UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)
	)
DOUG BLOSSOM,	) **DOCKET NO. CWA-10-2002-0131**
	)
RESPONDENT.	)

ORDER ON COMPLAINANT'S MOTION FOR ORDER COMPELLING PRODUCTION OF ABILITY TO PAY DOCUMENTS AND ORDER REGARDING LOCATION OF HEARING

I. Complainant's Motion for Order Compelling Production of Ability to Pay Documents

On October 28, 2003, Complainant filed a motion to compel Respondent to produce documents he intends to rely upon, if any, regarding his inability to pay the penalty proposed in the Complaint, and financial information which may have an impact on Complainant's analysis of Respondent's ability to pay (Motion). In the event that Respondent does not produce the requested documents, Complainant requests an order, *in limine*, excluding such defense and documentation supporting it from the record.

The time provided by the Rules of Practice, 40 C.F.R. Part 22, for responding to a motion is fifteen days from the date of service of the motion, plus five days where the motion was served by mail. 40 C.F.R. § 22.16(b), 22.7(c). Respondent's response to Complainant's Motion was due on November 17, 2003. No such response has been filed to date. The Rules of Practice provide, at 40 C.F.R. § 22.16(b), that "if no response is filed within the designated period, the parties may be deemed to have waived any objection to the granting of the motion." Although the Motion may be granted on the basis that Respondent has waived any objection to the Motion, it will be considered on its merits.

This action was initiated by the filing of a Complaint on July 26, 2002. The Complaint seeks a total proposed penalty of $35,000. In his formal Answer to the Complaint submitted through counsel on October 17, 2002,[1] Respondent denied liability for the violations alleged and for the proposed penalty, but did not raise any claim of inability to pay the proposed penalty. Nevertheless, the Prehearing Order issued in this case on November 18, 2002, provided in Sections 3(E) & 3(F) as follows:

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[1] Respondent, acting *pro se*, had previously informally responded to the Complaint on September 9, 2002.

> (E) if Respondent takes the position that it is unable to pay the proposed penalty, [he shall submit as part of the prehearing exchange] a narrative statement explaining the factual and legal basis for its position and a copy of any and all documents it intends to rely upon in support of such position; and
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> (F) if Respondent takes the position that the proposed penalty should be reduced or eliminated on any other grounds, a narrative statement explaining the factual and legal basis for its position and a copy of any and all documents it intends to rely upon in support of such position

On June 25, 2003, in response to the Prehearing Order, Respondent submitted his prehearing exchange.[2] In the prehearing exchange Respondent identified as one of his intended witnesses "Joseph L. Moore, CPA/Expert" and stated that "Mr. Moore will testify regarding Mr. Blossom's finances in the event a penalty is assessed in this matter. His curriculum vitae is attached as Respondent's Exhibit 27." However, Respondent submitted with his exchange no documents relevant to his finances nor records upon which Mr. Moore might base his expert opinion. Further, while Respondent provided a lengthy narrative purportedly responsive to the issues raised in the prehearing exchange section (E), such response dealt with the substance of the violation charged and provided no information regarding Respondent's financial ability to pay the proposed penalty. Respondent did not respond to subsection (3)(F) of the Prehearing Order. On September 16, 2003, Respondent submitted a Supplement to his initial prehearing exchange but it too contained no information relevant to his ability to pay the proposed penalty.

Complainant represents in its Motion that on June 26, 2003, it wrote to Respondent requesting that he voluntarily provide specific financial information in order to conduct an ability-to-pay analysis, and that to date it has not received any substantive response from Respondent.

The criteria for allowing discovery of documents are that such discovery will not in any way unreasonably delay the proceeding or burden the non-moving party, that the information seeks information that is most reasonably obtained from the non-moving party who has failed to provide it voluntarily, and that it has significant probative value on a disputed issue of material fact relevant to liability or the relief sought. 40 C.F.R. § 22.19(e)(1). The hearing of this matter is set to begin on January 6, 2004, about six weeks from now. Thus, prompt production of the

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[2] The prehearing exchange process was delayed to give the parties the opportunity to participate for four months in an alternative dispute resolution process and based upon two extensions thereafter requested by Respondent's counsel. Despite such delay and the extensions, Respondent failed to submit his prehearing exchange by the deadline established and on June 23, 2003 a Show Cause Order was issued, to which Respondent replied when he submitted his prehearing exchange.

discovery sought will not delay the proceedings. Specific, current information regarding Respondent's finances is solely within Respondent's possession and should not unreasonably burden Respondent, and was not provided voluntarily by Respondent. The information Complainant seeks is of significant probative value on the penalty issue. Section 309(g)(3) of the Clean Water Act includes "ability to pay" as a penalty determination factor. Respondent has not clearly put "ability to pay" at issue, but it is suggested by the summary of proposed testimony of Mr. Moore. To clarify whether Respondent intends to raise it as an issue for hearing, and to enable Complainant to address this issue, Respondent shall be required to produce the requested documents. The Environmental Appeals Board has stated, "in any case where ability to pay is put in issue, the Region must be given access to the respondent's financial records before the start of [the] hearing." *New Waterbury, Ltd.,* 5 E.A.D. 529, 542 (EAB 1994).

Therefore, Complainant's Motion is **GRANTED**. On or before **December 10, 2003**, Respondent shall file a narrative statement clearly and unequivocally stating whether he is claiming that the proposed penalty should be eliminated or reduced based upon his financial circumstances and if so, explaining in detail the factual basis for making such claim. Further, if Respondent represents in his statement that he intends to make such a claim, at that time he shall file, along with his statement, a copy of any and all documents he, or any witness he intends to call on his behalf, intends to rely upon in support of any claimed reduction in the penalty based upon his financial circumstances as well as completed copies of the forms relating to Respondent's ability to pay attached to Complainant's letter to Respondent dated June 26, 2003 (attached as "Attachment A" to Complainant's Motion).

Respondent is hereby advised that, in the event he fails to produce all of the requested documentation on or before December 10, 2003, he risks being prohibited from introducing any testimonial or documentary evidence in support of any reduction or elimination of the penalty based upon his financial circumstances and that an inference may be drawn adverse to Respondent with respect to ability to pay.

II. Location of Hearing

The hearing in this matter was set for hearing on January 6, 2004 in Kenai, Alaska, but when the Regional Hearing Clerk notified the undersigned that she was unable to resolve the contractual arrangements necessary to utilize courtroom facilities in Kenai, she made alternative arrangements for Anchorage, Alaska. An Order Regarding Revised Hearing Location was issued on October 27, 2003, setting the hearing to commence on January 6, 2004 in Anchorage, Alaska. On November 11, 2003, Respondent submitted an Opposition to Change of Location for Hearing, requesting that the hearing be held in the central peninsula area at Kenai.

In its Opposition, Respondent asserts that Kenai, the district in which Respondent lives and the location of the property which the hearing concerns, is also the location of most, that is, nine, of Respondent's witnesses. The cost of flying the nine witnesses and Respondent's counsel

to hearing in Anchorage would cost over $2000, and a round trip drive would be six hours, Respondent asserts. The costs to Respondent of such transportation and possible overnight accommodations would be an unnecessary expense.

The undersigned's office has again requested the Regional Hearing Clerk to arrange for a courtroom in Kenai, but to no avail. The undersigned's office has been informed that the Alaska Court System has a policy requiring users of state courtrooms to sign a "hold harmless" agreement, which U.S. Government agencies cannot sign.

Accordingly, Respondent is hereby given the opportunity to work directly with the Regional Hearing Clerk to find an alternative courtroom facility for the hearing on the Kenai Peninsula.

In the event that a suitable courtroom in Kenai is not reserved by the Regional Hearing Clerk on or before **December 19, 2003,** for the hearing in this matter to commence on January 6, 2004, then the hearing will commence on January 6, 2004 in Anchorage, Alaska.

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Susan L. Biro
Chief Administrative Law Judge

Dated: November 28, 2003
Washington , D.C.