

**UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY**

**BEFORE THE ADMINISTRATOR**

<b>IN THE MATTER OF</b>	)	
	)	
<b>City of New Bedford, Massachusetts,</b>	)	<b>Docket No. CWA-01-2002-0059</b>
	)	
<b>Respondent</b>	)	

**ORDER ON COMPLAINANT’S MOTION FOR ORDER COMPELLING  
PRODUCTION OF INABILITY TO PAY DOCUMENTS**

On April 14, 2003, the United States Environmental Protection Agency (“Complainant”) filed a motion requesting that the Court issue an order to compel Respondent, City of New Bedford, Massachusetts (“City”) to provide documentation supporting its inability to pay claim (“Motion”). Complainant further requests that if the Respondent fails to provide such documentation within a reasonable time period, then the Administrative Law Judge should exclude such a defense and documents from the record.

The Rules of Practice provide that a party’s response to a motion must be filed within fifteen days from the date of service. 40 C.F.R § 22.16(b). The Rules further state that, “[s]ervice of the complaint is complete when the return receipt is signed.” 40 C.F.R. § 22.7(c). Consequently, Respondent’s response to the Motion was due on May 7, 2003. A response has not been filed to date. In addition, “[a]ny party who fails to respond within the designated period waives any objection to the granting of the motion.” 40 C.F.R. § 22.16(b).

Respondent, in its April 4, 2003 prehearing exchange, claimed an inability to pay the proposed penalty, stating that “Daniel Patten, Treasurer/Chief Financial Officer for the City of New Bedford, is expected to testify as to the Respondent’s inability to pay the proposed penalty, including the affect (sic) that State Budget cuts have had on the Respondent.” Respondent’s

Prehearing Exchange at 1. In terms of documentary evidence, Respondent’s Exchange identifies

only a single document: “Chapter 1 of the Acts of 2003, which was approved by the Governor of the Commonwealth on January 17, 2003.” (“Commonwealth Act”) Respondent’s Proposed Exhibit, RX-1. *Id.* at 2. As a result of that Commonwealth Act, Respondent states that “its 2003 fiscal year budget, which ends on June 30, 2003, has been reduced by 2.3 million dollars.” *Id.* Respondent’s Prehearing Exchange at 2. Respondent maintains that “significant cuts in future State funding is imminent” and that a penalty would add to its “budgetary uncertainty,” potentially impacting Respondent and the other communities for which it provides water.

In order to verify that assertion, Complainant seeks to compel Respondent to produce the following documentation: (1) audited financial statements including all notes and attachments for the most recent five years; (2) budgets for the most recent five years; (3) the most recent bond rating and bond prospectus; (4) the current tax, water and sewer rates; and (5) completed “Munipay”<sup>1</sup> input sheets. *See* Motion at Attachments A and B.

## Discussion

The Rules of Practice provide that, after the prehearing exchange, a party may move for additional discovery. In determining whether to order such other discovery, a court is guided by a three part test:

[S]uch other discovery [may be ordered] only if it: (i) [w]ill neither unreasonably delay the proceeding nor unreasonably burden the non moving party; (ii) [s]eeks information that is most reasonably obtained from the non-moving party, and which the non-moving party has refused to provide voluntarily; and (iii) [s]eeks information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought.

Rules of Practice, 40 C.F.R. § 22.19(e)(1).

Here, while the Respondent has asserted an inability to pay defense,<sup>2</sup> it is problematic.

First, Respondent contended an inability to pay at a point in time when it did not know the

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<sup>1</sup>The Munipay sheets ask for census data and financial information. The Complainant will use this information to run its software model “Municipal Ability to Pay.” *See*, Motion at Attachment A.

<sup>2</sup>For CWA cases involving a civil penalty action, “ability to pay” is not literally among the enumerated penalty determination factors. Instead, Section 311(b)(8) of the CWA refers to “the economic impact of the penalty on the violator.” 33 U.S.C. §1321(b)(8). However, this factor is tantamount to an “ability to pay” factor. *See, for example, In the Matter of Vemco, Inc.*, Order on Motions, May 28, 2003 (E.P.A.), Chief Administrative Law Judge Biro, 2003 WL 1919589 (E.P.A.).

penalty amount being proposed. EPA did not make its penalty proposal until April 18, 2003, while Respondent's contention of inability to pay was made two weeks prior to the proposal's disclosure. Therefore, unless it is contending that it could not pay *any* penalty, its claim was, at best, premature.

More significantly, the Court's Prehearing Order, issued in January 2003, requires "[i]f the Respondent intends to take the position that it is unable to pay the proposed penalty, or that payment will have an adverse effect on the Respondent's ability to continue in business, Respondent shall furnish supporting documentation *such as financial statements or tax returns.*" Prehearing Order at 1. (Emphasis added). As noted above, Respondent has furnished no such documents with its prehearing exchange. The only document supplied by the Respondent, the Commonwealth Act, provides no relevant information that is specific to the Respondent's ability to pay.

It is important for Respondent to appreciate the significance of this failure to support its inability to pay claim. The Environmental Appeals Board ("EAB" or "Board") has addressed the procedure applied where ability to pay claims are presented. While the Board noted that, consistent with the Administrative Procedure Act, the burden of proof rests with the proponent and, accordingly, that EPA "bears, in the first instance, the burden of proof on the appropriateness of a civil penalty," this does not require a separate burden for each of the penalty factors, but instead it must show that it "considered each of the statutory factors and that the recommended penalty is supported by its analysis of those factors." *In re: Spitzer Great Lakes Ltd.*, TSCA Appeal No. 99-3, June 30, 2000, 9 E.A.D. 302, 2000 WL 893127 (EPA EAB).

Specifically regarding ability to pay, the EAB has noted that once a respondent places that factor in issue, the presumption that the penalty can be paid no longer exists but, as it is the respondent which has control over the relevant records, it must "provide evidence to show that it is not able to pay the proposed penalty." *Id.* Thus, where this factor has become an issue, EPA must be given access to the respondent's financial records *before* the start of the hearing and consistent with the prehearing exchange order. Where a respondent fails to meet this obligation EPA "may properly argue and the [administrative law judge] may conclude that any objection to the penalty based upon ability to pay has been waived." *Id.*

Accordingly, the posture of the case, at this juncture, is that the City has missed the opportunity to assert an ability to pay claim. As the hearing date has not yet been announced, the City still may have the opportunity to supplement its exchange as regarding the claim but it would have to do so by meeting the requirements of 40 C.F.R. 22.19(f), *Supplementing prior exchanges*.

Despite the disadvantageous posture that the City has put itself in regarding this issue, EPA's unopposed Motion is still before the Court. The rules provide that "[a]ny party who fails

to respond within the designated period<sup>3</sup> waives any objection to the granting of the motion.”  
40 C.F.R. § 22.16(b).

The information that Complainant seeks satisfies the test for other discovery. The information will not unreasonably delay the proceeding or burden the non-movant because the Court has not set a hearing date. Furthermore, it is reasonable to assume that the information is in the possession of the Respondent because the information sought is the type kept in the ordinary course of business. Finally, the information has significant probative value as to the disputed material fact of Respondent’s ability to pay.<sup>4</sup>

The Court recognizes that the Respondent will need a reasonable amount of time to comply with the order. The Respondent, therefore, must file all of the documents requested no later than twenty-one (21) days after the date of this order or it will have waived the right to assert a defense on the basis of the economic impact of the proposed penalty.

Accordingly, the Complainant’s request to compel production of inability to pay documents is **GRANTED**. The Respondent shall file the documents requested in the Motion **on or before July 24, 2003**.

**So ordered.**

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William B. Moran  
United States Administrative Law Judge

Dated: July 2, 2003  
Washington, D.C.

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<sup>3</sup>Responses to motions are due within 15 days after service. Here, as noted, the City never filed any response, late or otherwise.

<sup>4</sup>“Where a party fails to provide information within its control as required pursuant to this section, the Presiding Officer may, in his discretion: (1) [i]nfer that the information would be adverse to the party failing to provide it; (2) [e]xclude the information from evidence; or (3) [i]ssue a default order under 22.17(c).” Id.