UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
Frank D. Smith & Sons, Inc.,	)	**Docket No. CWA 02-2005-3801**
	)	
	)	
Respondent	)	
	)	

DEFAULT ORDER

I. Introduction

This proceeding arises under the authority of Section 311(b)(6)(B)(ii) of the Clean Water Act ("CWA" or "Act"), 33 U.S.C. § 1321(b)(6)(B)(ii), and is governed by the Environmental Protection Agency Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Rules of Practice"), 40 C.F.R. Part 22. On May 12, 2005, the United States Environmental Protection Agency, Region II ("EPA" or "Complainant") filed a Complaint against Frank D. Smith & Sons, Inc. ("Respondent"), alleging violations of the CWA and its implementing regulations for failure or refusal to comply with the Spill Prevention Control and Countermeasure ("SPCC") Plan found at 40 C.F.R. Part 112 promulgated pursuant to the authority of Section 311(j) of the Act; 33 U.S.C. § 1321(j). On June 10, 2005, Respondent, through counsel, filed its Answer.

Thereafter, on January 11, 2006, the Court issued its Prehearing Order, requiring the parties to make their initial prehearing exchanges by March 13, 2006. *See* 40 C.F.R. § 22.19. EPA timely filed its prehearing exchange. However, there is no record that Respondent filed its prehearing exchange. Accordingly, this Court filed an Order to Show Cause on March 24, 2006, setting April 5, 2005 as the deadline for Respondent to show good cause as to why it failed to submit its prehearing exchange and why a default order should not be issued.[1]

[1] In the Order to Show Cause, this Court spelled out for Respondent's Counsel what would have to be provided in order to avoid a default order. Specifically, the Court noted that "[w]hen the Court finds that default has occurred, Section 22.17(c), requires that the Court issue a default order against the defaulting party '*unless the record shows good cause why a default order should not be issued*.'" Order to Show Cause (citing 40 C.F.R. § 22.17(c)) (emphasis added).

On April 3, 2006, Respondent's counsel, Bruce A. Gunther, faxed the first of two letters to the Court ("April 3rd Letter") acknowledging the Order to Show Cause. The April 3rd letter, which was addressed not to the Court but to Ms. Knolyn Jones, Legal Assistant to Judge Moran, provided no cognizable reason for Respondent's failure to comply with the Prehearing Order. Mr. Gunther stated that he did not know what to do about this matter, representing that his client sold the corporation and all its assets to another fuel oil dealer on January 12, 2006. According to Mr. Gunther, an updated SPCC Plan is no longer required because the sale made the violations moot leaving Respondent with the responsibility to pay EPA a fine. Mr. Gunther also included a copy of a letter to Mr. Murphy, EPA's Counsel for this matter, where he wrote in great length about the sale of the company and how his client had to use that money to pay off various lenders and debts. Mr. Gunther also told Mr. Murphy that all storage tanks are empty and suggested that no legal action may be taken. None of this is relevant to the show cause order, which order relates to advancing a legitimate reason for failing to comply with the prehearing order.

The issues cited by Mr. Gunther - that he knew of the sale two months prior to the due date of the prehearing exchange - do not justify the failure to comply with the Prehearing Order.[2] Nor did Counsel for Respondent recently become involved with this case. He was Counsel for the Respondent when the Answer was filed and thereafter he engaged in the Alternative Dispute Resolution process which began in September of 2005 and terminated, after the maximum period allowed, some four months later, on January 10, 2006. When the Court issued its Prehearing Order on January 11, 2006, the parties had two months to file their prehearing exchanges. That Order also informed Respondent's Counsel of the option of either filing a prehearing exchange for a direct case or simply submitting a statement requesting to cross-examine Complainant's witnesses. In either event, compliance with the Order was not burdensome. Beyond that, assuming that a reasonable basis could be presented, Counsel had the option of simply filing a motion for extension of time to file the prehearing exchange.

Following the initial response to the Order to Show Cause, on April 7, 2006, Mr. Gunther, on his own initiative, faxed a second letter, this time addressed to the Court, in which he admitted his failure as an attorney to comply with the Prehearing Order. The letter concluded by making an obscure reference that he and Mr. Murphy want to " immediately enter into a formal resolution of all issues," but did not explain what that meant.

With no good cause presented for failing to comply with the prehearing order, *but subject to the provision set forth below in this Order*, the Court issues this Default Order, finding Respondent liable for the violations alleged in the Complaint and assessing a civil penalty of $41,000.

[2] Even if Respondent's Counsel and EPA were attempting to settle the matter, such negotiations do not freeze the obligation to file the prehearing exchanges.

II. Findings of Fact

On the basis of the Complaint, the following Findings of Fact are made:

1. Respondent is a corporation organized under the laws of the State of New Jersey, with a place of business located at 1552 Route 38, Mount Holly, New Jersey 08060 ("Facility").

2. Respondent began operating an SPCC-regulated Facility in 1925.

3. Respondent is engaged in drilling, producing, gathering, storing, processing, refining, transferring, distributing, using or consuming oil or oil products located at the Facility.

4. On September 27, 2002, EPA conducted an SPCC inspection at Respondent's Facility. EPA issued Respondent a Notice of Non-Compliance ("NON") because the Facility's SPCC plan had not been updated since 1974.[3] EPA provided a schedule for correcting the violations by November 26, 2002, but EPA never heard back from Respondent.

5. On February 12, 2004, EPA conducted a follow-up SPCC inspection at Respondent's Facility and determined that Respondent had not corrected the violations from the 2002 inspection. EPA issued another NON and requested a schedule for correction of violations. EPA did not receive a reply from Respondent.

6. On May 12, 2005, Complainant filed a Complaint and Notice of Opportunity for Hearing alleging Respondent violated the CWA and its implementing regulations for SPCC found at 40 C.F.R. Part 112. Specifically, Count I of the Complaint alleged that Respondent failed to prepare an SPCC Plan for its Facility according 40 C.F.R. § 112.7 as required by 40 C.F.R.§ 112.3(a) pursuant to Section 311(j) of the Act. Count II alleged that Respondent failed to implement an SPCC Plan for its Facility required by 40 C.F.R. § 112.3(a) pursuant to the promulgated authority of Section 311(j) of the Act. For these alleged violations, Complainant sought a total civil penalty of $41,000.

7. Complainant considered the statutory factors regarding the seriousness of the violations, the economic benefit to Respondent resulting from the violation, the degree of culpability, any history of prior violations, the nature, extent, and degree of success of any efforts of the Respondent to minimize or mitigate the effects of the discharge, the economic impact on the violator, and any other matters as justice may require pursuant to Section 311(b)(8) of the Act.

8. On June 10, 2005, Respondent filed an Answer which denied the allegations in the Complaint and requested a hearing.

9. On January 11, 2006, the Court issued a Prehearing Order requiring the parties to file their initial prehearing exchanges by March 13, 2006. Complainant filed its prehearing exchange on March 10, 2006. To date, no prehearing exchange has been received from Respondent.

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[3] EPA also determined that the Facility did not have secondary containment for bulk storage tanks and truck loading areas and did not have an impervious floor in the tank farm.

10. On March 24, 2006, the Court issued an Order to Show Cause giving the Respondent until April 5, 2006 to show good cause as to why it failed to submit it prehearing exchange. On April 3, 2006, Respondent's Counsel, Bruce A. Gunther, faxed the Court a letter apologizing for his failure to file a prehearing exchange but did not provide good cause as to why a default order should not be issued against Respondent. The April 7, 2006 letter from Respondent's Counsel was submitted after the due date for any response to the Order to Show Cause, and it also did not present a cognizable reason for the failure to comply with the prehearing order.

III. Conclusions of Law

1. Pursuant to 40 C.F.R. § 22.17(a), Respondent is found to be in default for failing to comply with the Court's prehearing exchange order. *See* 40 C.F.R. § 22.19(a). Default by Respondent constitutes, for purposes of this proceeding, an admission of all facts alleged in the Complaint and a waiver of Respondent's right to contest such factual allegations.

2. Respondent has failed to show good cause why the default order should not be issued.

3. Respondent is the "owner and operator," of an oil storage facility within the meaning of Section 311(a)(6) of the Act, 33 U.S.C. § 1321(a)(6), and 40 C.F.R. § 112.2.

4. The Facility is an "onshore facility" within the meaning of Section 311(a)(10) of the Act, 33 U.S.C. § 1321(a)(10), and 40 C.F.R.§ 112.2.

5. The Facility is a "non-transportation-related facility" under the definition incorporated by reference at 40 C.F.R. § 112.2 and set forth in an appendix thereto and published on December 18, 1971, in Volume 36 of the Federal Register, at page 24,080.

6. Respondent is the owner or operator of an SPCC-regulated facility that began operations before January 10, 1974.

7. Respondent failed to prepare an SPCC Plan for its Facility pursuant to 40 C.F.R. § 112.7 as required by 40 C.F.R. § 112.3(a) as determined by the EPA SPCC inspections on September 27, 2002 and February 12, 2004.

8. Respondent failed to implement an SPCC Plan for its Facility pursuant to 40 C.F.R. § 112.3(a) as determined by the EPA SPCC inspections on September 27, 2002 and February 12, 2004.

IV. Discussion

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 [prehearing] information exchange requirements of § 22.19(a) or an order of the [ALJ]." 40 C.F.R. § 22.17(a). Furthermore, Section 22.19(g)(3) states that where a party fails to provide prehearing information, "the [ALJ] may, in his discretion . . . [i]ssue a default order under § 22.17(c)." 40 C.F.R. § 22.19(g)(3). For the purposes of the pending proceeding, 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).

Given Respondent's failure to comply with the Prehearing Order issued on January 11, 2006 and its failure to show good cause for that failure, the Court finds that default is appropriate in this matter. *See In re Jiffy Builders, Inc.*, 8 E.A.D. 315, 319 (EAB 1999) ("the [ALJ] unquestionably has the authority to issue a default order for failure to comply with a Prehearing Order . . . ."); *In re Jiffy Builders, Inc*., 8 E.A.D. 315, 320 n.8 (EAB 1999) (As noted in the appeal of that case, upholding the decision of the administrative law judge, where a respondent states that it did not purposefully commit the default, such an assertion does not constitute adequate justification to constitute good cause). Accordingly, Respondent is deemed to have admitted the facts alleged in the Complaint and waived the right to a hearing. *See* 40 C.F.R. § 22.17(a). Respondent has not shown good cause why a default order should not be issued. *See* 40 C.F.R. § 22.17(c).

The civil penalty proposed in the Complaint is consistent with the record in this proceeding and the statutory penalty criteria in Section 311(b)(8) of the CWA, 33 U.S.C. 1321(b)(8). The Complainant's Prehearing Exchange demonstrates that the penalty for Counts I and II was calculated in accordance with the statutory guidelines determining seriousness of noncompliance, culpability of Respondent, efforts to minimize or mitigate as well as adjustments to gravity. The proposed penalty of $41,000 is entirely reasonable as, pursuant to 40 C.F.R.§ 19.4 and Section 311(b)(6)(B)(ii) of the Act, the "amount of a class II civil penalty . . . may not exceed $10,000 per day for each day during which the violation continues; [and] the maximum amount of any class II civil penalty . . . shall not exceed $125,000." 33 U.S.C. § 1321(b)(6)(B)(ii).

ORDER

Subject *only* to the parties filing of a fully executed Consent Agreement on or before May 11, 2006, the Respondent is found to be in default and, accordingly, is found to have violated the requirements of the SPCC Plan regulations under 40 C.F.R. Part 112 as alleged in Counts I and II of the Complaint. **Filing of such a Consent Agreement, pursuant to 40 C.F.R. § 22.18, will operate to supercede this Default Order. In the absence of such filing, a civil penalty in the amount of $41,000 (forty-one thousand dollars) is hereby assessed against the Respondent, Smith & Sons, Inc.** Payment of the full amount of the civil penalty assessed shall be made within 30 (thirty) days after this Default Order becomes a final order under 40 C.F.R. § 22.27(c). Payment should be submitted by a certified check or cashier's check made payable to the "Treasurer, United States of America" and mailed to:

U.S. Environmental Protection Agency, Region II
Regional Hearing Clerk
Mellon Bank
P.O. Box 360188M
Pittsburgh, PA 15251

A transmittal identifying the subject case and the EPA docket number, plus the Respondent's name and address, must accompany the check. Failure of the Respondent to pay the penalty within the prescribed statutory time frame after entry of the final order may result in the assessment of interest on the civil penalty.

This Default Order constitutes an Initial Decision as provided in 40 C.F.R. § 22.17(c).

Pursuant to 40 C.F.R. § 22.27(c), an Initial Decision shall become a final order 45 (forty-five) days after its service upon the parties and without further proceedings unless: (1) a party moves to re-open the hearing within 20 (twenty) days after service of the Initial Decision pursuant to 40 C.F.R. § 22.28(a); (2) an appeal to the Environmental Appeals Board ("EAB") is taken from it by a party to this decision within 30 (thirty) days after the Initial Decision is served upon the parties pursuant to 40 C.F.R. § 22.30(a); or (3) the EAB elects, upon its own initiative, to review the Initial Decision pursuant to 40 C.F.R. § 22.30(b). The parties should take special notice that the provision in this Default Order allowing for the possibility that a fully executed Consent Order may be filed on or before May 11, 2006, an event which would supercede this Default Order, does *not* operate to toll the time for computing when this Initial Decision becomes a final order, as set forth in the provisions cited above.

So ordered.

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William B. Moran
United States Administrative Law Judge

Dated: April 26, 2006
Washington, D.C.

In the Matter of Frank D. Smith & Sons, Inc., Respondent
Docket No. CWA-02-2005-3801

CERTIFICATE OF SERVICE

I certify that the foregoing **Default Order,** dated April 26, 2006, was sent this day in the following manner to the addressees listed below:

Original and One copy by Pouch Mail to:

Karen Maples
Regional Hearing Clerk
U.S. EPA, Region II
290 Broadway, 16th Floor
New York, NY 1007

Copy Sent by Facsimile and Regular Mail to:

Timothy C. Murphy, Esq.
Assistant Regional Counsel
U.S. EPA, Region II
290 Broadway, 16th Floor
New York, NY 10007

Copy Sent by Facsimile, Certified Mail and Regular Mail to:

Bruce A. Gunther, Esq.
417 Third Avenue
Haddon Heights, NJ 08035

Copy Sent by Certified Mail and Regular Mail to:

Frank Smith Jr., CEO
Frank D. Smith & Sons, Inc.
1552 Route 38
Mount Holly, NJ 08060

_____
Knolyn Jones
Legal Staff Assistant

Dated: April 26, 2006

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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Frank D. Smith & Sons, Inc.,	)	**Docket No. CWA 02-2005-3801**
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Respondent	)	
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AMENDMENT TO DEFAULT ORDER

On April 26, 2006, this Court issued a Default Order finding Respondent, Frank D. Smith & Sons, Inc., liable for the violations alleged in the Complaint and assessing a civil penalty of $41,000. In the Order section,[1] the Court directed Respondent to submit "a certified check or cashier's check made payable to the 'Treasurer, United States of America'" and mail it to the U.S. Environmental Protection Agency, Region II, Regional Hearing Clerk at the Mellon Bank in Pittsburgh, Pennsylvania. The Court acknowledges that the penalty must be paid in full by a cashier's or certified check made out instead to the "Oil Spill Liability Trust Fund" noting on the check "EPA" and the docket number of this case. A copy of the check is to be provided to the Regional Hearing Clerk at Region II and to the Complainant. The original check should be mailed to:

U.S. Coast Guard
Civil Penalties
P.O. Box 100160
Atlanta, GA 30384

So ordered.

_____
William B. Moran
United States Administrative Law Judge

Dated: May 1, 2006
Washington, D.C.

[1] The Order section begins on page 5 of the Default Order and the information discussed is also on page 5.

In the Matter of Frank D. Smith & Sons, Inc., Respondent
Docket No. CWA-02-2005-3801

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Knolyn Jones
Legal Staff Assistant

Dated: May 1, 2006

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