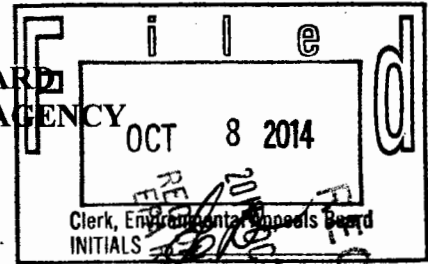


BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.



In re:)

Hagerstown Aircraft Services, Inc.)

Docket No. RCRA-03-2011-0112)

RCRA (3008) Appeal No. 14-0112

FINAL ORDER

The U.S. EPA Environmental Appeals Board (“Board”) previously elected to review, under its *sua sponte* authority, the U.S. EPA Region 3 Regional Judicial Officer’s (“RJO’s”) order denying a motion to set aside a default order as well as the underlying Initial Decision and Default Order in the above-captioned matter. *See* Order Electing to Exercise Sua Sponte Review at 1-2 (May 15, 2014) (referring to *In re Hagerstown Aircraft Servs., Inc.*, Docket No. RCRA-03-2011-0112, Order on Respondent’s Motion to Set Aside Default Order and Temporarily Stay Proceedings (RJO Apr. 3, 2014), and Initial Decision and Default Order (RJO June 27, 2013)). The RJO had found, upon motion by the Complainant, U.S. EPA Region 3 (“Region”), that Respondent, Hagerstown Aircraft Services (“Hagerstown”), was in default because it had failed to file an answer to the complaint. Initial Decision and Default Order at 11, 20; *see also* 40 C.F.R. § 22.17(a) (authorizing default under certain circumstances, including failure to timely file an answer).

The Board decided to review this matter because it had questions about certain facts, including (1) the length of time that had elapsed between the Region’s filing of the complaint and the RJO’s issuance of the Initial Decision and Default Order (more than two years); and (2) the impact the death of Hagerstown’s president and owner has on this case, as he appears to be the

only witness who could have explained the rationale behind Respondent's default. The Board was also interested in learning additional information about Hagerstown's inability-to-pay claim, which Hagerstown had raised in response to the RJO's March 13, 2014 Order to Show Cause. *See* Respondent's Response to Order to Show Cause at 4.

The Board therefore asked the parties to provide supplemental briefing on two issues: (1) how the Board should evaluate the "totality of the circumstances" standard that the Board articulated in *In re Burrell*, TSCA Appeal No. 11-05, slip op. at 11-20 (EAB Aug. 21, 2012), 15 E.A.D. ___, in light of the facts and circumstances in this case; and (2) what evidence could Hagerstown produce to demonstrate its alleged inability-to-pay. Upon review of these briefs, the Board has determined that it will not disturb the RJO's Initial Decision and Default Order or her order denying the motion to set aside the default. While the Board is sympathetic to Respondent's situation, Respondent has not provided a sufficient basis to set aside the default order under the "totality of the circumstances" standard. The Respondent concedes that it "cannot meet its burden" to justify not meeting its procedural obligation to answer the complaint. Supplemental Brief of Hagerstown at 4. In addition, while Respondent avers that it is unable to pay the penalty, the Respondent correctly notes that *Burrell* holds that inability to pay is not a defense to liability and therefore not a basis to set aside a default order. *Id.* at 3 (citing *Burrell* at 20).

Although we conclude that we do not have sufficient basis to set aside the default order, we continue to be troubled by delays in requesting and/or issuing default orders. *See Burrell*, slip op. at 18 n.14, 15 E.A.D. at ___. The reasons for our concerns are highlighted by the facts in this case, where it took two years to enter the default order against Hagerstown after the filing of

a motion for default based on a failure to file an answer. Had the default order been issued more expeditiously, Hagerstown's former president and majority owner – the witness who could have explained the reason for the default – would more likely have been available to potentially contest the entry of the order and/or explain the reasons for the failure to file an answer.¹

Accordingly, pursuant to 40 C.F.R. § 22.30(f), the Board **adopts** the RJO's June 27, 2013 Initial Decision and Default Order as the Agency's final order. Hagerstown shall pay the \$64,000 civil penalty by a method described in the Initial Decision and Default Order on pages 20-22 within thirty (30) days of service of this Final Order, unless otherwise agreed to by the Region. Hagerstown shall also comply with the compliance tasks referred to on page 20 of the Initial Decision and Default Order. Hagerstown must serve copies of the check or other instrument of payment on the Regional Hearing Clerk and on the Region. Failure to pay the penalty within the prescribed time may result in assessment of interest on the penalty. *See* 31 U.S.C. § 3737; 40 C.F.R. § 22.31(c).

So Ordered.²

ENVIRONMENTAL APPEALS BOARD

Dated: OCT - 8 2014

By: 

Randolph L. Hill

Environmental Appeals Judge

¹ According to the parties, the former owner died two months before the RJO issued her Initial Decision and Default Order. *See, e.g.*, Supplemental Brief of Appellee, U.S. EPA, at 5, 8.

² The three-member panel deciding this matter is composed of Environmental Appeals Judges Leslye M. Fraser, Randolph L. Hill, and Catherine R. McCabe. *See* 40 C.F.R. § 1.25(e)(1).

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **Final Order** in the matter of *Hagerstown Aircraft Services, Inc.*, RCRA (3008) Appeal No. 14-01, were sent to the following persons in the manner indicated:

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Date: OCT - 8 2014



Annette Duncan
Secretary