UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF	:	
ASBESTOS CONTROL, INC.	:	Dkt. No. CAA-III-028
	:	Judge Greene
Respondent	:	

ORDER DENYING MOTION TO SET ASIDE DEFAULT JUDGMENT

This matter arose upon an administrative complaint filed on or about September 28, 1993 pursuant to Section 113(a)(3) and (d) of the Clean Air Act (the Act), 42 U.S.C. §§ 7413(a)(3) and (d), against Asbestos Control, Inc., charging violations of the Act and the National Emission Standard for Asbestos (the Asbestos NESHAP), 40 C.F.R. Part 61, Subpart M. Respondent submitted its answer on or about November 12, 1993. On or about February 15, 1994, Complainant filed an amended complaint. The amended complaint proposed a penalty in the amount of $45,000.[1]

[1] Respondent did not file an answer to the amended complaint.

By Order dated July 19, 1994, the parties were directed to submit pretrial exchanges by September 2, 1994. Complainant made a timely submission of its pretrial exchange on September 1, 1994. Respondent did not submit its pretrial exchange by the September 2, 1994 deadline. By Order dated September 27, 1994, Respondent was directed to show cause why it should not be held in default. Respondent did not respond to the Order to Show Cause.

On November 1, 1994, this Court issued a Default Order finding Respondent in default for failure to comply with the Pretrial Exchange Order and the Order to Show Cause. On or about September 22, 1995, Respondent moved to set aside the Default Order pursuant to Section 22.17(d) of the Consolidated Rules of Practice, 40 C.F.R. § 22.17(d). Respondent's motion rests upon claims that (1) it did not receive the Default Order, and (2) it has a defense on the merits.

Complainant opposed Respondent's motion, arguing that (1) this tribunal lacks jurisdiction to rule on Respondent's motion, and (2) Respondent failed to satisfy the "good cause" standard for setting aside a default order under 40 C.F.R. § 22.17(d). For reasons set forth below, Respondent's motion to set aside the Default Order will be denied.

Complainant maintains that once an initial decision[2] has

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[2] Pursuant to 40 C.F.R. § 22.17(b), a default order constitutes an initial decision.

been issued, an Administrative Law Judge's jurisdiction terminates. Complainant's Memorandum in Opposition to Motion of Respondent Asbestos Control, Inc. to Open Default Judgment (October 5, 1995) at 8 (citing In Re Asbestos Specialists, Inc., 4 E.A.D. 819, 824-25 n. 15 (October 6, 1993). This is not necessarily the case. Section 22.17(d) of the Consolidated Rules of Practice clearly contemplates continued jurisdiction by the presiding officer. Specifically, Section 22.17(d) provides that "[f]or good cause shown, the Regional Administrator or the Presiding Officer, as appropriate, may set aside a default order."

In In Re Asbestos, the case cited by Complainant, the EAB explained that "the rationale for terminating the presiding officer's jurisdiction . . . is to avoid the possibility of conflicting orders from the presiding officer and the Administrator." At issue in In Re Asbestos was a motion for reconsideration filed with the presiding officer less than twenty days after the presiding officer had filed an order granting the respondent's motion to dismiss. In that situation, "conflicting orders from the presiding officer and the Administrator" were indeed possible. Here, however, the twenty-day deadline for bringing an appeal to the Order on Default pursuant to 40 C.F.R.

§ 22.30 has long passed, and as a result, conflicting orders would obviously be unlikely to create a problem.[3]

Accordingly, it is held that this tribunal has jurisdiction over Respondent's motion.

"Good Cause" Pursuant to 40 C.F.R. § 22.17(d)

As previously noted, Section 22.17(d) of the Consolidated Rules provides that "for good cause shown . . . the Presiding Officer . . . may set aside a default order." This provision has been interpreted broadly:

> It is appropriate to examine whether fairness and a balance of the equities dictate that a default order be set aside. This means that facts and circumstances other than those relating to a party's failure to respond may be relevant and persuasive when making the good cause determination. In some circumstances, the presence of a meritorious defense alone can constitute good cause for setting aside a default order, particularly if there is a strong probability that the action would have had an outcome different from that produced by the default order had there been a hearing.

Midwest Bank & Trust Company, Inc., 3 E.A.D. 696, 699 (October 23 1991) (citations omitted). Even allowing such interpretation, however, Respondent's motion does not establish "good cause."

Respondent maintains that it did not receive the July 17, 1994, order for pretrial exchange; the September 27, 1994, Order to Show Cause; or the November 1, 1994, default order. Motion of Respondent Asbestos Control, Inc. to Open Default Judgment

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[3] The forty-five day deadline for the Environmental Appeals Board to review the initial decision sua sponte has also long passed.

(September 22, 1995) at 2. In support of this claim, it presents affidavits from the Respondent's President, Respondent, his Administrative Assistant, and Respondent's counsel. Id. at Exhibits 2-4. However, the orders were served upon Respondent's then-counsel. Respondent does not deny that its then-counsel was served. See id. It is "well settled that service of notices, orders or decisions on counsel is in law notice to, or service on, the client." In the Matter of Dr. Robert Schattner, President and Sporicidin International, Inc., a/k/a Sporicidin Company, Docket No. FIFRA-93-H-01 (August 12, 1993) at 15. As the Supreme Court has stated, if a party

> voluntarily chose [an] attorney as his representative in the action . . . he cannot [later] avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'

Link v. Wabash Railroad Co., 370 U.S. 626, 633-34 (1962) (citation omitted); see also In the Matter of Detroit Plastic Molding Company, 3 E.A.D. 103, 106 (March 1, 1990) ("[t]o satisfy the good cause requirement, it is not enough to attribute a default to mere neglect of counsel."). Here, it is undisputed that Respondent's counsel was served with the Orders. As a result, Respondent must accept responsibility for the failure to comply with that Order.

As previously noted, the presence of a meritorious defense may be an important consideration in a "good cause" inquiry under Section 22.17(d). Here, Respondent states that "ACI desires to contest the violations alleged by the EPA in the [instant case] and believes it has a defense on the merits." Motion of Respondent Asbestos Control, Inc. to Open Default Judgment (September 22, 1995) at 3. However, Respondent has not disclosed in its motion -- or anywhere else in the record -- a defense on the merits, much less a "meritorious" defense. The mere assertion on Respondent's part that it "believes it has a defense" is insufficient. And, as has been stated above, failure to receive the Default Order does not constitute a sufficient reason to reopen.

Respondent having failed to establish "good cause" to set aside the Default Order under 40 C.F.R. § 22.17(d), the motion must be denied.

ORDER

Accordingly, it is ORDERED that Respondent's motion shall be, and it is hereby, denied.

J. F. Greene
Administrative Law Judge

Washington, D. C.
November 30, 1995

As previously noted, the presence of a meritorious defense may be an important consideration in a "good cause" inquiry under Section 22.17(d). Here, Respondent states that "ACI desires to contest the violations alleged by the EPA in the [instant case] and believes it has a defense on the merits." Motion of Respondent Asbestos Control, Inc. to Open Default Judgment (September 22, 1995) at 3. However, Respondent has not disclosed in its motion -- or anywhere else in the record -- a defense on the merits, much less a "meritorious" defense. The mere assertion on Respondent's part that it "believes it has a defense" is insufficient. And, as has been stated above, failure to receive the Default Order does not constitute a sufficient reason to reopen.

Respondent having failed to establish "good cause" to set aside the Default Order under 40 C.F.R. § 22.17(d), the motion must be denied.

ORDER

Accordingly, it is ORDERED that Respondent's motion shall be, and it is hereby, denied.

J. F. Greene
Administrative Law Judge

Washington, D. C.
December 14, 1995