



UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
DONALD CUTLER,) DOCKET NO. CWA-10-2000-0188
)
)
RESPONDENT)

MEMORANDUM

On March 6, 2001, I issued an order denying Complainant's motion for additional discovery relating to Respondent's "ability to pay" defense to the penalty sought by Complainant. A summary of the reasons for that order follows:

1. Respondent has previously provided a substantial amount of information concerning his financial situation, e.g., income tax returns for the years 1997 to 1999 inclusive and a signed portion of a Financial Data Request Form, and has been directed to provide a copy of his 2000 income tax return at least one week prior to the hearing scheduled to commence March 20, 2001.
2. I agree with Respondent that the Financial Data Request Form is burdensome and "obnoxious" in its detail concerning living expenses and certain other requested data.

3. The "loan package" in connection with the purchase of the John Deere loader can only be relevant on the theory that Respondent has some undisclosed source of income.
4. Lastly, once Complainant has made a prima facie case that Respondent has the ability to pay the penalty sought, the burden of production and the attendant risk on that issue shifts to Respondent.*

Dated this 7th day of March 2001.

Original signed by undersigned

Spencer T. Nissen
Administrative Law Judge

* It is worthy of note that in Chempace Corporation, FIFRA Appeal Nos. 99-2 & 99-3, 2000 WL 696, 821 (EAB, May 18, 2000), a case cited by Complainant, Complainant's motion for additional discovery as to Chempace's ability to pay was denied.