *New Waterbury*, 5 E.A.D. at 542 , 1994 EPA App. LEXIS 15, *35 (emphasis added). Provision 3(B) of the Prehearing Order ensures that Respondent does so in a timely manner.

Accordingly, for the reasons stated herein, Complainant's Motion to Vacate Part 3(B) of the prehearing exchange is **DENIED**.

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Susan L. Biro
Chief Administrative Law Judge

Dated: June 30, 2008
Washington, D.C.