UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	**)**	
	)	
ANTHONY I. FORSTER	**)**	**Docket No. CWA-05-2002-0005**
	)	
Respondent.	**)**	

ORDER ON MOTION TO VACATE AND STRIKE

On May 29, 2002, Complainant[1] filed a "Motion to Vacate and Strike" regarding the "ability to pay" penalty factor concerning Respondent, Anthony Forster.[2] Citing, *inter alia,* to the Environmental Appeals Board ("EAB") case of *In re New Waterbury, Ltd.*, 5 E.A.D. 529 (E.P.A. 1994), Complainant contends that Respondent waived its power to contest ability to pay by failing to contest that issue in the Answer after it was raised in the Complaint. Further, Complainant requests that the Court vacate that part of the Prehearing Order that instructed Respondent to furnish supporting documentation if it intended to claim an inability to pay the proposed penalty. Last, Complainant's motion requests that the Court strike any response from the Respondent to that portion of the prehearing order concerning ability to pay.

As seen by examining the words of the EAB in *New Waterbury*, it is within the Administrative Law Judge's ("ALJ") discretion to determine whether the ability to pay factor has been waived:

> . . . 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

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[1] The Motion to Vacate and Strike in the instant case was filed by EPA counsel describing himself as "Senior Attorney and Counsel for the Administrator's Delegated Complainant."

[2] A companion case with the same set of alleged facts is: *In the Matter of Roadway Surfacing, Inc.,* CWA-05-2002-04, ("*Roadway*"). By order of the EPA Chief Administrative Law Judge, the *Roadway* case was re-assigned to the undersigned.

> 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 and thus this factor does not warrant a reduction of the proposed penalty.

Id. at 542 (emphasis supplied, footnote omitted). *See also In re Chempace Corp.*, FIFRA Appeal Nos. 99-2 & 99-3, 2000 EPA App. LEXIS 15, at *39 (E.P.A., May 18, 2000), 9 E.A.D. ___ (The EAB's general policy is to defer to an ALJ's prehearing determinations). Additionally, the EAB has adopted the policy that pleadings should be allowed to be liberally amended. Indeed, in this very case, EPA amended its own Complaint. Accordingly, waiver due to a failure to raise a matter in the pleadings is not to be easily found unless it would result in prejudice to the other party, a circumstance which would tend to occur in the latter stages of a proceeding. *Cf. In re Lazarus, Inc.*, 7 E.A.D. 318, 333-34 (E.P.A. 1997).[3] An inflexible approach in which waiver of ability to pay is found automatically upon Respondent's failure to contend that issue in the Answer violates the spirit of an administrative proceeding, which is to evaluate claims on their merits.[4] *See id., citing, In re Wego Chem. & Mineral Corp.*, 4 E.A.D. 513, 525 (E.P.A. 1993) ("the purpose of pleading is to facilitate a proper decision on the merits").

Nevertheless, Complainant's motion has become moot. In response to Complainant's motion, by a letter dated June 7, 2002, and in the wake of a conference call conducted by the Court with the parties, Respondent, through counsel, informed the Court and Complainant that he did not intend to contest ability to pay. Respondent further stated he would not present facts related to Respondent's individual financial condition or argue that his individual financial condition warrants a decreased penalty. However, Respondent reserved his intent to present a defense based on certain factors not directly related to ability to pay, including his general status as an individual landowner, in contrast to that of a corporation or other economic entity.[5]

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[3] The Court recognizes that the facts in *Lazarus* involved affirmative defenses and that the "ability to pay" factor is not an affirmative defense. Nevertheless, the general policy concerning liberal amendment of pleadings in *Lazarus* applies to the present case by analogy, because an "affirmative defense" and "ability to pay" are both matters which can be raised in pleadings.

[4] As noted in *Almonte v. Coca-Cola Bottling*, "...courts are reluctant to forfeit a party's right to be heard by the harsh sanction of striking pleadings..." 169 F.R.D. 246, *248, Oct. 15, 1996.

[5] Respondent also reiterated its intent to present evidence and make arguments based on any of the other criteria set forth at 33 U.S.C. § 1319(g)(3).

As Respondent has expressed that he will not dispute "ability to pay," Complainant's motion has become moot and no further relief is necessary.

So ordered.

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William B. Moran
United States Administrative Law Judge

Dated: September 18, 2002
Washington, D.C.