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	**)**	

DEFAULT ORDER

I. Introduction

This proceeding arises under the authority of Section 113(d) of the Clean Air Act ("CAA"), 42 U.S.C. § 7413(d), and is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties ("Rules of Practice"), 40 C.F.R. Part 22. On August 15, 2003, the United States Environmental Protection Agency, Region III ("EPA" or "Complainant") filed a Complaint against JHNY, Inc. a/k/a Quin-T Technical Papers and Boards ("Respondent") alleging violations of the CAA and its implementing National Emission Standard for asbestos ("asbestos NESHAP") found at 40 C.F.R. Part 61, Subpart M. For the reasons that follow, the Court issues this Default Order finding Respondent liable for the violations alleged in the Complaint and assessing a civil penalty of $51,700.

II. 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 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 exchange prehearing information, "the [Court] may, in [its] discretion...[i]ssue a default order under § 22.17(c)." 40 C.F.R. § 22.19(g). When 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." 40 C.F.R. § 22.17(c).

The Prehearing Order issued by the Court on February 23, 2004 required the parties to make their initial prehearing exchanges under 40 C.F.R. § 22.19 by April 23, 2004. No prehearing exchange was received from Respondent by that date. In its Response to Order to Show Cause and Opposition to Motion for Default ("Response"), Counsel for Respondent attributes this failure to "significant financial difficulties effecting [sic] JHNY's ability to continue to retain counsel," and argues that "the parties have previously exchanged a significant

amount of information relating to the citations at issue, and JHNY's financial condition." Response at 1. Respondent also claims that EPA has not been prejudiced in any way by its failure to file a prehearing exchange, and notes that the Prehearing Order provides that the parties may file supplements to their prehearing exchanges until thirty days prior to a hearing. *Id*. at 2. Finally, Respondent alleges that "EPA made no effort to contact JHNY concerning the need for formal Prehearing Exchange before filing its Default Motion." *Id*. at 3 n. 2.

The Court finds that Counsel's arguments fail to show good cause why a default order should not be issued under Section 22.17(c). Respondent has not provided any evidence to demonstrate its "significant financial difficulties" or "precarious financial position," but appears to rely solely on documents previously submitted to EPA in the context of settlement negotiations to support this position. In fact, Respondent lists several financial documents that it allegedly provided to Complainant during the Alternative Dispute Resolution process, and states that "the parties have had numerous discuss[ions] relating to this dispute and JHNY's defenses." Response at 1-2. While EPA may in fact have such documents, the Rules of Practice clearly state that "[e]xcept 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). Furthermore, Section 22.22(a)(1) specifically precludes the admission of evidence relating to settlement that would be excluded in the federal courts under Rule 408 of the Federal Rules of Evidence. 40 C.F.R. § 22.22(a)(1).

More importantly, although the Prehearing Order does contemplate the possibility of supplementing prior exchanges, this does not excuse counsel for Respondent from complying with the initial deadline set by the Court. *See* 40 C.F.R. § 22.19(a)(1). The Court notes that the Respondent has been represented by the same legal counsel throughout this proceeding and that such counsel never filed any document seeking to withdraw from representation. Counsel has also never sought an extension of time to file its initial prehearing exchange under 40 C.F.R. § 22.7(b), and has once again disregarded the Prehearing Order by filing its prehearing exchange *without* copies of any documents or exhibits. Moreover, Complainant did not have an obligation to inform Respondent of "the need for formal Prehearing Exchange" or assert that it had been prejudiced in order to file a motion for default. *See* 40 C.F.R. § 22.17(a).

Given Respondent's failure to comply with the Prehearing Order issued on February 23, 2004, its failure to timely file a prehearing exchange, and its failure to show good cause for these omissions, Respondent is hereby found to be in default. *See In re B & L Plating, Inc.*, CAA Appeal No. 02-08, 2003 EPA App. LEXIS 8 at *21 n. 18 (EAB, Oct. 20, 2003) ("an ALJ has the authority to find a party in default *sua sponte* when there has been a failure to file a prehearing exchange"); *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, particularly where, as here, noncompliance has occurred more than once"). Pursuant to Section 22.17(a), default by Respondent constitutes an admission of the facts alleged in the Complaint and a waiver of Respondent's right to contest such factual allegations. 40 C.F.R. § 22.17(a).

III. Findings of Fact

1. Respondent is a corporation organized under the laws of the Commonwealth of Pennsylvania.

2. At all times relevant to the Complaint, Respondent owned and operated a facility located at 140 East 16th Street, Erie, PA 16512 (the "facility") where it used commercial asbestos to manufacture paper, millboard, and/or felt.

3. A residential neighborhood is located within approximately fifty yards of the facility.

4. Pursuant to 42 U.S.C. § 7414, an authorized representative of Complainant ("EPA inspector") conducted inspections at the facility on March 16, 2000, October 12, 2000, February 6, 2001, February 21, 2001, and June 26, 2001. The purpose of these inspections was to verify Respondent's compliance with the asbestos NESHAP.

5. During the February 6, 2001 inspection, the EPA inspector observed an air cleaning system and two roof vents at the facility. The left roof vent was utilized to ventilate the air cleaning system to the outside air.

6. During the February 6, 2001 inspection, the EPA inspector observed suspected asbestos-containing material caked inside the left roof vent and on the cross beam of the right roof vent. The EPA inspector photographed and collected three samples of material from the left roof vent.

7. During the February 6, 2001 inspection, the EPA inspector observed that one of the filter bags in the air cleaning device was collapsed, and dust suspected to contain asbestos covered the floor and catwalk in the room where the air cleaning device was located. The EPA inspector collected one sample of dust from the catwalk.

8. During the February 21, 2001 inspection, the EPA inspector observed that conditions in the roof vents and the room containing the air cleaning device were substantially the same as they were during the February 6, 2001 inspection. The EPA inspector collected two samples from the right roof vent and one sample from the catwalk in the room where the air cleaning device was located.

9. During 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.

10. At the time of the inspections on March 16, 2000 and October 12, 2000, Respondent failed to monitor each potential source of asbestos emissions for visible emissions to the outside air at least once each day.

11. At the time of the inspections on March 16, 2000, October 12, 2000, February 21, 2001, and June 26, 2001, no records of the results of visible emissions monitoring or air cleaning device inspections were maintained by Respondent or available for inspection.

12. Subsequent Polarized Light Microscopy tests of the samples collected at the facility revealed that each sample contained 20 percent asbestos.

13. Pursuant to 42 U.S.C. § 7414, Complainant sent an information request letter to Respondent on January 26, 2001 requesting, among other things, that Respondent provide a narrative of the ownership history of the property or buildings located at 140 East 16th Street, Erie, PA.

14. On February 19, 2001, David Britton, Environmental Manager at Quin-T, forwarded a letter to EPA in response to the January 26, 2001 information request indicating that Quin-T has been under the ownership of the JHNY Corporation prior to and since January 1, 1999.

15. Pursuant to 42 U.S.C. § 7414, Complainant sent an information request letter to Respondent on August 22, 2002 requesting, among other things, that Respondent provide information regarding its dust collector.

16. On September 6, 2002, David Britton, Environmental Manager at Quin-T, forwarded a letter to EPA in response to the August 22, 2002 information request indicating that a dust collector is used to collect the dust on the slitting operation and that the unit meets ASTM Method D737-75. Mr. Britton also stated in the letter that no air monitoring is used during the production of asbestos products other than visible inspection of the discharge stack.

17. Pursuant to Section 113(d)(1) of the CAA, 42 U.S.C. § 7413(d)(1), Complainant and the United States Department of Justice jointly determined that this matter was appropriate for administrative penalty action.

18. Section 112 of the CAA, 42 U.S.C. § 7412, requires EPA to publish a list of air pollutants determined to be hazardous and promulgate emission standards or, where necessary,[1] design, equipment, work practice, or operational standards for each hazardous air pollutant listed in that section. Pursuant to Section 114 of the CAA, 42 U.S.C. § 7414, EPA may require any person who owns or operates an emission source to establish and maintain records regarding emissions monitoring and control equipment. The National Emission Standard for asbestos, found at 40 C.F.R. Part 61, Subpart M, contains work practice and record-keeping requirements for owners and operators of manufacturing operations using commercial asbestos. 40 C.F.R. § 61.144.

19. On August 15, 2003, Complainant filed an Administrative Complaint and Notice of Opportunity for Hearing alleging that Respondent violated the CAA and the asbestos NESHAP regulations found at 40 C.F.R. Part 61, Subpart M. Specifically, Count I of the Complaint

[1] The CAA provides that "if it is not feasible in the judgment of the Administrator to prescribe or enforce an emission standard for control of a hazardous air pollutant or pollutants, the Administrator may, in lieu thereof, promulgate a design, equipment, work practice, or operational standard, or combination thereof, which in the Administrator's judgment is consistent with the provisions of subsection (d) or (f) of this section." 42 U.S.C. § 7412(h)(1).

alleged that Respondent failed to discharge no visible emissions to the outside air during the collection, processing, packaging, or transporting of any asbestos-containing waste material generated by the source, and failed to properly install, use, operate, and maintain all air cleaning equipment on February 6 and 21, 2001 in violation of 40 C.F.R. §§ 61.144(b)(1)-(2) and 61.152(a)(2). Count II alleged that Respondent failed to monitor for visible emissions to the outside air once each day on March 16, 2000 and October 12, 2000 in violation of 40 C.F.R. § 61.144(b)(3). Count III alleged that Respondent failed to maintain records of the results of visible emissions monitoring and air cleaning device inspections on March 16, 2000, October 12, 2000, February 21, 2001, and June 26, 2001 in violation of 40 C.F.R. § 61.144(b)(5). Count IV alleged that Respondent failed to furnish upon request and make available at the facility during normal business hours for inspection by the Administrator all records required under 40 C.F.R. § 61.144 on March 16, 2000, October 12, 2000, February 21, 2001, and June 26, 2001 in violation of 40 C.F.R. § 61.144(b)(6). Count V alleged that Respondent failed to retain a copy of all monitoring and inspection records for at least 2 years on March 16, 2000, October 12, 2000, February 21, 2001, and June 26, 2001 in violation of 40 C.F.R. § 61.144(b)(7).

20. Section 113(d)(1) of the CAA, 42 U.S.C. § 7413(d)(1), authorizes civil administrative penalties of up to $25,000[2] per day for violations of the asbestos NESHAP.

21. For the violations alleged in the Complaint, Complainant sought a total civil penalty of $51,700. In determining the amount of the proposed penalty, Complainant considered the statutory factors in Section 113(e)(1) of the CAA, 42 U.S.C. § 7413(e)(1), regarding the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violations, payment by the violator of penalties previously assessed for the same violations, the economic benefit of noncompliance, the seriousness of the violations, and other factors as justice may require. The penalty amount for each count was calculated in accordance with the U.S. EPA Clean Air Act Stationary Source Civil Penalty Policy dated October 25, 1991 ("CAA Penalty Policy").

22. On September 19, 2003, Respondent filed an Answer which denied the allegations in the Complaint and requested a hearing.

23. On February 23, 2004, the Court issued a Prehearing Order requiring the parties to file their initial prehearing exchanges under 40 C.F.R. § 22.19 by April 23, 2004. Complainant filed its prehearing exchange on April 23, 2004, but no prehearing exchange was received from Respondent by that date.

24. On June 8, 2004, Complainant filed a Motion for Default Judgment and Memorandum of Law in Support ("Motion"), which sought a default judgment against Respondent for the

[2] The Debt Collection Improvement Act of 1996 authorizes a 10% adjustment for inflation for administrative penalties assessed under the CAA. 31 U.S.C. § 3107; 40 C.F.R. Part 19.

violations alleged in the Complaint based on Respondent's failure to comply with the Prehearing Order and failure to file a prehearing exchange.

25. On June 14, 2004, the Court issued an Order to Show Cause directing Respondent to show good cause why a default order should not be issued against it. The Court required such response to be filed by June 24, 2004.

26. On June 23, 2004, Respondent faxed to the Court its Response to Order to Show Cause and Opposition to Motion for Default, as well as an Initial Prehearing Exchange.[3] The Response stated that no prehearing exchange was made "due to significant financial difficulties effecting [sic] JHNY's ability to continue to retain counsel," and alleged that the parties have previously exchanged a significant amount of information relating to the violations at issue and Respondent's financial condition. The Initial Prehearing Exchange consisted of a brief narrative summary for two witnesses and a list of exhibits that Respondent claims to have already provided to Complainant.

IV. 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 prehearing exchange requirements in 40 C.F.R. § 22.19(a) and the Prehearing Order issued by the Court. 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 a default order should not be issued.

3. Respondent is a "person" as defined in 42 U.S.C. § 7602(e).

4. The samples collected at the "facility" by the EPA inspector on February 6, 2001 and February 21, 2001 were "asbestos-containing waste material" and "friable asbestos material" as those terms are defined in 40 C.F.R. § 61.141.

5. During the February 21, 2001 inspection, the EPA inspector observed "visible emissions" at the facility as that term is defined in 40 C.F.R. § 61.141.

6. At all times relevant to the Complaint, Respondent was the owner and operator of a "manufacturing" operation using "commercial asbestos" at its facility as those terms are defined in 40 C.F.R. § 61.141.

[3] The Response and Initial Prehearing Exchange do not indicate that they were filed with the Regional Hearing Clerk as required by 40 C.F.R. § 22.5(a). As noted, the late-filed response was devoid of any documents submission.

7. Respondent failed to discharge no visible emissions to the outside air or use the methods specified by 40 C.F.R. § 61.152 to clean emissions from its manufacturing operations on February 6, 2001 and February 21, 2001 in violation of 40 C.F.R. § 61.141(b)(1)-(2).

8. Respondent failed to monitor each potential source of asbestos emissions for visible emissions to the outside air at least once each day on March 16, 2000 and October 12, 2000 in violation of 40 C.F.R. § 61.144(b)(3).

9. Respondent failed to maintain records of the results of visible emissions monitoring and air cleaning device inspections on March 16, 2000, October 12, 2000, February 21, 2001, and June 26, 2001 in violation of 40 C.F.R. § 61.144(b)(5).

10. Respondent failed to furnish upon request, or make available at the facility during normal business hours for inspection, all records required under 40 C.F.R. § 61.144 on March 16, 2000, October 12, 2000, February 21, 2001, and June 26, 2001 in violation of 40 C.F.R. § 61.144(b)(6).

11. Respondent failed to retain a copy of all monitoring and inspection records for at least two years at the time of the inspections on March 16, 2000, October 12, 2000, February 21, 2001, and June 26, 2001 in violation of 40 C.F.R. § 61.144(b)(7).

12. The civil penalty of $51,700 proposed by Complainant for the violations alleged in the Complaint is consistent with the statutory penalty criteria in Section 113(e) of the CAA, 42 U.S.C. § 7413(e), the CAA Penalty Policy, and the record in this proceeding.

V. Conclusions and Assessment of Civil Penalty

The findings of fact, deemed to be admitted, establish by a preponderance of the evidence that Respondent violated the asbestos NESHAP for manufacturing operations using commercial asbestos as charged in the Complaint.[4] *See* 40 C.F.R. § 22.24. When a default order resolves all outstanding claims in a proceeding, it constitutes an initial decision under Section 22.27 and the relief proposed in the Complaint "shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act." 40 C.F.R. § 22.17(c). Complainant sought a total civil penalty of $51,700 for the violations alleged in the Complaint. The

[4] The Court has some reservations regarding whether the record-keeping violations in Counts IV and V of the Complaint were properly alleged, in addition to Count III, since they may presuppose the maintenance of valid records in the first instance. *See In re Consumers Scrap Recycling, Inc.*, CAA Appeal No. 02-06, 2004 EPA App. LEXIS 1 at *31-37 (EAB, Jan. 29, 2004). However, the Court notes that Complainant has treated the record-keeping violations alleged in Counts III, IV, V of the Complaint as a *single violation* for purposes of the proposed penalty. Complaint at 13.

Complaint, Motion for Default Judgment, and Complainant's Initial Prehearing Exchange ("CPE") demonstrate that the proposed penalty was calculated in accordance with the statutory factors in 42 U.S.C. § 7413(e) and the CAA Penalty Policy by determining an economic benefit component, gravity component, and then applying several adjustment factors to the gravity component to reflect the specific circumstances of the violations. Complaint at 12-15; Motion at 6-13; CPE at 12-18.

For the economic benefit component, Complainant found that it did not have complete information regarding Respondent's actual asbestos abatement and disposal expenses or the economic benefit Respondent derived from not adhering to the asbestos manufacturing requirements. Motion at 9. Even without this information, Complainant stated that it did not believe that the economic benefit to Respondent exceeded $5,000 for the alleged violations. *Id.* As a result, the proposed penalty did not include an economic benefit component. *Id.* at 9, 12; CAA Penalty Policy at 7.

For the gravity component, Complainant followed the methodology of the CAA Penalty Policy and assessed Respondent with a $15,000 penalty for Count I of the Complaint, $15,000 for Count II, and $15,000 for Counts III-V. Motion at 12-13; CAA Penalty Policy at 10-14. In doing so, Complainant considered the seriousness of the violations, including the environmental consequences and adverse health effects of asbestos exposure, and decided to limit the violations for penalty purposes to one day in duration given the large penalty amount that would have resulted from seeking penalties for multiple days. Motion at 8-12. Although Complainant reviewed several Dun & Bradstreet reports showing that Respondent previously had sales in the amount of $10,000,000, it used the lowest adjustment factor in the CAA Penalty Policy for size of business and increased the penalty by $2,000. *Id.* at 6-7; CPE Exhibits ("Ex.") 47-49; CAA Penalty Policy at 14. Complainant then adjusted the gravity component by 10% for inflation, proposing a total penalty of $51,700. Complaint at 12-13; Motion at 13.

Complainant examined several adjustment factors to the gravity component, but did not make any further changes to the proposed penalty. In determining Respondent's full compliance history, Complainant did not discover any prior history of asbestos NESHAP violations or violations of other environmental statutes, and decided not to raise the penalty based on Respondent's willfulness or negligence. Motion at 7-8; CPE at 13, 16. Complainant also failed to find any payment of penalties previously assessed for the same violation, and determined that there was no evidence to warrant adjusting the penalty for good faith efforts to comply. Motion at 8-9; CPE at 14, 16. Finally, Complainant evaluated Respondent's ability to pay the proposed penalty and determined that no adjustment was warranted for this factor. Motion at 7; CPE Ex. 50-51.

Based on the record in this proceeding, the Court finds that Complainant has established, by a preponderance of the evidence, that Respondent violated the asbestos NESHAP requirements for manufacturing operations using commercial asbestos in 40 C.F.R. § 61.144 as set forth in Counts I-V of the Complaint. Furthermore, the Court concludes that the civil penalty proposed in the Complaint is consistent with the record and the statutory penalty criteria in 42

U.S.C. § 7413(e). Respondent is hereby assessed a civil penalty of $51,700.

ORDER

Respondent is found to be in default and, accordingly, is found to have violated the asbestos NESHAP requirements in 40 C.F.R. § 61.144 as alleged in Counts I-V of the Complaint. A civil penalty in the amount of $51,700 (Fifty-one thousand seven hundred dollars) is assessed against the Respondent, JHNY, Inc. a/k/a Quin-T Technical Papers and Boards. 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 shall be submitted by a certified check or cashier's check made payable to the "Treasurer, United States of America" and mailed to:

United States Environmental Protection Agency, Region III
Regional Hearing Clerk
Mellon Bank
P.O. Box 360515
Pittsburgh, PA 15251-6515

A transmittal letter 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 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).

SO ORDERED.

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William B. Moran
United States Administrative Law Judge

Dated: July 9, 2004
Washington, D.C.