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

In re:	)	
Sargent Enterprises, Inc.	)	CAA Appeal No. 10-02
Docket No. CAA-03-2009-0189	)	

APPELLEE'S RESPONSE BRIEF

Submitted by:

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INTRODUCTION

The United States Environmental Protection Agency ("EPA" or Appellee/Complainant") responds to an appeal filed by Sargent Enterprises, Inc. ("Sargent" or "Appellant/Respondent") of Administrative Law Judge Barbara A. Gunning's January 28, 2010 Default Order assessing a civil penalty of $17,400 for a violation of Section 112 of the Clean Air Act, as amended ("CAA"), 42 U.S.C. § 7412, and the National Emissions Standard for Asbestos regulations ("Asbestos NESHAP"), codified at 40 C.F.R. part 61, Subpart M. Sargent was found to be in default pursuant to Section 22.17(a) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("CROP"), 40 C.F.R. part 22, for failing to comply with the information exchange requirements of a September 24, 2009 Prehearing Order and failing to respond to a December 30, 2009 Order to Show Cause. For the reasons stated below, Administrative Law Judge Barbara A. Gunning's January 28, 2010 Default Order, which constitutes an Initial Decision pursuant to 40 C.F.R. § 22.17(c), should be affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

On June 4, 2009, EPA issued a Complaint and Notice of Opportunity for Hearing" ("Complaint") to the School District of Upper Dublin ("Upper Dublin"), 1 Source Safety and Health, Inc. ("1 Source") and Sargent, collectively, the "Respondents", under the authority of Section 113(a)(3) and (d) of the Clean Air Act, 42 U.S.C. § 7413(a)(3) and (d). The Complaint alleges that the Respondents failed to comply with Section 112 of the CAA, 42 U.S.C. § 7412, and the Asbestos NESHAP by failing to keep regulated asbestos containing material ("RACM")

wet until disposal as required by 40 C.F.R. § 61.145(c)(6)(i). The Complaint sought a total proposed civil penalty of $21,900 jointly from the Respondents for the alleged violation of the Asbestos NESHAP and Section 112 of the Clean Air Act, 42 U.S.C. § 7412.

Acting *pro se,* Respondent 1 Source filed a Motion for an Extension of Time to File Answer on or about July 2, 2009. Through counsel, Respondent Upper Dublin filed its Answer on or about July 6, 2009. Acting *pro se*, Respondent Sargent also filed its Answer on or about July 6, 2009. On July 21, 2009, the Regional Judicial Officer granted Respondent 1 Source's Motion and ordered its Answer to be filed on or before August 20, 2009. On August 13, 2009, a Consent Agreement and Final Order ("CAFO") between Complainant and Respondent 1 Source, memorializing 1 Source's agreement to pay a $2,700 civil penalty for the violation alleged against it in the Complaint, was filed with the Regional Hearing Clerk.

On September 17, 2009, Administrative Law Judge Barbara A. Gunning ("Presiding Officer") was designated to preside in this matter. On September 24, 2009, by Prehearing Order and pursuant to 40 C.F.R. § 22.19, the Presiding Officer ordered Complainant's Initial Prehearing Exchange to be filed on or before November 24, 2009; Respondents Sargent and Upper Dublin to file their prehearing exchanges by December 22, 2009, and Complainant to submit its rebuttal prehearing exchange by January 7, 2010. On September 29, 2009, a CAFO between Complainant and Respondent Upper Dublin, memorializing Upper Dublin's agreement to pay a $1,800 civil penalty for the violation alleged against it in the Complaint, was filed with the Regional Hearing Clerk. As are result, Sargent became the sole remaining respondent.

On November 24, 2009, Complainant filed its Initial Prehearing Exchange which included an adjustment to the penalty proposed in the Complaint to reflect the settlements reached with Respondents Upper Dublin and 1 Source such that the penalty sought against

Respondent Sargent was $17,400. *See* Complainant's PHE at 7-10. As of December 28, 2009, Complainant had not received either a prehearing exchange or a motion for an extension of time from Sargent. On this date, EPA filed a Motion for Extension of Time to File Complainant's Rebuttal Prehearing Exchange, Issuance of Show Cause Order, and Other Appropriate Relief ("Motion to Show Cause") requesting the Presiding Officer to *inter alia* issue an order to show cause why Respondent Sargent should not be found in default for its failure its to comply with the Prehearing Order's December 22, 2009 deadline and information exchange requirements, and the requirements of 40 C.F.R. § 22.19(a).

On December 30, 2009, the Presiding Officer issued an Order to Show Cause and Order Granting Complainant's Motion for Extension of Time to File Complainant's Rebuttal Prehearing Exchange ("Order to Show Cause") ordering *inter alia* Sargent to show cause, if any, on or before January 19, 2010, why it failed to meet the December 22, 2009 filing deadline and why a default order should not be entered for failing to meet such deadline. As of January 28, 2010, Respondent Sargent had not filed a prehearing exchange or otherwise met the information requirements of the Prehearing Order, and had not responded to the Order to Show Cause. On this date, the Presiding Officer issued a Default Order finding Sargent liable for the violation alleged in the Complaint and assessing Respondent Sargent a civil penalty of $17,400, constituting an Initial Decision under the CROP.

On or about February 25, 2010, Respondent Sargent filed a Notice of Appeal and an Appeal Brief with the Environmental Appeals Board (the "Board").

ARGUMENT

I. THE PRESIDING OFFICER HAD PROPER GROUNDS TO ISSUE A DEFAULT ORDER DUE TO APPELLANT/RESPONDENT'S FAILURE TO COMPLY WITH THE PREHEARING INFORMATION EXCHANGE REQUIREMENTS AND ORDER TO SHOW CAUSE.

Section 22.17(a) of the CROP explicitly states that parties "may be found to be in default …upon failure to comply with the information exchange requirements of § 22.19(a) or an order of the Presiding Officer." 40 C.F.R. § 22.17(a). This section further provides that "default by respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations." *Id.* According to section 22.17(c) of the CROP, "[w]hen the Presiding Officer finds that a default has occurred, he shall issue a default order against the defaulting party…unless the record shows good cause why a default order should not be issued". 40 C.F.R. § 22.17(c). The Board has affirmed the issuance of default orders when prehearing information exchange requirements are not complied with or presiding officer orders are not responded to. *In re Four Strong Builders, Inc.*, 12 E.A.D. 762, 772 (EAB 2006); *In re Jiffy Builders, Inc*, 8 E.A.D. 315, 323 (EAB 1999); *In re Rybond,*6 E.A.D. 614, 642 (EAB 1996)*; In re House Analysis & Assocs. & Fred Powell,* 4 E.A.D. 501, 512 (EAB 1993).

In this case, the Presiding Officer's September 24, 2009 Prehearing Order clearly sets a deadline of December 22, 2009 for the filing of Respondents Prehearing Exchange and expressly warns that "…failure to comply with the prehearing exchange requirements set forth herein … can result in the entry of a default judgment against the defaulting party." Prehearing

Order at 4. Respondent Sargent failed to comply with the prehearing information requirements or file a motion for extension of time by the Prehearing Order's December 22, 2009 deadline.

Sargent was put on notice of its delinquent status when, on December 28, 2009, EPA filed a Motion to Show Cause[1]. While not required to do so under the CROP[2], the Presiding Officer issued an Order to Show Cause on December 30. 2009 directing Sargent to show cause, if any, on or before January 19, 2010, why it failed to meet the December 22, 2009 filing deadline and why a default order should not be entered for failing to meet such deadline. Sargent failed to respond to the Presiding Officer's December 30, 2009 Order to Show Cause.

Sargent's failure to comply with the information exchange requirements of § 22.19(a) embodied in the September 24, 2009 Prehearing Order by the December 22, 2009 deadline or at any time during the proceeding is grounds for the issuance of a default order under the CROP. 40 C.F.R. §§ 22.17(a) and (c). Sargent's subsequent failure to respond to the Presiding Officer's December 30, 2009 Order to Show Cause by the January 19, 2010 deadline or at any time during the proceeding is also grounds for the issuance of a default order under the CROP. 40 C.F.R. §§ 22.17(a) and (c).

As of January 28, 2010, Sargent had not complied with the prehearing information exchange requirements or responded to the Order to Show Cause, nor had it provided any cause for the defaults. The Board has stated that "[t]he governing rules do not support the notion that a Presiding Officer must show inexhaustible patience in reckoning with a party's inattentiveness; rather they suggest the contrary – that default is an essential ingredient in the efficient

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[1] On December 28, 2009, EPA sent, by Facsimile and Federal Express, a copy of its Motion to Show Cause to Sargent. A copy of this correspondence and evidence of its receipt on December 28, 2009 (fax) and December 29, 2009 (Fed-Ex) is attached (Attachment 1).

[2] There is no requirement in section 22.17(c) of the CROP for a Presiding Officer to issue an order to show cause prior to issuing a default order. 40 C.F.R. § 22.17(c). The Board has described the issuance of an order to show cause as "a purely discretionary act by the Presiding Officer.' *Jiffy Builders,* 8 E.A.D. at 320, n.7.

administration of the adjudicatory process". *Jiffy Builders,* 8 E.A.D. at 320. On January 28, 2009, the Presiding Officer properly issued a Default Order finding Sargent liable for the violation alleged in the Complaint, and assessing a civil penalty of $17,400, constituting an Initial Decision under the CROP.

II. THE "TOTALITY OF THE CIRCUMSTANCES" DO NOT WARRANT REVERSAL OF THE DEFAULT ORDER.

A. The standard of review requires a consideration of the 'totality of the circumstances'.

The CROP do not explicitly define the Board's standard of review for appeals of default orders constituting initial decisions. The Board, however, has previously indicated that "[t]o determine the worthiness of a challenge to a default order, the Board will evaluate "the totality of the circumstances" involved in the case." *Four Strong Builders*, 12 E.A.D. at 766; *In re JHNY, Inc., a/k/a Quin-T Technical Papers and Boards*, 12 E.A.D. 372, 384-391 (EAB 2005); *Jiffy Builders*, 8 E.A.D. at 319, *quoting In re Rybond,* 6 E.A.D. 614, 616 (EAB 1996). Such evaluation includes an examination of the alleged procedural omission (or omissions) that prompted the default order and whether any legitimate excuse or other justification for the omission exists. *Four Strong Builders, Inc.*, 12 E.A.D. at 766-767, citing as examples *JHNY*, 12 E.A.D. at 384, 385-91; *Jiffy Builders,* 8 E.A.D. at 320-321. Additionally, the evaluation may include an analysis of the likelihood of the defaulting party's success on the merits. *Four Strong Builders, Inc.*, 12 E.A.D. at 767. The Board has previously maintained that default orders will be set aside "when fairness and a balance of the equities so dictate". *In re Thermal Reduction Co., Inc.,* 4 E.A.D. 128, 131 (EAB 1992).

B. The "totality of the circumstances' do not warrant a reversal of the Default Order.

i. Appellant/Respondent has not shown 'good cause' for its failure to comply with the prehearing information exchange requirements and the Order to Show Cause.

Section 22.17(c) of the CROP specifies "for good cause shown, the Presiding Officer may set aside a default order." 40 C.F.R. § 22.17(c). Even though Appellant/Respondent is not technically moving to set aside the default order but is instead appealing the Initial Decision to the Board[3], the Board has generally expected some articulation of the 'cause' of the default on appeal. *Jiffy Builders,* 8 E.A.D. at 320, n.8, *citing Rybond,* 6 E.A.D. at 625.

Appellant/Respondent identifies three general causes, each discussed below, for its failure to meet the information exchange requirements of the September 24, 2009 Prehearing Order and its failure to respond to the Presiding Officer's December 30, 2009 Order to Show Cause. First, Appellant/Respondent asserts that its failure to comply with the prehearing information exchange requirements and to respond to the Order to Show Cause were caused by misunderstandings in connection with its settlement communications with EPA. Appeal Brief at 2, 4-6. Consistent with EPA policy found at 40 C.F.R. § 22.18(b) encouraging settlement of proceedings and with Judge Gunning's September 24, 2009 Prehearing Order expressly encouraging the parties "...to initiate or continue to engage in settlement discussions during and after preparation of their prehearing exchange", EPA and Sargent conversed on the telephone on approximately two or three occasions prior to Sargent's December 22, 2009 prehearing information exchange deadline to try and reach a settlement. 40 C.F.R. § 22.18(b) and Prehearing Order at 2. The parties were unable to come to any agreement as to either liability or to penalty. At no time during such conversations did EPA represent or otherwise suggest that

[3] Under the CROP, a motion to set aside a default order and an appeal to the Board both have the effect of preventing an Initial Decision from automatically becoming a Final Order. 40 C.F.R. § 22.28(c).

Sargent could ignore or otherwise disregard the information exchange requirements of the September 24, 2009 Prehearing Order which, by its own terms clarified that "[t]he pursuit of settlement negotiations or an averment that a settlement in principle has been reached *will not constitute good cause* for failure to comply with the prehearing requirements or to meet the schedule set forth in this Prehearing Order (emphasis added)." Prehearing Order at 2. Moreover, any confusion on the part of Sargent as to whether it was expected to comply with the information exchange requirements should have been cleared up when it received EPA's December 28, 2009 Motion to Show Cause, and the Presiding Officer's December 30, 2009 Order to Show Cause.

Appellant/Respondent attributes missing the required deadline for responding to the Presiding Officer's December 30, 2009 Order to Show Cause and the issuance of the Default Order to "[a]n apparent miscommunication between Sargent and the office of Jennifer Abramson, Esq., Assistant Regional Counsel, U.S. EPA Region III..." in connection with a fax sent to Sargent prior to the issuance of the Default Order. Appeal Brief at 6. The fax at issue could not have caused Sargent's failure to respond to the Order to Show by the January 19, 2010 deadline as it wasn't until sent until January 25, 2009, *six days after the deadline had already passed.* See Attachment 2, at 2. In addition, the fax could not have been a cause of 'apparent miscommunication' when it expressly made of point notifying Sargent of its delinquencies and warned of the potential for default. See Attachment 2, at 1.

Secondly, Appellant/Respondent asserts that its failure to comply with the prehearing information exchange requirements and to respond to the Order to Show Cause were caused by its "unfamiliarity with the legal proceedings, coupled with its inability to secure legal

representation[4]". Appeal Brief at 2, 4-7. Such argument may have been more compelling had Sargent made *any* attempt to comply the prehearing information requirements or respond to the Order to Show Cause. In a prior case involving a *pro se* litigant, the Board has taken the position that "...parties that proceed *pro se*, while held to a more lenient standard than parties represented by members of the bar, are not excused from compliance with the [CROP]". *Jiffy Builders,* 8 E.A.D. at 321; *Rybound* 6 E.A.D at 627; *House Analysis* & Assocs., 4 E.A.D at 505. Granting relief to Appellant/Respondent under the present circumstances, where the deadlines and consequences of noncompliance were clearly expressed in both the Prehearing Order and Order to Show Cause in a manner that could be reasonably understood by literate person without a law degree, would constitute an 'excuse' from compliance with the CROP. *See* Prehearing Order at 4 and Order to Show Cause at 1-2. Additionally, the Board has affirmed a presiding officer's authority to issue a default order to *pro se* litigants particularly in cases where, as here, noncompliance has occurred more than once. *Jiffy Builders,* 8 E.A.D. at 319.

Lastly, Appellant/Respondent asserts that its failure to respond to the Order to Show Cause was due in part to the fact that "Brian J. Sargent, the only employee of SEI with enough involvement in the matter [had] been off work for personal reason from mid/late December to mid/late January, [and] did not receive and review all of the correspondence until January 21, 2010." Appeal Brief at 5. During this very timeframe, however, Sargent submitted at least three Asbestos Notifications, two of which appear to address contemporaneous asbestos abatement work, evidencing the fact that the business was operating in Mr. Sargent's absence. Attachment

[4] While Appellant/Respondent attributes its failure to secure legal counsel to the 'significant' costs, it notably does not represent or otherwise imply that it has an inability to pay the $17,400 penalty assessed in the Default Order. Appeal Brief at 2, 4 and 6. Sargent did not raise 'inability to pay' as an issue in its Answer to the Complaint, or at any time subsequently in the proceedings.

3. Sargent received EPA's Motion to Show Cause on December 28, 2009[5] and received the Order to Show Cause on January 6, 2010. Appeal Brief at 5. As the sole person responsible for a party in active litigation, Mr. Sargent's failure to take reasonable measures to avoid Sargent being found in default of the prehearing information requirements of the September 24, 2009 Prehearing Order, such as notifying the court or EPA of his absence, ensuring that Sargent employees were made aware of and attended to litigation-related matters (as was apparently done for its business-related matters) in his absence, or immediately responding to the Order to Show Cause upon his receipt/review on January 21, 2009, are oversights that represent neglect rather than good cause.

For the above mentioned reasons, Appellant/Respondent has not presented any legitimate excuses or justifications which would constitute 'good cause' for its failure to comply with the prehearing information exchange requirements of the Prehearing Order or to respond to the Order to Show Cause.

ii. Appellant/Respondent has not raised any defenses to liability.

The Board has stated that an examination of the 'totality of circumstances' may include a consideration of the likelihood that the action would have had a different outcome had there been a hearing. *Jiffy Builders,* 8 E.A.D. at 319, *citing Rybond* 6 E.A.D. *at 625* In assessing the likelihood of a different outcome, the Board has considered whether the Respondent would likely prevail on any defenses to liability raises by the Respondent. *Jiffy Builders,* 8 E.A.D. at 319, *citing Rybond* 6 E.A.D. *at 628-38.* Appellant/Respondent's default constitutes an admission of all facts alleged in the Complaint and a waiver of its right to contest such factual allegations according to the CROP. 40 C.F.R § 22.17(a). Appellant/Respodent has not raised any defenses

[5] See footnote 3, *supra.*

to liability for the violation alleged in the Complaint. For the above-mentioned reasons, Appellant/Respondent has failed to meets its burden of showing likely success on these defenses.

CONCLUSION

Based on the foregoing, the Board should find that the Presiding Officer properly issued a Default Order and that a reversal is not warranted based on the "totality of the circumstances", and should therefore affirm the Presiding Officer's Initial Decision.

Respectfully Submitted,

3/15/2010
Date

Jennifer M. Abramson
Senior Assistant Regional Counsel

CERTFICIATE OF SERVICE

I hereby certify that on the date indicated below, the foregoing APPELLEE'S RESPONSE BRIEF and corresponding ATTACHMENTS 1-3 in the matter of Sargent Enterprises, Inc., CAA Appeal No. 10-02, were filed with the Clerk of the Board through the EPA Central Data Exchange ("CDX") system, and that true and correct copies were hand delivered to the EPA Region III Regional Hearing Clerk and mailed to the following persons in the following manner:

FEDERAL EXPRESS

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3/15/2010
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