UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
JHNY, Inc. a/k/a	)	
Quin-T Technical Papers and Boards	)	**Docket No. CAA-03-2003-0298**
	)	
Respondent	)	

ORDER DENYING MOTION FOR RECONSIDERATION AND TO REOPEN THE HEARING

I. Introduction

On August 2, 2004, Respondent filed a Motion seeking to have the July 12, 2004 Default Order [1] reconsidered and the hearing reopened, pursuant to 40 C.F.R. § 22.28 .[2] Motion By Respondent that the July 12, 2004 Initial Decision be Reconsidered and the Hearing Be Reopened. ("Motion"). Respondent contends that the factual basis for the Default Order is unsupported by the record, since financial documents submitted to EPA during the alternative dispute resolution process adequately demonstrate Respondent's precarious financial position and should not be excluded as evidence related to settlement. Respondent also argues that key findings of facts and conclusions of law in the Default Order regarding Respondent's financial health and alleged asbestos emissions are not supported by the record. Furthermore, Respondent asserts that default is not appropriate in this matter since its actions constituted "at most a technical violation" of the Rules of Practice and resulted in no prejudice to Complainant.

On August 17, 2004, Complainant filed a Motion in Opposition to Respondent's Motion for Reconsideration and to Reopen a Hearing and Memorandum of Law in Support ("Response"). Complainant argues that Respondent's Motion is improper under Section 22.28(a) of the Rules of Practice, given that no hearing was held in this matter, and notes that Respondent has not sought to set aside the Default Order as provided in Section 22.27. Moreover, Complainant asserts that Respondent has failed to provide any new evidence or show

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[1] Pursuant to 40 C.F.R. § 22.17(c), the Initial Decision in this matter consisted of the Default Order, issued on July 12, 2004.

[2] This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Rules of Practice") found at 40 C.F.R. Part 22.

good cause why the Default Order should be set aside.

II. Discussion

While the Rules of Practice do not specifically allow for reconsideration of an Initial Decision[3] issued by an administrative law judge ("ALJ"),[4] there is nothing in the Rules that prohibits the Court from considering such a motion. *See In the Matter of the Barden Corp.*, Docket No. CAA-1-2000-0070, 2002 EPA ALJ LEXIS 64 at *6-10 (ALJ, Oct. 1, 2002) (Order on Motion for Reconsideration); *In the Matter of Lawrence County Agricultural Society*, Docket No. TSCA-5-98-90, 2000 EPA ALJ LEXIS 69 at *5-6 (ALJ, Nov. 22, 2000) (Order Denying Respondent's Motions for Reconsideration of Order and for Extension of Time). Pursuant to Section 22.16(c), "an [ALJ] shall rule on all motions filed or made after an answer is filed and before an initial decision has become final or has been appealed." 40 C.F.R. § 22.16(c). Since Respondent's Motion was filed before the Initial Decision became final under Section 22.27(c) or was appealed under Section 22.30, the Court has jurisdiction to rule on the Motion and does not agree with Complainant that dismissal is appropriate.

By analogy, under Section 22.32, a motion for reconsideration of a final order before the Environmental Appeals Board ("EAB") must "set forth the matters claimed to have been erroneously decided and the nature of the alleged errors." 40 C.F.R. § 22.32. In adjudicating such motions, the EAB has generally stated that reconsideration is justified by "an intervening change in the controlling law, new evidence, or the need to correct a clear error or prevent manifest injustice." *In re Roger Antkiewicz and Pest Elimination Products of America, Inc.*, FIFRA Appeal Nos. 97-11 & 97-12, 1999 WL 198917 (EAB, Mar. 26, 1999) (Order on Motion for Reconsideration) (*quoting In re Southern Timber Products, Inc.*, 3 E.A.D. 880, 888-89 (JO 1992)). As the Judicial Officer noted in *Southern Timber Products*:

> A motion for reconsideration should not be regarded as an opportunity to reargue the case in a more convincing fashion. It should only be used to bring to the attention of this office clearly erroneous factual or legal conclusions. Reconsideration is normally appropriate only when this office has obviously overlooked or misapprehended the law or facts or the position of one of the parties.

Southern Timber Products, 3 E.A.D. at 889 (*quoting In re City of Detroit*, TSCA Appeal No. 89-5, slip op. at 2 (CJO, Feb. 20, 1991).

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[3]The Court's July 9, 2004 Default Order constituted the Initial Decision in this matter. Default Order at 9. *See* 40 C.F.R. § 22.17(c).

[4] Section 22.32 does provide that a motion to reconsider a final order issued pursuant to Section 22.30 shall be directed to, and decided by, the Environmental Appeals Board. 40 C.F.R. § 22.32.

Complainant correctly points out, however, that Respondent's request that the hearing be reopened pursuant to 40 C.F.R. § 22.28 is improper since no evidentiary hearing was held in this matter. Given the procedural posture of this case, it would have been more appropriate for Respondent to have filed a motion to set aside the Default Order, for good cause shown, under Section 22.17(c). In fact, the "Legal Standard" portion of Respondent's Motion cites cases before the EAB that discuss the standard for setting aside a default order. Motion at 1-2 (*citing In re Rybond, Inc.*, 6 E.A.D. 614 (EAB 1996) and *In re Thermal Reduction Co.*, 4 E.A.D. 128, 131 (EAB 1992)).[5] As a result, the Court will treat Respondent's Motion to Reopen the Hearing under Section 22.28 as a motion to set aside the Default Order under Section 22.17(c).

In its Motion, Respondent argues that the factual findings in the Default Order that Respondent failed to provide any evidence to demonstrate its significant financial difficulties are not supported by the record. Motion at 4. According to Respondent, Section 22.19(a) does not require documents that have already been exchanged with EPA to be "reexchanged" as part of a formal preliminary information exchange, and Section 22.22 provides that exhibits may only be excluded if not exchanged at least 15 days before the hearing. *Id.* at 4-5. Respondent contends that documentation concerning its precarious financial position was provided to Complainant as far back as January 2004, well in advance of the deadline set forth in the Prehearing Order. *Id.* at 5-6. Respondent also claims that the financial information it provided was referenced in Respondent's prehearing exchange, was partially included in Complainant's prehearing exchange, and thus was not considered to be "evidence of settlement" by either party. *Id.* at 6.

Even if the financial information provided to EPA is excluded, Respondent argues that Complainant's Prehearing Exchange Exhibit ("CPE Ex.") 50 demonstrates that Respondent is in poor financial health and contradicts Complainant's statement that Respondent does $10,000,000 in sales. *Id.* at 7-8. Respondent claims that this information was apparently not considered in the penalty calculation and ignored in the Default Order. *Id.* at 8. Furthermore, Respondent argues that the record submitted by EPA fails to provide any evidence to substantiate the claim that visible emissions escaped from the facility as stated in Finding of Fact 9 in the Default Order. *Id.* Finally, Respondent argues that applicable case law does not support the imposition of the harsh sanction of default for what was "at most a technical violation of a Rule that resulted in no prejudice to the opposing side." *Id.* at 9.

Based on the standards set forth above, the Court does not find any reason to revoke its Default Order nor does it find that the Respondent has shown "good cause" to set aside that decision. Respondent has not identified any newly discovered evidence or intervening changes in the controlling law that would make default inappropriate in this matter. Moreover, Respondent's argument that the factual findings in the Default Order are not supported by the record misconstrues the basis for Respondent's default and the legal consequences of that finding. The Court also does not agree with Respondent's assertion that its actions amounted to

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[5] In *Rybond*, the EAB noted that it was not bound by the "good cause" standard for setting aside a default order in 40 C.F.R. § 22.17. *Rybond*, 9 E.A.D. at 625 n. 19.

a "technical violation" of the Rules of Practice and did not warrant the sanction of default under applicable law.

The procedural history of this case was fully stated in the Default Order and will only be discussed in brief here. On February 23, 2004, the Court issued a Prehearing Order requiring each party to file its initial prehearing exchange under 40 C.F.R. § 22.19, including "copies of all documents and exhibits it intends to introduce into evidence," by April 23, 2004. No prehearing exchange was received from Respondent by that date. After Complainant filed a Motion for Default Judgment on June 8, 2004, the Court issued an Order to Show Cause on June 14, 2004, directing Respondent to show good cause why a default order should not be issued, based on its failure to comply with the Prehearing Order and failure to file a prehearing exchange. On June 23, 2004, Respondent faxed to the Court its Response to Order to Show Cause and Opposition to Motion for Default, which stated that no prehearing exchange was made "due to significant financial difficulties effecting [sic] JHNY's ability to continue to retain counsel," and alleging that Respondent had previously provided EPA with information regarding the violations at issue and its financial condition. At that time Respondent also submitted an Initial Prehearing Exchange, identifying two witnesses and a brief narrative summary of their expected testimony. The prehearing exchange included a list of exhibits, without copies, which exhibits the Respondent claims to have already provided to Complainant. On July 12, 2004, the Court found that Respondent had failed to show good cause and issued a Default Order.

Section 22.17(a) of the Rules of Practice provides that a party 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 [Court]." 40 C.F.R. § 22.17(a). Furthermore, Section 22.19(g) states that where a party fails to file a prehearing information exchange, "the [Court] may, in [its] discretion...[i]ssue a default order under § 22.17(c)." 40 C.F.R. § 22.19(g). In the Default Order, the Court noted that Respondent has been represented by the same legal counsel throughout this proceeding, and has never sought an extension of time to file its initial prehearing exchange under 40 C.F.R. § 22.7(b). While default may be a harsh and disfavored sanction, as Respondent notes, the Court finds that the Default Order was, and remains, clearly warranted by the Rules of Practice governing this proceeding.

Moreover, Respondent's Motion for Reconsideration essentially reiterates the same argument from its Response to Order to Show Cause that it previously exchanged financial information with EPA, and adds that Section 22.19(a) does not require such documents to be "reexchanged" in order to be introduced into evidence. Motion at 4. According to Respondent, "[a] fair reading of Section 22.19(a) and the Prehearing Order would not required [sic] the financial information to be attached to the Preliminary Information Exchange, only that it be furnished to the EPA." *Id.* at 9. However, the plain language of the Rules of Practice does not support this interpretation.

Section 22.19(a)(1) provides that "[i]n accordance with an order issued by the [ALJ], each party shall file a prehearing information exchange. Except as provided in § 22.22(a), a document or exhibit that has not been included in prehearing information exchange shall not be

admitted into evidence...." 40 C.F.R. § 22.19(a)(1). Pursuant to Section 22.5, "[t]he original and one copy of each document intended to be part of the record shall be filed with the Regional Hearing Clerk when the proceeding is before the [ALJ]," and "[a] copy of each document filed in the proceeding shall be served on the [ALJ]...." 40 C.F.R. § 22.5. In this case, the documents that Respondent claims to have "exchanged" with EPA were all provided *prior* to the Prehearing Order issued by this Court, and were not filed in accordance with Section 22.5. Respondent has also never filed a prehearing exchange that included "[c]opies of all documents and exhibits which it intends to introduce at the hearing" as required by Section 22.19(a)(2)(ii) and the Prehearing Order. In addition, any documents submitted to EPA as part of the alternative dispute resolution process, are treated by the Court as confidential in accordance with Section 574 of the Dispute Resolution Act of 1990, 5 U.S.C. §§ 571-84. *See In the Matter of Environmental Protection Services*, Docket No. TSCA-03-2001-0331, 2003 EPA ALJ LEXIS 59 (ALJ, June 4, 2003) (Order on Motion to Strike Exhibit C); *In the Matter of Ridgewood Providence*, Docket Nos. RCRA-I-98-1031 & CWA-2-I-98-1030, 1999 EPA ALJ LEXIS 37 at *3-4 (ALJ, Apr. 27, 1999) (Order Denying Motion for Simultaneous Prehearing Exchange).

To be plain, the fundamental problem with Respondent's Motion, which is the same problem that existed in its earlier filed Response to the Order to Show Cause and its Opposition to the Motion for Default, is that the Respondent failed to comply with the Court's Prehearing Order and thereafter failed to provide an adequate basis for excusing that failure. The Motion for Reconsideration does not change this situation. This is not a *pro se* case, with a Respondent who misapprehends the litigation process. The counsel representing the Respondent is the same counsel who received the Court's Prehearing Order back in February 2004. That Order made it explicit that "[t]he Parties must simultaneously make their initial prehearing exchanges by **Friday, April 23, 2004**." As an attorney, counsel for Respondent should have known that the procedural rules provide "[*i]n accordanc*e *with an order issued by the Presiding Officer, each party shall file a prehearing information exchange.*" 40 C.F.R.§ 22.19 (a). (emphasis added). Further, Counsel for Respondent has never contended any such misunderstanding.

The Prehearing Order directed the parties to the Rules of Practice applicable to this proceeding. The state of affairs was that as of June 14, 2004, when the Court issued its Order to show cause, Respondent's Counsel had not filed any prehearing exchange pursuant to the Court's Order of February 23, 2004. As an attorney, Counsel for Respondent had only to examine 40 C.F.R. §22.19 to learn the requirements for a party's prehearing information exchange. Such a review would have revealed that the prehearing exchange compliance obligations are quite distinct from the Alternative Dispute Resolution provisions. When the Respondent's Counsel ultimately did provide an initial prehearing exchange, on June 23, 2004, the exchange revealed, by virtue of the two pages constituting the response, that timely compliance was not burdensome at all.

Further, while Counsel for Respondent, acting as one might expect from a *pro se* respondent, has blurred the distinction between the settlement discussions and exchanges of information which accompanied those discussions from the litigation responsibilities, attorneys are expected to know the difference between these processes. Counsel for Respondent has

attempted to paint the duties to comply with the Court's Order as little more than a formality, as financial information had already been informally exchanged with EPA. Viewed in such a light, the impression is created that a default would be nothing more than a strict insistence on observing formality for its own sake. In fact, under this view it amounts to a waste of resources by making a party exchange documents twice, once in the settlement context and again in the context of the litigation.

There are several reasons why such a presentation is in error. First, the Default provision itself, Section 22.17, makes it clear that a "party may be found in default ... upon failure to comply with the information exchange requirements of § 22.19(a) or an order of the Presiding Officer." In fact, where default occurs, as it did here, the only way to avoid issuance of a default order is the presentation of "good cause" as to why the order should not be issued. Section 22.17(c). Counsel for Respondent has not made such a showing, either in the response to the Order to Show Cause or in the present motion for reconsideration of the Default Order. Instead, Counsel has contorted the meaning of Section 22.19(a) by implying that the Court is insisting on reexchanging documents already exchanged in settlement discussions. Further, Counsel suggests that a fair reading of Section 22.22(a) means that the prehearing exchange requirement does not really have meaning until 15 days before trial, asserting that is the only basis for excluding information at the hearing. However, Section 22.19(f) makes it clear that the information exchange requirement is a continuing obligation, as one who has made such an exchange "shall promptly supplement or correct the exchange when the party learns that the information exchanged or response provided is incomplete, inaccurate or outdated and the additional or corrective information has not otherwise been disclosed to the other party pursuant to this section."

In addition, the Respondent's prehearing exchange submission reveals that it is substantially more than simply a resubmission of financial documents which were already exchanged during settlement discussions. Respondent is now attempting to exchange additional evidence not only on the subject of its financial health but also on the underlying violations themselves. For example, Respondent's Counsel lists Mr. James Crotty, manager of JHNY, as one with knowledge relating to the financial status of the Respondent. However, Respondent's Counsel also states that Mr. Crotty would testify as to the EPA inspections, "JHNY's compliance with EPA regularlatory (sic) issues," and the "plant conditions at the time of the visits." Mr. David Britton, JHNY production manager, is also listed as a witness, who would testify on the subject of the "plant conditions at the time of the inspections as well as emissions from the facility." Respondent's June 23, 2004 Prehearing Exchange at 1. Surely, neither of these witnesses, nor the information they would testify about, would fall into the category of new information or information which the Respondent's Counsel, upon reasonable inquiry, would have learned about in preparing a timely response to the February 23, 2004 Prehearing Order, which Order, requiring that the response be filed by April 23, 2004, afforded the Respondent two months to make a timely response.

Respondent also misconstrues the record regarding the penalty determination by arguing that EPA "asserts that because JHNY did $10,000,000 in sales, the penalty would not have any

impact on its business."[6] Motion at 7. As stated in the Default Order, EPA considered the $10,000,000 figure it obtained from a Dun & Bradstreet report when assessing Respondent's *size of business*. Default Order at 8. EPA admitted that the figure may be inaccurate and, as a result, used the lowest possible adjustment factor when estimating the size of Respondent's business. *Id.*; CPE at 12-13. Respondent correctly points out that CPE Ex. 50, a memorandum dated January 27, 2004 from Joan Meyer of Industrial Economics, Inc. to Judy Hykel of EPA assessing financial information submitted by Respondent, stated that Respondent had total sales of $6.2 million in 2002 and $6.3 million in 2003, a net income of $3,470 in 2001 and a net loss of $277,769 in 2002, and found that the financial information "suggests that JHNY is in poor financial health." Motion at 6-7; CPE Ex. 50 at 5. However, Respondent failed to mention that Ex. 50 also provided that Respondent submitted only "fragmentary information," and that Ms. Meyer concluded that she was "unable to understand the company's current financial outlook." CPE Ex. 50 at 5.

The EAB has addressed the procedure applied where ability to pay claims are presented. While EPA "bears the burden of proof on the appropriateness of the overall civil penalty," it does "not bear a separate burden with regard to each of the statutory [penalty] factors." *In re Spitzer Great Lakes Ltd.*, 9 E.A.D. 302, 320 (EAB 2000); *In re CDT Landfill Corp.*, CAA Appeal No. 02-02, 2003 EPA App. LEXIS 5 at *85-86 (EAB, June 5, 2003). If EPA shows that it "considered each of the statutory factors and that the recommended penalty is supported by its analysis of those factors," the "burden then shifts to the Respondent to rebut [EPA's] prima facie case by showing that the proposed penalty is not appropriate either because [EPA] failed to consider a statutory factor or because the evidence shows that the recommended calculation is not supported." *Spitzer*, 9 E.A.D. at 320.

With regard to the ability to pay factor, the Respondent must "provide evidence to show that it is not able to pay the proposed penalty" before the start of the hearing and consistent with the prehearing order since it is the party with control over the relevant records. *Id.* at 321. If the Respondent fails to meet this obligation, EPA "may properly argue and the [ALJ] may conclude that any objection to the penalty based upon ability to pay has been waived." *Id.* (quoting *In re New Waterbury, Ltd.*, 5 E.A.D. 529, 542 (EAB 1994)). When a Respondent does place its ability to pay at issue, EPA must demonstrate as part of its prima facie case that it did consider the appropriateness of the proposed penalty in light of its impact on Respondent's business. *CDT Landfill*, 2003 EPA App. LEXIS 5 at *89. In order to make this showing, EPA can "rely on some general financial information regarding the respondent's financial status which can support the inference that the penalty assessment need not be reduced." *Id.* at *89-90 (quoting *New Waterbury*, 5 E.A.D. at 542-43). Thereafter, if the Respondent does not offer "sufficient, specific evidence as to its inability to continue in business to rebut the Region's prima facie

[6] As Respondent notes, one of the statutory penalty factors EPA must consider under the Clean Air Act is "the economic impact of the penalty on the business." 42 U.S.C. § 7413(e)(1). This factor is more commonly known as Respondent's "ability to pay." *See In re Carroll Oil Co.*, 10 E.A.D. 635, 662 n. 24 (EAB 2002).

showing," EPA may decide not to adjust the penalty for this factor. *Id.* at *90.

In this case, Complainant has demonstrated on the record that it sought financial information from Respondent and considered Respondent's ability to pay in determining the appropriateness of the proposed civil penalty. *See* CPE Exs. 47-51. Based on its evaluation, Complainant concluded that no adjustment in the proposed penalty was warranted for this factor. CPE at 13. Respondent has failed to rebut this showing by providing any evidence, consistent with the Prehearing Order, regarding its inability to pay the proposed penalty. Accordingly, the Court finds no error in its determination of this issue.

Finally, Respondent specifically contests Finding of Fact 9, which states that "[d]uring the February 21, 2001 inspection, the EPA inspector requested that the air cleaning device be turned on while he observed the vents on the roof. The EPA inspector witnessed visible emissions escape the left roof vent when the air cleaning device was turned on." Default Order at 3. Respondent contends that "the record as submitted by the EPA fails to provide any evidence to substantiate that emission [sic] did escape, or what the emissions consisted of." Motion at 8. In fact, Complainant submitted an asbestos NESHAP field inspection checklist from the February 21, 2001 inspection that describes visible emissions escaping from the left roof vent, and also provided sampling records of material collected from the left roof vent which show that the samples contained asbestos. CPE Exs. 18-21, 24. Moreover, the Court notes that default by Respondent constitutes "an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations." 40 C.F.R. § 22.17(a); *see* Administrative Complaint and Notice of Opportunity for Hearing ¶ 29. Accordingly, Respondent's Motion for Reconsideration and to Reopen the Hearing is DENIED.

So ordered.

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William B. Moran
United States Administrative Law Judge

Dated: November 17, 2004
Washington, D.C.