IN RE PYRAMID CHEMICAL COMPANY

RCRA (3008) Appeal No. 03-03

DEFAULT ORDER AND FINAL DECISION

Decided September 16, 2004

Syllabus

This matter was brought before the Board by a Motion for Default filed by the Complainant: the Director of the Multimedia Enforcement Division of the Office of Regulatory Enforcement, located at the Headquarters of the United States Environmental Protection Agency ("EPA"). In this matter the Board is both the decision maker in the first instance and the final decision maker.

Complainant filed a Complaint against Pyramid Chemical Company ("Respondent") pursuant to section 3008(a) of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6928(a). In particular, Complainant charged Respondent with violations of RCRA, as well as State and Federal hazardous waste regulations, related to Respondent's export of hazardous waste to the Netherlands. Attached to the Complaint, which was filed June 6, 2003, was a Compliance Order. The terms of the Compliance Order would have required Respondent to remove or dispose of the shipped materials stored in the Netherlands, but would in any event require Respondent to reimburse the Netherlands for any cleanup activities conducted by the Netherlands. On June 1, 2004, Complainant informed the Board that the Netherlands has completed cleanup of the materials Respondent shipped.

Respondent failed to file an answer to the Complaint, and by virtue of its failure to request a hearing, the Compliance Order became a final order. Nonetheless, Complainant filed a Motion for Default with the Board, to which Respondent did not file a response. Only after the Board issued an Order to Show Cause did Respondent challenge the proposed issuance of a default order. Respondent's opposition to the proposed default order, which challenged some of the merits of the charges, yet neglected to respond to each of the allegations in the Complaint and the Motion for Default, was filed more than three months after the deadline to file an answer.

Held: The Board does not find "good cause" to excuse Respondent's untimely response to the Complaint; therefore, Respondent is found to be in default and is thus liable on all counts. Respondent must comply with the Compliance Order, except the terms that have become moot due to the Netherlands' cleanup of Respondent's materials.

Respondent did not file a timely response to the Complaint, and there are no extenuating circumstances to excuse Respondent's untimeliness. The Board finds that Respondent received service of both the Complaint and the Motion for Default, based on the Board's examination of the return receipts. Respondent states that it "[b]elieved it was addressing the complaint through counsel." However, under the Board's case law, the neglect of a

party or a party's attorney does not excuse an untimely filing, nor does lack of willfulness affect the determination. Moreover, Respondent was aware of the delinquency and could have promptly determined whether the allegation of untimeliness was true and brought this to the Board's attention, but Respondent did not do so.

In considering the totality of the circumstances, it is permissible for the Board to find "good cause" not to enter a default order or, if applicable, to overturn a previously entered default order, provided that the defaulting party shows a strong probability of success on the merits. However, Respondent has not proven a strong likelihood of success on the merits. On Count I, failure to prepare a hazardous waste manifest is a strict liability offense. Therefore, Respondent cannot avoid its responsibility by blaming its contractor. Respondent's bills of lading do not fulfill the regulatory requirements for hazardous waste manifests. On Count II, Respondent exported hazardous waste without notification to EPA of intent to export, without consent of the receiving country, and without an EPA Acknowledgment of Consent, in violation of the law. Respondent has not provided the Board with sufficient proof to show that Respondent gave EPA notice of intent to export hazardous waste or that the Netherlands consented, nor has Respondent provided an EPA Acknowledgment of Consent. On Count III, Respondent failed to comply with the special manifest requirement which required Respondent, *inter alia*, to instruct the transporter to return the waste to the United States when it determined that delivery of exported hazardous waste could not be accomplished.

Respondent has provided no valid excuse for its untimeliness and has not proven a strong likelihood of success on the merits. Under the totality of the circumstances, there is no "good cause" for Respondent's failure to file a timely answer to the Complaint, and no procedural unfairness results from entering a default judgment against Respondent.

As Complainant has filed a Motion for Default, the Board determines whether the relief requested — the Compliance Order — is not clearly inconsistent with the record of the proceeding or RCRA. Within the context of exercising limited review authority over this particular Compliance Order, the Board concludes that, except for terms rendered moot due to new developments, the terms of the Compliance Order remain operative and in effect.

Before Environmental Appeals Judges Scott C. Fulton, Ronald L. McCallum, and Edward E. Reich.

Opinion of the Board by Judge McCallum:

I. *INTRODUCTION*

This Default Order and Final Decision arises from a "Motion for a Default Order" ("Motion for Default") and from this Board's "Order to Show Cause Why Complainant's Motion for Default Should Not Be Granted" ("Order to Show Cause"). Complainant is the Director of the Multimedia Enforcement Division of the Office of Regulatory Enforcement, which is located at the Headquarters of the United States Environmental Protection Agency ("EPA" or "Agency"). In this matter the Board is both the decision maker in the first instance and the final decision

maker.[1]

This case was initiated on June 6, 2003, when Complainant filed and properly served a "Complaint," which included a Compliance Order and a Notice of Opportunity for Hearing, on Pyramid Chemical Company ("Respondent" or "Pyramid"), pursuant to section 3008(a) of the Resource Conservation and Recovery Act, as amended ("RCRA"), 42 U.S.C. § 6928(a).[2] Complainant charged Respondent with violations of RCRA and regulations promulgated thereunder, related to Respondent's export of hazardous waste to the Netherlands. The Complaint also included charges that the same export activities violated Pennsylvania's hazardous waste laws, some of which, as discussed below, operate in lieu of Federal hazardous waste laws but are nonetheless federally enforceable (as well as being separately enforceable by Pennsylvania).

As for the relief requested in the Complaint, Complainant seeks a Compliance Order that would require Respondent to remove or dispose of the shipped materials stored in the Netherlands, but would in any event require Respondent to reimburse the Netherlands for any cleanup activities conducted by the Netherlands. *Infra* Appendix A.[3] More specifically, the Compliance Order directs Respondent to remove the materials, stored at the European Combined Terminal in the Netherlands, either by transporting them to the United States, selling all or part of the materials — subject to EPA approval and the approval of the Netherlands — or disposing of the materials Respondent is unable to sell, consistent with applicable law and all prior orders. *Id.* at A.(1)-(2). It further provides that Respondent must reimburse the Netherlands Environment Ministry, or its designated agent, for all costs associated with the disposal — including but not limited to storage, waste characterization, repackaging, removal, and treatment — of the materials Respondent sent to the Netherlands and that were stored at the European Combined Terminal. *Id.* at A.(3). On June 1, 2004, Complainant informed the Board that the Netherlands has completed cleanup of the materials Respondent shipped. Complainant's Submission of Additional Information to the Motion for Default (filed June 1, 2004) ("Complainant's Additional Information"). Thus, any question of Respondent's compliance with the removal or disposal aspects of the Compliance Order is now moot.

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[1] In a proceeding commenced at EPA Headquarters, such as the present case, the Board "rule[s] on all motions filed or made before an answer to the complaint is filed." 40 C.F.R. § 22.16(c); *accord id.* § 22.4(a)(1). Complainant[1]s Motion for Default was prompted by Respondent[1]s failure to file an answer to the complaint, thus conferring jurisdiction on the Board to rule on the motion.

[2] Prior to issuance of the Complaint, Complainant gave notice to Pennsylvania, pursuant to section 3008(a)(2) of RCRA, 42 U.S.C. § 6928(a)(2) (prior notice is a prerequisite to EPA's commencement of an action in an authorized State).

[3] To this Default Order and Final Decision, the Board attaches, as "Appendix A," a copy of the Compliance Order that the Complainant included with the Complaint (and the Motion for Default).

Notwithstanding the serious allegations in the Complaint and the substantial responsibilities and costs imposed by the Compliance Order, Respondent did not file an answer to the Complaint or request a hearing, as provided for in the rules governing these proceedings. *See* 40 C.F.R. § 22.15 (requirements for answers).[4] This prompted Complainant, on August 19, 2003, to file its Motion for Default, to which Respondent did not file a response. On October 16, 2003, the Board issued the Order to Show Cause, directing Respondent to file a response by October 31, 2003. Respondent complied by filing its "Response to Order to Show Cause" ("Respondent's Response").[5]

Upon consideration of the Motion for Default and Respondent's Response, it is the Board's conclusion, as discussed below, that Respondent has no valid excuse for not filing a timely answer to the complaint. Although Respondent opposes the proposed default order, the Board concludes that, considering the totality of the circumstances, a default order as to Respondent's liability for the alleged violations is appropriate. In addition, because Respondent did not timely file an answer to the Complaint, the Compliance Order has become a final order by operation of law.[6] Respondent must comply with the terms of the Compliance Order that relate to reimbursement of the Netherlands for all of the costs associated with the disposal of the shipped materials, including but not limited to storage, waste characterization, repackaging, removal, and treatment thereof.

II. *DISCUSSION*

A. *Standards Governing Default*

EPA's Consolidated Rules of Practice ("Consolidated Rules")[7] provide that a party "may be found to be in default: after motion, upon failure to file a timely

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[4] In opposing the default, Respondent requests that the Board "[a]llow Pyramid to answer the Complaint." SurReply to EPA's Reply to Order to Show Cause at 3 (filed Dec. 18, 2003) ("Respondent's SurReply"). This latter statement is a tacit admission by Respondent that it has not answered the Complaint.

[5] On October 30, 2003, the Board received Respondent's "Uncontested Motion for Extension of Time to Respond to Order to Show Cause" ("Motion for Extension of Time"), which the Board granted. Respondent filed its response on November 17, 2003, opposing the Motion for Default. Complainant filed its "Reply to Pyramid's Response to the Order to Show Cause" ("Complainant's Reply") on December 1, 2003, and Respondent filed its SurReply on December 18, 2003.

[6] Nevertheless, as explained in this Default Order and Final Decision, the Board will conduct a limited review of the Compliance Order for purposes of ensuring that the relief compelled by the order is, *inter alia*, not "inconsistent with the record of the proceeding or the Act." 40 C.F.R. § 22.17(c).

[7] The full name of the Consolidated Rules of Practice is: "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action
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answer to the complaint." 40 C.F.R. § 22.17(a). Furthermore, "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.* When the presiding authority over a matter — the Board in this instance — finds that default has occurred, it "shall issue a default order against the defaulting party as to any or all parts of the proceeding *unless* the record shows *good cause* why a default order should not be issued." *Id*. § 22.17(c) (emphasis added). Our "good cause" determination, predicate to finding a party in default, takes the "totality of the circumstances" into consideration. *In re Thermal Reduction Co.*, 4 E.A.D. 128, 131 (EAB 1992); *see also In re B & L Plating*, 11 E.A.D. 183, 191-92 (EAB 2003); *In re Jiffy Builders, Inc.*, 8 E.A.D. 315, 319 (EAB 1999).

In terms of the relief to be granted upon a finding of default, "[t]he relief proposed in the complaint or the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act [authorizing the proceeding at issue]." 40 C.F.R. § 22.17(c). Default issues arise most typically before the Board in penalty cases, where we review the penalty proposed in the complaint to ensure that it is appropriate in view of the nature of the case. *E.g.*, *In re Rybond, Inc.*, 6 E.A.D. 614 (EAB 1996). But the requirement that we review the proposed relief generally applies as well to other forms of relief sought through administrative enforcement action, including the elements of a compliance order. Our determination in the default setting as to whether to impose proposed relief is equitable in nature, as is our consideration of whether to set aside default once entered. *See id.* at 624 (quoting *In re Midwest Bank & Trust Co.*, 3 E.A.D. 696, 699 (CJO 1991)); *cf. B & L Plating*, 11 E.A.D. at 191 n.14.

When a party commits a procedural violation that can give rise to a default, such as an untimely answer,[8] a significant factor in the good cause determination is whether the purported defaulting party has any valid excuse for the procedural violation. For instance, in *Jiffy Builders*, in evaluating whether to overturn a default order, the Board expressed that it would "[o]rdinarily expect some articulation of the 'cause' of the default * * * ." 8 E.A.D. at 320 n.8; *accord B & L Plat-*

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Orders, and the Revocation, Termination or Suspension of Permits." 40 C.F.R. part 22. EPA has the authority to establish its own procedural rules. *Katzson Bros., Inc. v. EPA*, 839 F.2d 1396, 1399 (10th Cir. 1988) (a service of process case, holding that EPA is not bound by the Federal Rules of Civil Procedure); *accord, e.g., F.C.C. v. Shreiber*, 381 U.S. 279, 290 (1965) (citing, *inter alia, F.C.C. v. Pottsville Broad. Co.*, 309 U.S. 134, 143 (1940)); *NLRB v. Permanent Label Corp.*, 657 F.2d 512, 526 (3rd Cir. 1981); *Hess & Clark, Div. of Rhodia, Inc. v. FDA*, 495 F.2d 975, 984 (D.C. Cir. 1974).

[8] Other grounds for default include failure to comply with the information exchange requirements of 40 C.F.R. § 22.19(a) or an order of the Administrative Law Judge, Regional Judicial Officer, or Board presiding over a proceeding, or upon failure to appear at a conference or hearing. 40 C.F.R. § 22.17(a).

ing, 11 E.A.D. at 192 (respondent failed to articulate a good cause basis for setting aside the default) (dicta). In *Jiffy Builders*, the Board made the following observation: "Conspicuously absent from Respondent's list of justifications is any explanation why, after having missed an earlier deadline and having retained the services of counsel presumably, in part, to ensure timely representation, Respondent nevertheless defaulted on the obligation in question here." 8 E.A.D. at 320 n.8. Moreover, we have held that lack of willful intent to delay the proceedings, by itself, does not excuse noncompliance with EPA's procedural rules.[9] *Jiffy Builders*, 8 E.A.D. at 321; *Rybond*, 6 E.A.D. at 625 n.19; *In re Detroit Plastic Molding Co.*, 3 E.A.D. 103, 106-07 (CJO 1990).

Nevertheless, in examining the totality of the circumstances for purposes of making a good cause determination, the Board may take into consideration the purported defaulting party's likelihood of success on the merits. *Jiffy Builders*, 8 E.A.D. at 319, 322; *Rybond*, 6 E.A.D. at 625, 628; *see also Midwest Bank*, 3 E.A.D. at 699. However, the burden falls on Respondent to demonstrate that there is more than the mere possibility of a defense, but rather a "strong probability" that litigating the defense will produce a favorable outcome. *Jiffy Builders*, 8 E.A.D. at 322; *Rybond*, 6 E.A.D. at 628.

B. *Facts Concerning the Service of Process*

Complainant filed the Complaint with the Clerk of the Board on June 6, 2003, and sent it to Respondent by certified mail. Complainant's Reply, Ex. B (certified mail receipts). The certified mail receipt indicates that the Complaint was mailed to Respondent on June 5, 2003. *Id.* Complainant addressed this mailing as follows to:

> Joel D. Udell, CEO
> Pyramid Chemical Company
> 54 N. Ridge Avenue
> Ambler, PA 19002

Id.

As to serving a complaint on a corporation, the Consolidated Rules provide that service shall be upon, *inter alia*, an officer of the corporation or any other person authorized to receive service of process on its behalf. 40 C.F.R. § 22.5(b)(1)(ii)(A). The return receipt for the Complaint appears to bear the signa-

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[9] We have rejected the argument that we are bound by the Federal Rules of Civil Procedure's test for default determinations. *In re Detroit Plastic Molding Co.*, 3 E.A.D. at 103, 106-07 (CJO 1990); *accord Jiffy Builders*, 8 E.A.D. at 321 n.9; *Rybond*, 6 E.A.D. at 625 n.19.

ture of Joel D. Udell — an officer of Respondent[10] — and that return receipt bears a date of June 13, 2003. *See* Complainant's Reply, Ex. B. Pursuant to the Consolidated Rules, service of a complaint is complete when the return receipt is signed. 40 C.F.R. § 22.7(c). Under those same Rules, an answer to the complaint must be filed within 30 days after service of the complaint. *Id.* § 22.15(a). In addition to the 30-day period, an extra five days is allowed for filing a responsive document when a document was served by first class mail or a commercial delivery service, such as the Complaint in this case, but not by overnight or same-day delivery. *Id.* § 22.7(c). Accordingly, Respondent had until July 18, 2003 — 35 days after signing the receipt of service — to file an answer.

Having received no response, Complainant sent its Motion for Default to Respondent on August 18, 2003, by certified mail, return receipt requested.[11,12] Motion for Default, Certificate of Service. Complainant directed the Motion for Default to the same address Complainant used for service of the Complaint. Complainant's Reply, Ex. A (certified mail return receipt). Respondent received the Motion for Default, as the certified mail receipt for the Motion bears the signature of Joel D. Udell. *Id.*

Pursuant to the Consolidated Rules, service of a motion is complete upon mailing or when placed in the custody of a reliable commercial delivery service. 40 C.F.R. § 22.7(c). A party's response to a motion must be filed within 15 days after service of the motion. *Id.* § 22.16(b). Adding an extra five days because the Motion for Default was not sent by same-day or overnight delivery, *see id.* § 22.7(c), Respondent's deadline to respond to the Motion for Default was September 7, 2003. The Consolidated Rules provide that a party who fails to timely respond to a motion waives its objections. *Id.* § 22.16(b).

Seeing that Respondent had not filed a response to either the Complaint or the Motion for Default, the Board issued the Order to Show Cause, which it served on October 16, 2003. Respondent finally filed its first document in this proceeding — the Motion for Extension of Time — on October 30, 2003. The latter motion did not attach any proposed answer to the Complaint, nor did it attempt to respond to the Motion for Default. Moreover, Respondent's motion was filed more than three months after the July 18, 2003 answer deadline. The

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[10] Respondent's own Certification, for instance, refers to Joel D. Udell as the President of Respondent. Respondent's Response, Ex. 1 ("Certification of Pyramid Chemical Company" (Nov. 14, 2003)) ¶ 1.

[11] The Motion for Default was received and thus filed with the Clerk of the Board on August 19, 2003. *See* 40 C.F.R. § 22.5(a)(1) (when a proceeding is before the Board, a document is "filed" when it is received by the Clerk of the Board).

[12] Accompanying the Motion for Default was a "Memorandum in Support of Motion for Default" and a proposed "Order of Default Judgment and Initial Decision."

Board granted the requested extension, and Respondent filed its "Response to Order to Show Cause" on November 17, 2003, in accordance with the extension granted by the Board. In the Response to Order to Show Cause, Respondent contests its liability in this case, as discussed further below. Respondent requests that the Board deny Complainant's Motion for Default and "allow" Respondent to answer the Complaint. Respondent's SurReply at 3.

C. *The Parties' Contentions Regarding Service of Process*

Regarding service of process, Respondent contends, "While Pyramid did not respond earlier to EPA's order, it is unclear why this occurred and Pyramid was neither purposely evading nor ignoring this matter." Respondent's Response ¶ 12. In making this statement, Respondent cites to the attached "Certification of Pyramid Chemical Company," dated November 14, 2003 (hereinafter, "Certification"), signed by Joel D. Udell. *Id.* (citing Ex. 1). In the Certification, Mr. Udell asserts, "Pyramid was unaware that a default was proposed to be entered until October of this year." Certification ¶ 12. Respondent's Response appears to cast blame for the default on Respondent's attorney in the Netherlands, by stating, "Pyramid relied for its updates on its Netherlands's lawyer." Respondent's Response ¶ 12 (citing Certification ¶¶ 9-10).

To the contrary, Complainant provides proof, in the form of a certified mail return receipt, that Respondent, in particular Mr. Udell, did indeed receive the Motion for Default, and that the Motion was received on August 29, 2003. Complainant's Reply, Ex. A (bearing a receipt signature of Joel D. Udell). In its SurReply, in a footnote, Respondent reiterates that it "believed it was addressing the complaint through counsel" and asserts that it is therefore irrelevant whether Mr. Udell received notice of the mailings and irrelevant whether the signatures on the return receipts belonged to Mr. Udell.[13] Respondent's SurReply at 2 n.1.

D. *No Valid Excuse for Respondent's Untimely Response*

Based on our examination of the return receipts for the Complaint and the Motion for Default, each bearing the signature of Joel D. Udell — Respondent's President — the Board concludes that Respondent received both the Complaint and the Motion for Default. Notably, Respondent does not claim that Mr. Udell did not receive a copy of the Complaint. Mr. Udell's Certification asserts that Respondent was unaware that a default was proposed to be entered until October

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[13] Respondent references the name "Mr. Udell" rather than stating the full name. As it was Joel D. Udell, Respondent's President, who signed the return receipts and the Certification, we conclude that Respondent uses the name "Mr. Udell" to mean Joel D. Udell. Therefore, Respondent's use of "Mr. Udell" means Joel D. Udell rather than Jack Udell, who is described as Respondent's Vice President, according to the Complaint's Certificate of Service. Accordingly, this decision also uses the name "Mr. Udell" to mean Joel D. Udell, unless otherwise specified herein.

2003 (Certification at ¶ 12), but contradicting this is the return receipt for the Motion for Default, stamped August 29, 2003, and bearing Mr. Udell's signature (Complainant's Reply, Ex. A).[14] Furthermore, Respondent does not challenge the signatures on either of the return receipts. *See* Respondent's SurReply at 2 n.1 (stating it is irrelevant whether either of the certified mail receipt signatures belongs to Mr. Udell). The Board thus concludes that Mr. Udell received both the Complaint and the Motion for Default and received them on the dates marked on the certified mail return receipts.

As noted previously, the Consolidated Rules require that a complaint brought against a corporation be served, *inter alia*, on an officer or any other person authorized to receive service of process on the corporation's behalf. 40 C.F.R. § 22.5(b)(1)(ii)(A). The aforementioned service provisions continue to operate until the corporation files its first document with the name, address, and telephone number of the person — for example, an attorney — authorized to receive service relating to the proceeding. *See id.* § 22.5(c)(4); *In re Antkiewicz*, 8 E.A.D. 218, 221 n.2 (EAB 1999). Respondent's attorney of record did not file an appearance in this matter until she filed the Motion for Extension of Time, which was filed subsequent to service of the Complaint, the Motion for Default, and the Board's Order to Show Cause.[15]

Respondent states that "it believed it was addressing the complaint through counsel." Respondent's SurReply at 2 n.1. However, we have made clear, time and again, that the failings of a client's attorney does not excuse compliance with the Consolidated Rules. *E.g.*, *In re Gary Dev. Co.*, 6 E.A.D. 526, 531-32 (EAB 1996); *In re Detroit Plastic Molding Co.*, 3 E.A.D. 103, 105-06 (CJO 1990). The latter case illustrates this principle. In *Detroit Plastic* an Administrative Law Judge ("ALJ") issued a prehearing order setting deadlines for the parties to file their prehearing exchanges. 3 E.A.D. at 104-05. The complainant fully responded by the deadline. *Id.* at 104. In contrast, the respondent in that case did not file its pre-hearing exchange until six days after the deadline, and the complainant did not receive a copy of the exchange until one month after the deadline. *Id.* at 104-05. The complainant moved for a default order and the respondent filed a timely response to the motion. *Id.* at 105. The excuse offered by the respondent

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[14] The Board also notes that in the Response to Order to Show Cause, Respondent's counsel does not repeat Mr. Udell's assertion that Respondent was unaware of the proposed default until October 2003.

[15] As we have observed, the above-cited Motion for Extension of Time was the first pleading filed on Respondent's behalf in this matter before the Board. Respondent's counsel of record made her appearance in this matter with the cover letter to that motion, showing counsel's name, address (with a United States address), and telephone number. *See* 40 C.F.R. § 22.5(c)(4). Respondent has not brought to the Board's attention the address of any other attorney for Respondent, such as an attorney operating in the Netherlands. *See id.* (continuing duty of a party to furnish the address for service of process); *see, e.g.*, *Antkiewicz*, 8 E.A.D. at 221 n.2; *In re Gary Dev. Co.*, 6 E.A.D. 526, 531 (EAB 1996).

was that the "press of business" had caused its attorney to overlook the deadline. *Id.* The ALJ entered a default order. *Id.*

On appeal, the Chief Judicial Officer rejected the respondent's explanation that its untimely compliance was due to counsel's oversight and the press of business:

> To satisfy the good cause requirements, it is not enough to attribute a default to mere neglect of counsel. A showing of good cause must point to some extenuating circumstance that excuses such neglect. The "press of business" is not an extenuating circumstance. Most attorneys work under the "press of business."

Id. at 106.

In the matter before the Board, Respondent did not respond in any manner until more than *three months* after the deadline to file an answer. This is substantially longer than the one month delay giving rise to the default in *Detroit Plastic.* Mr. Udell's Certification states that Respondent has not ignored this matter and that Respondent "[w]as unaware that a default was proposed to be entered until October of this year." Certification ¶ 12. Belying this statement, however, are Mr. Udell's own signatures on the certified mail receipts, on June 13, 2003, and August 29, 2003, thus indicating receipt of both the Complaint and the Motion for Default prior to October 2003.[16] *See* Complainant's Reply, Exs. A & B. Significantly, neither Mr. Udell nor Respondent challenge the authenticity of the signatures. *See* Respondent's SurReply at 2 n.1 (submitting that whether Mr. Udell received notice or whether either of the signatures belongs to Mr. Udell is irrelevant.) Accordingly, we find that service of process for the Complaint and the Motion for Default was perfected on June 13, 2003, and August 18, 2003, respectively. *See* 40 C.F.R. § 22.7(c) (service of a complaint is perfected upon receipt; service of a motion is perfected upon mailing).

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[16] The presiding adjudicator may rely on persuasive documentation over the statements of a party if the documentation possesses sufficient indicia of reliability and if the adjudicator, acting upon its fair judgment of the situation, finds the documentation to be more reliable than the party's statements. *In re Great Lakes Div. of Nat'l Steel Corp.*, 5 E.A.D. 355, 369-73 (EAB 1994) (in determining the time when a facility reported a release of hazardous substances, there was no error in relying on the government agency's records of the reporting time instead of a facility employee's recollections, the latter of which were unsupported by any notes, phone logs, or other potentially corroborating documentation). In the present case, Respondent's own signatures on the certified mail receipts and the postal receipt dates stamped thereon, speak clearly to the events that transpired. *See* Complainant's Reply, Exs. A & B.

Respondent attempts to shift blame for the default to its attorney in the Netherlands. *See* Respondent's Response ¶ 12; Respondent's SurReply at 2 n.1. In particular, as previously noted, Respondent states that it is unclear why it did not respond earlier, but adds, "Pyramid relied for its updates on its Netherlands's lawyer" and then cites to Mr. Udell's Certification as support. Respondent's Response ¶ 12 (citing Certification ¶¶ 9-10). The Certification, however, appears to be focused on the substance of the legal difficulties with the Dutch government — not with any failure to timely respond to the Complaint filed by the United States EPA. *See* Certification ¶¶ 9-10. The SurReply goes one step further by asserting, "Pyramid has said it believed it was addressing the complaint through counsel." Respondent's SurReply at 2 n.1.

Regardless of whether Respondent's attorney in the Netherlands was at fault, under our case law governing default determinations, the neglect of a party of a party's attorney does not excuse an untimely filing, nor does lack of willfulness, by itself, affect the determination. For instance, in the case of *Jiffy Builders*, a *pro se* litigant missed a deadline for filing its prehearing exchange. 8 E.A.D. 315, 317-21 (EAB 1999). Subsequently, on seeing that the party had retained an attorney, the presiding ALJ generously allowed another opportunity to file the exchange. *Id.* at 318-21. Despite retaining an attorney, however, the new deadline to file the exchange was missed yet again, and the ALJ issued a default order. *Id.* The Board held that lack of willful intent to delay proceedings is not, by itself, sufficient to excuse noncompliance. *Id.* at 321; *accord In re Rybond, Inc.*, 6 E.A.D. 614, 625 n.19 (EAB 1996); *Detroit Plastic*, 3 E.A.D. at 106-07.

Moreover, as for an attorney's negligence, under Board precedent an attorney stands in the shoes of his or her client, and ultimately, the client takes responsibility for the attorney's failings. *See, e.g., Jiffy Builders*, 8 E.A.D. at 321; *accord Detroit Plastic*, 3 E.A.D. at 106. The Board agrees, generally, with the principle that a client voluntarily chooses its attorney as its representative in an action and thus cannot avoid the consequences of the acts or omissions of its 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.'"[17] *Link v. Wabash R.R. Co.*, 370 U.S. 626, 633-34 (1962) (quoting *Smith v. Ayer*, 101 U.S. 320, 326 (1879)); *accord United States v. Boyle*, 469 U.S. 241, 249-52 (1985) (tax return must be timely filed regardless of whether a client entrusted its attorney with the duty to make a timely filing).

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[17] *But cf. In re B & L Plating, Inc.*, 11 E.A.D. 182, 191 n.15 (in dicta, recognizing an excuse for an untimely filing, where a party's attorney is so ill as to be incapacitated and does not have the opportunity to notify the adjudicator, the appropriate hearing clerk, or the client of his or her disabling condition).

Even assuming Respondent's attorney in the Netherlands was at fault, Respondent should have recognized its attorney's supposed neglect and taken matters into its own hands, by replacing its attorney or taking other appropriate action. Complainant sent the Motion for Default to Respondent's corporate address in Pennsylvania, as no counsel for Respondent had filed a notice of appearance before the Board. *See supra* Part II.B and note 15 with its accompanying text. Accordingly, the Motion for Default gave direct notice to Respondent that, as alleged by Complainant, no one had filed an answer on its behalf. Upon being informed of the alleged delinquency, Respondent could have promptly determined whether the allegation was true and brought this to the Board's attention. *Cf. In re Gary Dev. Co.*, 6 E.A.D. 526, 531 (EAB 1996) (client waived service of process by failing to provide the updated address for its attorney). Instead, as noted, there was no timely response to the Motion for Default and no documents were filed on Respondent's behalf in this case until after issuance of the Order to Show Cause. *Supra* Part II.B. Respondent has not brought to the Board's attention any extenuating circumstances that would rise to the level of "good cause" for excusing noncompliance with EPA's procedural requirements.[18] *See Detroit Plastic*, 3 E.A.D. at 106 ("A showing of good cause must point to some extenuating circumstance that excuses such neglect.").

As for the procedural posture of this case, Respondent waived its objections to the Motion for Default when it failed to timely file a response to that motion. 40 C.F.R. § 22.16(b) (waiver of objections to motions when no timely response is filed); *In re Thermal Reduction Co.*, 4 E.A.D. 128, 131 (EAB 1992) (party failed to timely respond to motion for default and thus waived any objections); *accord In re House Analysis & Assocs.*, 4 E.A.D. 501, 506 n.19 (EAB 1993). Nevertheless, in the interests of a full inquiry into "good cause" pursuant to 40 C.F.R. § 22.17(c), the Board will examine the appropriateness of the proposed default order based on the "totality of the circumstances." *Cf. Rybond*, 6 E.A.D. 614 (defaulting party failed to timely comply with multiple prehearing orders of an ALJ; on appeal, despite the default, the Board nevertheless conducted a detailed inquiry).

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[18] In a somewhat analogous context, the Board has recognized "special circumstances" to excuse an untimely appeal, such as the following: *In re Avon Custom Mixing Svcs.*, 10 E.A.D. 700, 703 n.6 (EAB 2002) (delay caused by mail sterilization); *In re AES Puerto Rico L.P.*, 8 E.A.D. 324, 329 (EAB 1999) (aircraft problems of an otherwise reliable overnight delivery service), *aff'd sub nom. Sur Contra La Contaminacion v. EPA*, 202 F.3d 443 (1st Cir. 2000). The aforementioned circumstances, as they are within the context of untimely appeals, may not necessarily hold true for excusing untimely answers, but they are instructive nonetheless.

E. *Respondent Has Not Proven a Strong Probability of Success on the Merits*

In considering the totality of the circumstances, it is permissible for the Board to find good cause not to enter a default order or, if applicable, to overturn a previously entered default order, provided that the defaulting party shows a strong probability of success on the merits. *Jiffy Builders*, 8 E.A.D. at 319, 322; *Rybond*, 6 E.A.D. at 625, 628; *see also In re Midwest Bank & Trust Co.*, 3 E.A.D. 696, 699 (CJO 1991). Before proceeding to our analysis of this aspect of the case, however, we will briefly describe the regulatory regime under which the present action was brought against Respondent, *infra* Part II.E.1, as well as the factual background that gave rise to the violations, *infra* Part II.E.2. In addition, we will briefly address Respondent's hearsay challenge to various documents from the Netherlands that accompanied Complainant's Motion for Default, *infra* Part II.E.3. The analysis of the merits of Respondent's case, *infra* Part II.E.4, goes through each of the three counts of the Complaint, ending with the conclusion that Respondent has not proven a strong probability of success on the merits. Finally, in Part II.F, the Board summarizes its consideration of the totality of the circumstances that go into the determination that there is no "good cause" for Respondent's default.

1. *Statutory and Regulatory Background*

a. *The Operative Regulatory Standards — State or Federal*

As this aspect of the decision necessarily involves an examination of Respondent's liability, in order to determine Respondent's probability of success on the merits, the Board must first determine the operative regulatory requirements — State or Federal — for each of the counts of the Complaint. The starting point for making this determination is to recognize that once EPA grants authorization to a State hazardous waste program, the State regulations operate in lieu of the Federal program and become the "[o]perative regulations *for those aspects of RCRA for which the state program is authorized*." *In re Consumers Scrap Recycling, Inc.*, 11 E.A.D. 269, 271 n.1 (EAB 2004) (emphasis added); *In re M.A. Bruder & Sons, Inc.*, 10 E.A.D. 598, 601 n.3 (EAB 2002) (same); *see also In re Hardin County, OH*, 4 E.A.D. 318, 320 (EAB 1992). Authorization does not, however, divest EPA of authority to bring an enforcement action in an authorized State; EPA has the authority pursuant to RCRA § 3008(a), 42 U.S.C. § 6928(a), to enforce any requirement of the *authorized* State program, as well as any Federal requirement that is not part of the authorized State program. *E.g.*, *In re Bil-Dry Corp.*, 9 E.A.D. 575, 577 n.2, 585 n.12 (EAB 2001); *In re Everwood Treatment Co.*, 6 E.A.D. 589, 593 n.5 (EAB 1996), *aff'd*, Civ. Action No. 96-1159-RV-M, 1998 WL 1674543 (S.D. Ala. Jan. 21, 1998); *see also Consumers Scrap Recycling*, 11 E.A.D. at 271 n.1; *M.A. Bruder*, 10 E.A.D. at 601 n.3. For instance, in *Bil-Dry* the Board applied Pennsylvania regulations in determining whether the

respondent had violated requirements that EPA had authorized Pennsylvania to implement, but at the same time the Board also applied the Federal regulations regarding requirements for which EPA had not granted authorization to Pennsylvania. 9 E.A.D. at 577 n.2, 585 n.12; *accord Everwood Treatment*, 6 E.A.D. at 593 n.5.

The operative requirements for purposes of this case are as follows.[19] For Count I, the operative requirements are found in the Pennsylvania regulation at 25 Pa. Code § 75.262(e) (promulgated by 12 Pa. Bull. 2980 (Sept. 4, 1982) and by 15 Pa. Bull. 3293 (Sept. 14, 1985)).[20] For Counts II and III, the operative requirements are the Code of Federal Regulations, at 40 C.F.R. part 262, as well as the self-implementing statutory provisions, at RCRA § 3017(a), (c), 42 U.S.C.

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[19] In addition to citing to the operative requirements, Complainant also cites to the Federal regulations in Count I, and cites to State regulations in Counts II and III. Complainant's surplus citations are, under our procedural rules, harmless error; Respondent's pleadings do not exhibit any reliance upon any of the surplus citations. *See In re Rybond, Inc.*, 6 E.A.D. 614, 628 n.21 (EAB 1996) (a complainant's pleading error is harmless and will be overlooked where the respondent has not asserted any prejudice resulting from the error); *In re Spang & Co.*, 6 E.A.D. 226, 234 (EAB 1995) (same); *Hardin County*, 4 E.A.D. at 324 n.8 (failure to cite to the Ohio regulations in the complaint was harmless error, since the respondent's evidentiary defense would be no different under the Ohio regulations than under the Federal regulations).

[20] In 1986, EPA granted final authorization to the Pennsylvania hazardous waste program, including the regulation at 25 Pa. Code § 75.262(e). Pennsylvania; Final Authorization of State Hazardous Waste Program, 51 Fed. Reg. 1791 (Jan. 15, 1986, effective Jan. 30, 1986) ("1986 Authorization"). Several years later, Pennsylvania promulgated a new version of the Pennsylvania hazardous waste program, including 25 Pa. Code part 262a (promulgated by 29 Pa. Bull. 2367 (Feb. 16, 1999)). Pennsylvania submitted a revised application in the year 2000 seeking authorization for the new version of the hazardous waste program. EPA granted final authorization, effective November 27, 2000. Pennsylvania: Final Authorization of State Hazardous Waste Management Program Revisions, 65 Fed. Reg. 57,734, 57,736 (Sept. 26, 2000, effective November 27, 2000) ("2000 Authorization").

The Count I violations occurred prior to the effective date of EPA's 2000 authorization. Complaint ¶ 50 (describing the events occurring from July 2000 through November 2000); 2000 Authorization, 65 Fed. Reg. at 57,736 (effective November 27, 2000). Even if some of the Count I violations occurred on or after the 2000 Authorization of the Pennsylvania program went into effect, any differences between the State regulations EPA authorized in 1986 and the State regulations EPA authorized in 2000 have no impact on the analysis herein. *Compare* 25 Pa. Code § 75.262(e) *with* 25 Pa. Code § 262a.20; *see also Rybond*, 6 E.A.D. at 618 n.6 (citing to one version of the Pennsylvania Code, rather than two versions, "[f]or ease of reference").

§ 6938(a), (c).[21,22]

b. *Substantive Requirements Regarding Hazardous Waste Manifesting and the Export of Hazardous Waste Under RCRA*

"RCRA is a comprehensive statute that empowers EPA to regulate hazardous wastes from cradle to grave, in accordance with the rigorous safeguards and waste management procedures of Subtitle C, 42 U.S.C. §§ 6921-6934." *City of Chicago v. Envtl. Def. Fund*, 511 U.S. 328, 331 (1994); *accord, e.g., In re Ashland Chem. Co.*, 3 E.A.D. 1, 9 (CJO 1989). A generator of hazardous waste who transports, or offers for transportation, hazardous waste for offsite treatment, storage, or disposal shall prepare a hazardous waste manifest according to the instructions set forth in the applicable regulations. 25 Pa. Code § 75.262(e) (general requirements for hazardous waste manifesting); *accord* 25 Pa. Code § 262a.20; *see also* 40 C.F.R. § 262.20(a) (the parallel EPA regulations, implementing RCRA § 3002, 42 U.S.C. § 6922); 40 C.F.R. part 262, Appendix. Hazardous waste manifests are important in establishing a clear record of generation, handling, and final disposition of hazardous waste. *Ashland*, 3 E.A.D. at 9. A generator of hazardous waste is subject to strict liability, for instance, for violations of hazardous waste manifest requirements. *Id.* at 10 & n.13 (generator was held liable for inadvertently listing the wrong facility identification number on the hazardous waste manifest).

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[21] As with Count I, the violation in Count II occurred prior to when EPA's 2000 Final Authorization became effective, and thus we turn to the 1986 Authorization. Complaint ¶ 59 (describing events occurring from July 2000 through November 2000); 2000 Authorization (effective November 27, 2000). EPA's 1986 Authorization did not, however, include authorization for Pennsylvania to implement any requirement of the Hazardous and Solid Waste Act Amendments of 1984 ("HSWA"). 1986 Authorization, 51 Fed. Reg. at 1793; *see also Bil-Dry*, 9 E.A.D. at 585 n.12. The HSWA added section 3017 to RCRA, 42 U.S.C. § 6938, which contains the statutory export requirements involved in Counts II and III. Hazardous Waste Management System; Exports of Hazardous Waste, 51 Fed. Reg. 8744, 8745 (Mar. 13, 1986) ("Preamble to Proposed Export Rule"). Counts II and III of the Complaint contain citations to the export requirements, many of which are self-implementing statutory provisions, as well as being embodied in the Code of Federal Regulations.

[22] The violation in Count III occurred after EPA's 2000 Authorization of the revised Pennsylvania hazardous waste program went into effect. Complaint ¶¶ 70-73 (describing events occurring from December 2000 through June 2001); 2000 Final Authorization (effective November 27, 2000). However, in Pennsylvania's application for authorization in 2000, Pennsylvania did not seek authorization to implement RCRA's export provisions. 2000 Authorization, 65 Fed. Reg. at 57,738. Accordingly, EPA announced that it would continue to implement the export regulations at part 262, subpart E, of the Code of Federal Regulations, as appropriate. *Id.* Therefore, for purposes of Count III, the operative regulations are at 40 C.F.R. part 262, subpart E.

Even if the Board were to treat the Pennsylvania regulation cited in Count III as the operative regulation, that Pennsylvania regulation — for the most part — incorporates by reference the requirements found in part 262 of the Code of Federal Regulations. 25 Pa. Code § 262a.10.

The export of hazardous waste represents a special situation calling for additional procedures beyond those presented by a purely domestic regulatory regime. Section 3017 of RCRA, 42 U.S.C. § 6938, and its implementing regulations under 40 C.F.R. part 262, set forth requirements governing the export of hazardous wastes. EPA's export regulations apply to a "primary exporter," which includes any person who is required to prepare a hazardous waste manifest. 40 C.F.R. § 262.51. A primary exporter of hazardous wastes shall, before such hazardous waste is scheduled to leave the United States, provide a detailed notification to EPA, in compliance with regulatory and statutory requirements. *Id.* § 262.53 (implementing RCRA § 3017(c), 42 U.S.C. § 6938(c)). Thereafter, EPA and the State Department forward the notification to the country that would receive the waste and request such receiving country to consent or object.[23] *Id.* § 262.53(e) (implementing RCRA § 3017(d), 42 U.S.C. § 6938(d)). As EPA explained in the Preamble to the export notification rule, "The purpose of this [export] notification is to provide sufficient information so that a receiving country can make an informed decision on whether to accept the waste and, if so, to manage it in an environmentally sound manner." Hazardous Waste Management System; Exports of Hazardous Waste, 51 Fed. Reg. 28,664, 28,672 (Aug. 8, 1986) ("Preamble to Final Export Rule"). Moreover, "The notification is also intended to ensure that environmental, public health, and U.S. foreign policy interests are safeguarded and to assist EPA in determining the amounts and ultimate destination of exports of U.S. generated hazardous waste so as to enable EPA and Congress to gauge whether the right to export is being abused." *Id.* If the receiving country consents, EPA will forward an "EPA Acknowledgment of Consent" to the exporter. 40 C.F.R. § 262.53(f) (implementing RCRA § 3017(e), 42 U.S.C. § 6938(e)). A primary exporter cannot export the hazardous wastes unless that person has given the required notification to EPA, the receiving country has consented, a copy of the EPA Acknowledgment of Consent accompanies the shipment, and the shipment conforms to the receiving country's written consent as reflected in the EPA Acknowledgment of Consent. *Id.* § 262.52 (codifying the requirements of RCRA § 3017(a), 42 U.S.C. § 6938(a)).

When hazardous waste is exported, special manifest requirements also apply, pursuant to 40 C.F.R. § 262.54, including the requirement under 40 C.F.R. § 262.54(g), which is triggered if the hazardous waste shipment cannot be delivered for any reason to the designated or alternate consignee. A "consignee" is "the ultimate treatment, storage or disposal facility in a receiving country to which the hazardous waste will be sent." *Id.* § 262.51. If delivery cannot be made, the primary exporter must either (1) provide notice and obtain an EPA Acknowledgment of Consent, to allow shipment to a new consignee; or (2) instruct the transporter

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[23] A "receiving country" is "a foreign country to which a hazardous waste is sent for the purpose of treatment, storage or disposal (except short-term storage incidental to transportation)." 40 C.F.R. § 262.51.

to return the waste to the exporter in the United States; or (3) designate another facility within the United States. *Id.* § 262.54(g)(1)-(2); *see also* Hazardous Waste Management System; Exports of Hazardous Waste, 51 Fed. Reg. 8744, 8751 (Mar. 13, 1986) ("Preamble to Proposed Export Rule"). "The [] regulation also requires the primary exporter to instruct the transporter to revise the manifest in accordance with the exporter's instructions regarding where the waste should be taken." Preamble to Proposed Export Rule, 51 Fed. Reg. at 8751 (discussing 40 C.F.R. § 262.54(g)(3)). The requirement of 40 C.F.R. § 262.54(g) "[i]s intended to place the responsibility on the exporter for hazardous waste that cannot be delivered to a facility to which the foreign country has consented pursuant to the original notification." *Id.* Moreover, "The diplomatic ramifications of improper shipments of United States' wastes could have a significant impact on the United States as a responsible member of the international community." Preamble to Final Export Rule, 51 Fed. Reg. at 28,676.

2. *Factual Background*

Respondent is the "person" who owned and operated the two-building warehouse known as the Nittany Warehouse at 16 and 22 High Street, Pottstown, Pennsylvania ("Facility"), and Respondent was at all times relevant to the Complaint a "generator" of hazardous waste, within the meaning of 40 C.F.R. § 260.10 and 25 Pa. Code §§ 75.260, .262. Complaint ¶¶ 1-5.

On April 4, 2000, EPA conducted a removal assessment in accordance with the National Contingency Plan of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9675, after finding over 2,000 drums at the Facility, many of which were allegedly in poor condition with labels such as "flammables," "corrosives," "oxidizers," and "poisons." Complaint ¶ 10. On July 14, 2000, Respondent entered into an Administrative Order on Consent ("Consent Order") with U.S. EPA Region III to clean up hazardous substances and flammable materials located at the Facility. *Id.* ¶ 14.

Respondent states that, shortly after entering into the Consent Order, Respondent sent materials from its Facility to a transport agency in the Netherlands, for ultimate transport to a foreign buyer. Certification ¶ 4. Respondent's own briefs refer to the shipped material as "hazardous wastes." Respondent's Response ¶ 4; Respondent's Response, Ex. B (Final Closure Report, Pyramid Chemical Site, 2 & 22 High St., Pottstown, PA, at 5 (Feb. 14, 2000)) ("Final Closure Report") (stating that most of the materials had already been designated as "waste"); Respondent's Response, Ex. C *passim* (Bills of Lading) (describing several of the materials as "hazardous"). Respondent is not disputing that, beginning on July 21, 2000, Respondent sent twenty-nine (29) forty-foot ocean shipping containers from the Facility to Rotterdam, the Netherlands, in several shipments from at least July through November 2000, and that the containers were then stored at the European Combined Terminal in Rotterdam. Complaint ¶ 15.

After inspecting Respondent's containers and finding them to be leaking in August of 2000 (Certification ¶ 7; Complaint ¶¶ 17-18, 20-21), the Netherlands Environment Ministry, on June 11, 2001, and January 13, 2003, ordered Respondent to either return the twenty-nine (29) containers to the United States or remove the materials in an environmentally hygienic way. Motion for Default, Ex. D ("Decision on Objection," from G.J.R. Wolters, Inspector General for Housing, Spatial Planning and the Environment for the Minister, Directorate for Administrative Matters, General Enforcement, to Pyramid Sales Company, 54 North Ridge Avenue, Ambler, PA 19002) at 2-3 (dated Dec. 20, 2002; sent Jan. 13, 2003) ("Decision of the Netherlands").[24] If Respondent failed to carry out the order, the Netherlands Environment Ministry would have the materials removed with costs to be recovered from Respondent. Complaint ¶ 22; *see also* Certification ¶ 7. Respondent states that Respondent was ready to remove the shipments from the Netherlands, and in fact had a "Form M" to do so, dated August 3, 2000, and approved by the government of Nigeria. Certification ¶ 7 (referring to Respondent's Response, Ex. D (Federal Republic of Nigeria, Foreign Exchange (Monitoring and Miscellaneous Provisions Decree), Form M (Aug. 3, 2000)) ("Form M").

The Netherlands gave Respondent the opportunity to arrange for a buyer for the materials. Complaint ¶ 22. Regarding the potential shipment of Respondent's materials to Nigeria, Complainant makes the following allegations. In December 2000, Respondent sent the Netherlands Environment Ministry a copy of an invoice dated December 13, 2000, listing a company by the name of "Doris Bon Nigeria Limited" as the buyer of Respondent's containers of "Merchandise of Auction Sale on Lot Basis." *Id.* ¶ 30. On April 19, 2001, the Nigerian Federal Ministry of the Environment ("Nigerian Ministry"), in response to an inquiry from the Netherlands Environment Ministry, began an investigation into the planned consignment of the 29 containers to "Doris Bon Nigeria, Ltd., 20 Palm Avenue, 3^{d} Floor, Muslin, Lagos." *Id.* ¶ 34. On April 23, 2001, the Nigerian Ministry sent a letter to the Netherlands Environment Ministry giving notice that it was unable to locate Doris Bon Nigeria. *Id.* ¶ 35.

The Netherlands refused to allow the transport of the materials to Nigeria. Certification ¶¶ 7-9, 11; Decision of the Netherlands at 3. After the Netherlands had investigated the matter in conjunction with Nigerian authorities, Nigeria reportedly withdrew approval to transport the materials to Nigeria. *Id.* Respondent does not dispute that Nigeria withdrew its approval for the wastes; instead, Respondent focuses on Nigeria's initial issuance of the Form M on August 3, 2000, and Respondent's subsequent application for another Form M from Nigeria in December of 2000. *See* Certification ¶¶ 7, 11.

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[24] As discussed in detail, *infra* Part II.E.3 and II.G, the Board denies Respondent's request that the above-cited Netherlands document be held inadmissible as hearsay.

Respondent's shipped materials were stored at the European Combined Terminal in Rotterdam, the Netherlands, until approximately April 2004, when the Netherlands (or its agent) completed its cleanup of Respondent's shipped materials. Complainant's Additional Information at 2.

3. *Hearsay Challenge to Documents from the Netherlands*

Respondent challenges the admissibility of documents from the Netherlands, which are attached to the Motion for Default, arguing, "These documents are and would be inadmissible in court for any evidentiary purposes, as they are unsworn, they are hearsay themselves and they contain hearsay." Respondent's Response ¶ 2. Moreover, Respondent disputes their accuracy. *Id.*

Generally, hearsay is admissible in administrative law proceedings. *See, e.g., Richardson v. Perales*, 402 U.S. 389, 402 (1971). The Consolidated Rules, which are binding on these proceedings, provide that the adjudicator "shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value * * * ." 40 C.F.R. § 22.22(a). We have held, "Hearsay evidence is clearly admissible under the liberal standards for admissibility in the [Consolidated Rules], which are not subject to the stricter Federal Rules of Evidence." *In re William E. Comley, Inc.*, 11 E.A.D. 247, 266 (EAB 2004); *accord, e.g., In re Great Lakes Div. of Nat'l Steel Corp.*, 5 E.A.D. 355, 368-70 (EAB 1994). Accordingly, the documents Respondent challenges as hearsay are not to be excluded unless they are irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value. Significantly, Respondent does not specify what aspects of the challenged documents are irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value. Nevertheless, the Board need not rely upon the documents from the Netherlands in its inquiry into Respondent's liability, and the Board uses the challenged documents for the limited purpose of reviewing the proposed compliance order, as discussed in detail, *infra* Part II.G.

4. *Analysis of Respondent's Likelihood of Success on the Merits*

As discussed further, below, Count I of the Complaint charged shipment without a hazardous waste manifest, Count II charged shipment to a foreign country without notification and without consent, and Count III charged violation of special manifest requirements. Respondent challenges its liability for all three counts.

a. *Count I — Shipment of Hazardous Waste Without a Hazardous Waste Manifest*

In Count I, Complainant alleges that from July through November 2000, Respondent shipped hazardous waste from Pottstown, Pennsylvania to the Foreign Trade Zone in Rotterdam, the Netherlands, without the requisite hazardous

waste manifest and that Respondent failed to prepare such a manifest, in violation of 25 Pa. Code § 75.262(e) (and in violation of 40 C.F.R. § 262.20).[25] Complaint ¶¶ 50-51.

In opposition, Respondent points to bills of lading that indicate certain materials to be "hazardous," Respondent's Response ¶ 8 (citing Certification ¶ 6; Respondent's Response, Ex. C (Bills of Lading)), and asserts that the Final Closure Report its contractor prepared, concerning the Facility, certified that all shipments were fully identified, properly packaged, and labeled, and that the shipments fully complied with both national and international requirements.[26] *Id.* ¶ 9 (citing Certification ¶ 5; Final Closure Report at 5). Respondent contends that it has every reason to rely on its contractor to ensure that all permits and manifests were correct. *Id.* Moreover, Respondent asserts that EPA accepted the actions reflected in the Final Closure Report and that this contradicts the allegations of failure to prepare manifests. *Id.* (citing Respondent's Response, Ex. B (Letter from Joseph S. Arena, OSC, EPA Region III, to Nittany Warehouse, LP and Pyramid Chemical Sales Co. (dated Aug. 8, 2001)) ("EPA Response to Final Closure Report").

A generator who transports, or offers for transportation, a shipment of hazardous waste for offsite treatment, storage, or disposal must complete a hazardous waste manifest before the waste is transported offsite. 25 Pa. Code § 75.262(e); *accord* 40 C.F.R. § 262.20(a). At a minimum, a generator must prepare a hazardous waste manifest with information including, but not limited to, the following: name, mailing address, and EPA identification number of the generator, the transporter, and the facility; the unique five-digit number assigned to the manifest by the generator; a United States Department of Transportation ("DOT") description, including proper shipping name, hazard class, and identification numbers for the wastes; special handling instructions; and the generator's certification of accuracy and other requirements. 25 Pa. Code § 75.262(e); *accord* 40 C.F.R. part 262, Appendix (instructions for "Uniform Hazardous Waste Manifest").

The bills of lading made available to the Board do describe certain materials as being hazardous, along with what appears to be the hazard class and identifica-

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[25] As discussed previously, *supra* Part II.E.1.a, the above-cited Pennsylvania regulation is the operative regulation as to Count I.

[26] Specifically, the Final Closure Report asserts that prior to any shipment, all containers were fully identified, properly packaged, labeled, and documented in compliance with all applicable U.S. Department of Transportation regulations and, in the case of international shipments, United Nations shipping regulations. Final Closure Report at 5. Department of Transportation regulations require, *inter alia*, that the generator prepare a hazardous waste manifest in accordance with 40 C.F.R. part 262 and that no person may offer, transport, transfer, or deliver a hazardous waste unless a hazardous waste manifest is prepared in accordance with 40 C.F.R. § 262.20. 49 C.F.R. § 172.205(a)-(b).

tion number.[27] Respondent's Response, Ex. C (Bills of Lading). However, the bills of lading lack much of the information mandated by the hazardous waste manifest requirements. For instance, none of the bills of lading shows the name of the generator, the generator's mailing address, the identification number of the generator, the identification number of the facility designated to receive the waste, or the generator's certification of accuracy, among other omissions. *See id.*

Respondent argues that its contractor's Final Closure Report and EPA's response thereto contradict the Complainant's allegations and show that Respondent reasonably relied upon its contractor. Although the Final Closure Report mentions "waste manifest records," Final Disclosure Report at 7, Respondent has not provided such waste manifest records to the Board, nor has Respondent provided any documents to the Board proving compliance with the regulatory requirements for hazardous waste manifests.[28] Also, EPA's letter in response to the Final Closure Report makes no mention of receiving any hazardous waste manifest. *See* EPA Response to Final Closure Report. EPA's letter merely states that all requirements of the Response Action Plan have been completed. *Id.* Actual shipment of the hazardous waste is a separate matter and must be supported by the requisite manifest form. *See* 25 Pa. Code § 75.262(e) (providing that a generator who transports, or offers for transportation, hazardous waste for offsite treatment, storage, or disposal must obtain the appropriate hazardous waste manifest form and prepare such manifest according to the instructions supplied with the manifest); *accord* 40 C.F.R. § 262.20(a). Failure to prepare or properly prepare a hazardous waste manifest for a shipment of such waste is a strict liability offense. *In re Ashland Chem. Co.*, 3 E.A.D. 1, 10 n.13 (CJO 1989) (generator was liable for inadvertently listing the wrong EPA facility identification number on the manifest). "[T]he burden of complying with the manifest requirements rests squarely on the generator." *Id.* (citing 43 Fed. Reg. 58,945, 58,973 (Dec. 18, 1978)). Therefore, Respondent cannot avoid its responsibility by blaming its contractor. *See id.* The bills of lading provided by Respondent clearly do not fulfill the requirements of the hazardous waste manifest. Accordingly, regarding Count I, Respondent has not proven a strong likelihood of success on the merits.

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[27] For example, under description of packages and goods, one of the bills of lading reads: "266 PKGS VARIOUS NON-HAZ CHEMICALS AND 2 DRUMS FLAMMABLE LIQUID, N.O.S., (DOWANOL DM CONTAINING METHYL CELLOSOLVE), CLASS 3, UN1993, PGIII[;] 151 PACKAGES AS FOLLOWS: 129 PKGS VARIOUS NON-HAZ CHEMICALS 18 DRUMS ENVIRONMENTALLY HAZARDOUS SUBSTANCE, SOLID, N.O.S. (LEAD BARIUM SILICO SULFATE COMPLEX), CLASS 9, UN3077, PGIII * * * ." Respondent's Response, Ex. C.

[28] The Final Closure Report does include a *list* of manifests for several shipments, which indicate the shipment dates and the name of the disposal companies. Final Closure Report, Attach. 1. However, the list of manifests does not mention the names of any of the companies the parties have cited as being recipients, or potential recipients, of Respondent's materials, such as: Kopf and Luben; Cho Yang Shippers; Distribution Masters International; VIO & C; and, Doris Bon Nigeria, Ltd. *See id.*

b. *Count II — Export of Hazardous Waste Without Notification to EPA, Without Consent of the Receiving Country, and Without an EPA Acknowledgment of Consent*

Export requirements apply to a "primary exporter," which includes any person who is required to prepare a hazardous waste manifest, 40 C.F.R. § 262.51, and thus includes generators who export hazardous waste.[29] *See id.*; *see also* 25 Pa. Code § 75.262(*o*). As Respondent was required to prepare a hazardous waste manifest, Respondent is a "primary exporter." *See* 40 C.F.R. § 262.51; *see also* 25 Pa. Code § 75.262(*o*). A primary exporter cannot export the hazardous wastes to a foreign country unless that person has given the required notification to EPA, the receiving country has consented, a copy of the EPA Acknowledgment of Consent accompanies the shipment, and the shipment conforms to the receiving country's written consent as reflected in the EPA Acknowledgment of Consent. 40 C.F.R. § 262.52 (codifying RCRA § 3017(a), 42 U.S.C. § 6938(a)). A primary exporter must provide the notification to EPA before the initial shipment is intended to be shipped offsite. 40 C.F.R. § 262.53(a); *see also* 25 Pa. Code § 75.262(*o*).

Count II alleges that from July through November 2000, Respondent exported twenty-nine (29) shipping containers of hazardous waste from Pottstown, Pennsylvania to the Foreign Trade Zone in Rotterdam, the Netherlands, and failed to provide notification of intent to export to EPA. Complaint ¶ 56. Complainant further alleges that Respondent did not seek consent from the Dutch government to export the 29 shipping containers of hazardous waste to the Netherlands. *Id.* ¶ 57. Moreover, Complainant alleges that, from July through November 2000, Respondent exported the 29 shipping containers of hazardous waste from Pottstown, Pennsylvania without the Acknowledgment of Consent from EPA. *Id.* ¶ 59.

Respondent contends that its shipments of hazardous wastes out of the country were undertaken pursuant to an EPA administrative order on consent, under EPA oversight, as part of the Response Action Plan for the Facility. Respondent's Response ¶¶ 3-6. Respondent makes no claim, however, to having received consent from the Netherlands for the export.

If the EPA administrative order on consent truly shows that Respondent gave EPA notice of intent to export and that the Netherlands had consented, Respondent could have easily provided the Board with a copy of such order, yet Respondent has not done so. The Final Closure Report, which Respondent did

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[29] The full definition of "primary exporter" is "any person who is required to originate the manifest for a shipment of hazardous waste in accordance with 40 C.F.R. part 262, subpart B, or equivalent State provision, which specifies a treatment, storage, or disposal facility in a receiving country as the facility to which the hazardous waste will be sent and any intermediary arranging for the export." 40 C.F.R. § 262.51.

provide to the Board and was prepared by Respondent's own contractor, does not indicate any notice of intent to export, nor does it include an EPA Acknowledgment of Consent to export. Moreover, EPA's Response to the Final Closure Report, likewise, does not exhibit any consent to export from EPA or the Netherlands, nor does any other document in the record before the Board. Accordingly, regarding Count II, Respondent has not shown a strong likelihood of success on the merits.

c. *Count III — Violation of Special Manifest Requirements*

Under the general hazardous waste manifest requirements, a generator who transports, or offers for transportation, hazardous waste for treatment, storage, or disposal must prepare a hazardous waste manifest. 40 C.F.R. § 262.20(a); *accord* 25 Pa. Code § 262a.20. The generator, under the general manifest requirements, must designate on the hazardous waste manifest a treatment, storage, or disposal facility permitted to handle the waste described on the manifest. 40 C.F.R. part 262, Appendix (instructions for the Uniform Hazardous Waste Manifest); *see also* 25 Pa. Code § 262a.20. Pursuant to Federal regulations, the generator may also designate on the manifest one alternate facility which is permitted to handle the waste in the event an emergency prevents delivery of the waste to the primary designated facility.[30] 40 C.F.R. § 262.20(b). In the event that the transporter is unable to deliver the hazardous waste to the designated or alternate facility, the generator must either designate another facility or instruct the transporter to return the waste. *Id.* § 262.20(d).

As previously discussed, generators exporting hazardous waste, in addition to or in lieu of complying with the general manifest requirements, must also comply with certain special manifest requirements, which apply to exports of hazardous waste, in light of the special circumstances relative to such shipments. 40 C.F.R. §§ 262.50, .54; Preamble to Final Export Rule, 51 Fed. Reg. 28,664, 28,676.

The term "consignee," within the context of the applicable regulations, means "the ultimate treatment, storage or disposal facility in a receiving country to which the hazardous waste will be sent." 40 C.F.R. § 262.51. Accordingly, the role of a consignee in the export regulations parallels the role of the treatment, storage, and disposal facility under the general manifest requirements governing domestic transports. *Compare* 40 C.F.R. § 262.20 (general manifest requirements)

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[30] Pennsylvania's general hazardous waste manifest regulation is stricter than the minimum federal requirements by not allowing designation of an alternate facility permitted to handle the waste described on the manifest. 25 Pa. Code § 262a.20(5) ("A generator shall designate only one permitted facility to handle the waste described on the manifest.").

and 25 Pa. Code § 262a.20 (same) *with* 40 C.F.R. part 262, subpart E (export requirements).

The special manifest requirement at issue in Count III — 40 C.F.R. § 262.54(g)[31] — provides procedures to follow when the transporter cannot deliver the hazardous waste to the designated or alternate treatment, storage, and disposal facility. A delivery problem involving the export of hazardous waste triggers the special manifest requirement of 40 C.F.R. § 262.54(g). *Id.*

Specifically,

> A primary exporter must comply with the manifest requirements of 40 C.F.R. 262.20 through 262.23 except that:
>
> * * *
>
> (g) In lieu of the requirements of § 262.20(d), where a shipment cannot be delivered for any reason to the designated or alternate consignee, the primary exporter must:
>
> (1) Renotify EPA of a change in the conditions of the original notification to allow shipment to a new consignee in accordance with § 262.53(c) and obtain an EPA Acknowledgment of Consent prior to delivery; or
>
> (2) Instruct the transporter to return the waste to the primary exporter in the United States or designate another facility within the United States; *and*
>
> (3) Instruct the transporter to revise the manifest in accordance with the primary exporter's instructions.

Id. § 262.54 (emphasis added). Thus, the special manifest requirement, under subsections (g)(1) and (2), gives a generator three choices: provide notice and obtain an EPA Acknowledgment of Consent for the change in conditions in the original notification to allow shipment to a new consignee; or, instruct the transporter to return the waste to the primary exporter (such as the generator) in the United States; or, designate another facility within the United States to receive the hazardous waste. Preamble to Proposed Export Rule, 51 Fed. Reg. 8744, 8751; 40 C.F.R. § 262.54(g)(1), (2). In addition to the choices given, "The []regulation also

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[31] As discussed, *supra* Part II.E.1.a, the Code of Federal Regulations contain the operative regulations as to the special manifest allegation in Count III.

requires the [generator] to instruct the transporter to revise the manifest in accordance with the exporter's instructions regarding where the waste should be taken." Preamble to Proposed Export Rule, 51 Fed. Reg. at 8751 (discussing 40 C.F.R. § 262.54(g)(3)).

Count III alleges that since the shipments of hazardous wastes could not be delivered to the designated or alternate consignee, Respondent was required to follow the requirements under 40 C.F.R. § 262.54(g).[32] Complaint ¶ 74. Specifically, Complainant alleges that Respondent failed, *inter alia*, to instruct the transporter to return the wastes to the United States. *Id.* ¶ 75.

When the shipment could not be delivered, it was incumbent upon Respondent to abide by the special manifest requirement, which is triggered when delivery cannot be accomplished "for any reason." 40 C.F.R. § 262.54(g). There is no dispute that Respondent did not instruct the transporter to return the waste to itself in the United States or to another facility within the United States. *See id.* § 262.54(g)(2). The third route of compliance, which entails shipping the hazardous waste to a new consignee, requires the generator to notify EPA in accordance with 40 C.F.R. § 262.53(c) and to obtain an EPA Acknowledgment of Consent prior to delivery. *Id.* § 262.54(g)(1). There is no such notification or Acknowledgment in the record before the Board. Accordingly, as with the other counts, Respondent has not proven a strong likelihood of success on the merits.

F. *Totality of the Circumstances*

Taking into account the totality of the circumstances, the Board concludes default is appropriate as to all counts. In particular, Respondent provides no valid excuse for its untimeliness and has not proven a strong likelihood of success on the merits. In its defense, Respondent emphasizes that it seeks not to set aside a default, but rather to prevent a default from being entered in the first place. Respondent's SurReply at 2. Moreover, Respondent states that it "[s]tands ready to answer the complaint * * * ." *Id.*

The Board recognizes that Respondent seeks to avoid default and takes that into account. Nevertheless, the Board has made clear that it reserves its finite resources for those parties who are diligent enough to comply with EPA's procedural rules. *In re B & L Plating, Inc.*, 11 E.A.D. 183, 190-91 (EAB 2003); *In re Gary Dev. Co.*, 6 E.A.D. 526, 533-34 (EAB 1996); *see also In re Jiffy Builders,*

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[32] Arguably, one might contend that the violation in Count III was dependent upon Respondent having prepared a manifest specifying the consignee(s). Nevertheless, Respondent does not make such an argument in this situation in which the burden is upon Respondent to prove a strong likelihood of success on the merits. *Cf. In re Rochester Public Utilities*, 11 E.A.D. 593, 599 (EAB 2003) ("It is not our duty in an adversarial proceeding to comb the record and make a party's argument for it.") (quoting *In re Phelps Dodge Corp.*, 10 E.A.D. 460, 507 n.39 (EAB 2002)).

Inc., 8 E.A.D. 315, 320 (EAB 1999) ("[d]efault is an essential ingredient in the efficient administration of the adjudicatory process").

Although Respondent *now* "stands ready to answer the Complaint," this is no excuse for its earlier failure to do so, as Respondent could have submitted either an answer or a proposed answer that fully responded to the allegations of the complaint but still has not done so. Indeed, the Board granted Respondent's request for an extension of time to respond to our Order to Show Cause, to which it ultimately filed a response that challenged some of the merits of the charges, yet neglected to respond to each of the allegations in the Complaint and the Motion for Default. Under the totality of the circumstances, there is no "good cause" for Respondent's failure to file a timely answer to the Complaint, and no procedural unfairness results from entering a default judgment against Respondent. The Board has reviewed the allegations in the Complaint and the Motion for Default, and adopts those allegations as the Board's findings, except as they would conflict with any statements or directives within this decision.

G. *Review of the Compliance Order*

Section 22.15 of the Consolidated Rules requires a respondent to file an answer to the complaint within thirty (30) days after service of the complaint, which shall, *inter alia*, state the basis for opposing any proposed relief, such as a proposed compliance order, and state whether any hearing is requested. 40 C.F.R. § 22.15. In the present case, as we know, Respondent did not file an answer to the Complaint, much less file a timely request for a hearing. This failure to timely request a hearing raises an issue unique to RCRA and the Consolidated Rules. Specifically, with particular regard to RCRA enforcement proceedings, the Consolidated Rules contain a supplemental rule, at 40 C.F.R. § 22.37, applicable to compliance orders issued under section 3008(a) of RCRA, 42 U.S.C. § 6928(a). This supplemental rule provides that a compliance order "shall automatically become a final order unless, no later than 30 days after the order is served, the respondent requests a hearing pursuant to § 22.15." 40 C.F.R. § 22.37(b). The supplemental rule implements RCRA § 3008(b), 42 U.S.C. § 6928(b), which expressly states that a compliance order "[s]hall become final unless, no later than thirty days after the order is served, the person or persons named therein request a public hearing." Accordingly, because Respondent never filed an answer to the Complaint, much less filed a timely request for a hearing, Complainant's Compliance Order became a final order. *See* 40 C.F.R. § 22.37(b).

Notwithstanding the finality of the Compliance Order, the Complainant chose to file a Motion for Default with the Board requesting the issuance of a default order that would include the Compliance Order and that would resolve the

case and the allegations set forth in the Complaint.[33] Motion for Default at 7. Accordingly, in acting upon this request, the Board will, as contemplated by 40 C.F.R. § 22.17(c), review the requested relief to ensure that it would not be "clearly inconsistent with the record of proceeding or the Act." In keeping with this provision, when requested by a Complainant to issue a default order notwithstanding the finality of Complainant's order, the Board will set aside or modify the relief directed by the default compliance order in limited circumstances, such as where the outcome would be manifestly unjust in view of the record of the proceeding and the precepts of the Act.[34] *See* 40 C.F.R. § 22.4(a)(2) (Board may do all acts and take all measures as are necessary for the efficient, fair, and impartial adjudication of issues arising in a proceeding). *See also In re A.Y. McDonald Indus.*, 2 E.A.D. 402, 428 (CJO 1987); *In re Arrcom, Inc.*, 2 E.A.D. 203, 210-214 (CJO 1986). Accordingly, the Board concludes that, having been requested to issue a default order in this matter, it may exercise limited review over Complainant's Compliance Order.[35] *Cf., e.g., Sec'y of Labor, Mine Safety, and Health Admin. v. Contractors Sand & Gravel, Inc.*, Docket Nos. WEST 2000-421-M through WEST 2000-427-M, 23 FMSHRC 570, 2001 WL 717664 (Fed. Mine Safety & Health Review Comm'n, June 15, 2001) (order reopening default orders and final penalty assessments by using Federal Rule of Civil Procedure 60 as guidance). As discussed below, within the context of exercising limited review authority over this particular Compliance Order, the Board concludes that, except for terms rendered moot due to new developments, the terms of the Compliance Order remain operative and in effect.

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[33] Section 22.17 of the Consolidated Rules anticipates that a party may be found in default "after motion" for, *inter alia*, failure to file an answer to the complaint. 40 C.F.R. § 22.17. This section provided the basis for Complainant's Motion for Default. Complainant's Memorandum in Support of Motion for Default at 2.

[34] An analog to this type of review can be found in the federal court system, which, in Federal Rule of Civil Procedure 60 ("Rule 60") allows for the setting aside of final judgments and orders in appropriate circumstances. Fed. R. Civ. Pro. 60; *see also* Wright & Miller, Fed. Practice & Procedure §§ 2692, 2857-2866 (discussing Rule 60). For instance, Rule 60 provides that courts may relieve a party from a final judgment or order for reasons including that "[i]t is no longer equitable that the judgment should have prospective application." Under Rule 60, other bases for overturning final judgments or orders include: fraud, misrepresentation, or other misconduct of an adverse party; newly discovered evidence that by due diligence could not have been discovered in time to move for a new trial, and; clerical mistakes, arising from the court's oversight or omission. Fed. R. Civ. Pro. 60(a)-(b). Although the Board is not bound by the Federal Rules of Civil Procedure, the Board may, in its discretion, refer to the Federal Rules of Civil Procedure for guidance when interpreting EPA[1]s procedural rules. *In re B & L Plating, Inc.*, 11 E.A.D. 183, 188-89 n.10 (EAB 2003).

[35] Pursuant to delegated authority from the Administrator of EPA, the Board is authorized to "issue final orders under the SWDA [RCRA] which revoke or suspend permits, assess penalties, and require compliance." EPA Delegations Manual (Delegation 8-9-C, Administrative Enforcement: Issuance of Consent Orders and Final Orders, Jan. 24, 1992). *See generally* 40 C.F.R. § 22.4(a) (describing, *inter alia*, Board's powers and duties).

Complainant states that the Netherlands has completed the cleanup of the materials Respondent had shipped, and Complainant has attached copies of orders and bills paid by the Dutch government for the cleanup.[36] The latter new development moots the Compliance Order's terms giving Respondent the option to remove or otherwise dispose of the materials. *See infra* Appendix A, at A.(1)-(2). However, the Compliance Order also provides that Respondent would reimburse the Netherlands Environment Ministry, or its designated agent, for all costs associated with the disposal — including but not limited to storage, waste characterization, repackaging, removal, and treatment — of all or part of the materials Respondent sent to the Netherlands and that were stored at the European Combined Terminal. *Id.* at A.(3). The Netherlands' cleanup of Respondent's materials does not moot the reimbursement requirement.[37]

As discussed previously, by reason of default Respondent's liability is established as to the export of hazardous waste without the requisite hazardous waste manifest, without proper notification to EPA, without consent of the receiving country, and for failure to follow the special manifest requirement when delivery could not be accomplished. It is clear that hazardous waste manifests are important in establishing a clear record of generation, handling, and final disposition of hazardous waste.[38] *In re Ashland Chem. Co.*, 3 E.A.D. 1, 9 (CJO 1989). The export without consent violation, in particular, deprived the Netherlands and EPA of the opportunity to deny the export or to impose conditions on the export, such as those that might have safeguarded the shipment. *See* RCRA § 3017, 42 U.S.C. § 6938; 40 C.F.R. §§ 262.52, .53 (regarding the authority to object or impose terms of consent on an export of hazardous waste). As it now stands, the Netherlands has issued detailed findings that Respondent's hazardous wastes had been

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[36] Complainant states that it is providing additional information so that the Board is aware of the current status of the materials owned by Respondent that are the subject of this case. Complainant's Submission of Additional Information to the Motion for Default at 2 (filed June 1, 2004) ("Complainant's Additional Information").

Documents the Netherlands has provided to Complainant indicate total costs of 1,017,557.30 Euros, incurred by the Dutch government. *Id.*, Ex. C ("Annex A: Specification of costs VROM Inspectorate administrative order in case 'Pyramid'"). Dutch authorities have put on hold their financial recovery action pending the outcome of Complainant's actions. Complainant's Additional Information at 2. Complainant states that, in the interest of international cooperation, Complainant is eager to take the next steps necessary to see that the Dutch government is reimbursed for the costs incurred in relation to Respondent's illegal export of hazardous waste. *Id.* at 2-3. The Board makes no determination of the amount of reimbursement that may be collected.

[37] Respondent does not contend that the new information makes the Compliance Order no longer viable. *See* Respondent's Response to Complainant's Submission of Additional Information (filed June 24, 2004).

[38] "[P]reparation and maintenance of manifests are vital to ensure that hazardous waste is not mishandled * * * ." *RCRA Civil Penalty Policy* 14 (June 2003), *available at*: http://www.epa.gov/compliance/resources/policies/civil/rcra /rcpp2003-fnl.pdf.

leaking. Motion for Default, Ex. D ("Decision on Objection," from G.J.R. Wolters, Inspector General for Housing, Spatial Planning and the Environment for the Minister, Directorate for Administrative Matters, General Enforcement, to Pyramid Sales Company, 54 North Ridge Avenue, Ambler, PA 19002) at 3 (dated Dec. 20, 2002, sent on Jan. 13, 2003) ("Decision of the Netherlands"). Significantly, Respondent does not dispute that its shipment of hazardous waste leaked.[39] Furthermore, Respondent does not specify what aspects of the Decision of the Netherlands are irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value. *See* 40 C.F.R. § 22.22(a) (evidence that is not repetitious, unreliable, or of little probative value shall be admitted); *see also supra* Part II.E.3. The Decision of the Netherlands appears to be an official government decision, and it appears to be sufficiently reliable for the Board's consideration. *See In re Great Lakes Div. of Nat'l Steel Corp.*, 5 E.A.D. 355, 368-73 (EAB 1994) (reliance upon government reports upheld despite being hearsay). Taking into account that Respondent has not sufficiently explained what aspects of the Decision of the Netherlands are incorrect, the Board finds it appropriate to make some limited reference to the Decision of the Netherlands, at least with regards to whether the Compliance Order might present such a miscarriage of justice that would call for the opening of a final order.

Matters such as this have the potential to create an international incident: the Netherlands, which was never given the opportunity to consent to the shipment, now seeks reimbursement for the cleanup, which Complainant is attempting to facilitate through the Compliance Order, which would order the reimbursement. Complainant's Additional Information at 2-3. Regarding exports of hazardous waste, EPA has observed that "The diplomatic ramifications of improper shipments of United States' wastes could have a significant impact on the United States as a responsible member of the international community." Preamble to Final Export Rule, 51 Fed. Reg. 28,664, 28,676. Respondent seeks to assign blame to the Netherlands because its authorities refused to allow Respondent's removal of the material to Nigeria once it reached the Netherlands. Respondent's SurReply at 3. However, with regards to the potential transport to Nigeria, the Netherlands refused to allow that transport upon investigating the purported "buyer" of the materials in Nigeria and finding no such buyer. Decision of the Netherlands at 3. After investigating the matter in conjunction with Nigerian authorities, Nigeria reportedly withdrew approval to transport the materials to Nigeria. *Id.* Respondent does not dispute that Nigeria withdrew its alleged approval for the wastes; instead, Respondent focuses on Nigeria's initial issuance of a Form M on August 3, 2000, and Respondent's subsequent application for another Form M from Nige-

[39] Respondent's Certification states that in August of 2000 one of its containers "allegedly leaked," Certification ¶ 7, but Respondent, to date, has not specifically denied the allegation. *See* 40 C.F.R. § 22.15 (failure to clearly and directly admit, deny, or explain any material factual allegation may constitute an admission of the allegation).

ria in December of 2000. *See* Certification ¶¶ 7, 11. Under these circumstances, the Netherlands appears to have acted properly by denying transport to Nigeria. Accordingly, in light of Respondent's violations, the relief Complainant seeks does not appear to be inequitable.[40]

H. *The Stay Request*

Before concluding the discussion of this case, one recent development warrants mention. On July 30, 2004, Respondent filed a motion to stay and a supporting memorandum as to the Board's proceedings in this matter. Application for Stay Pending Determination of Grand Jury Proceeding ("Motion to Stay"); Memorandum in Support of Application for Stay Pending Determination of Grand Jury Proceeding ("Stay Memorandum"). On August 13, 2004, Complainant filed its Opposition to Respondent's Application for Stay Pending Determination of Grand Jury Proceeding ("Stay Opposition"), to which Respondent filed a reply on August 23, 2004. The Motion for Stay avers that Respondent is also the subject of a civil proceeding before the United States District Court for the Eastern District of Pennsylvania ("District Court Action"), and that the complaint in the District Court Action alleges that Respondent failed to comply with an order for the removal of certain hazardous substances and pollutants from Respondent's Facility, which is in Pottstown, Pennsylvania. Motion to Stay ¶ 2. The complaint in the District Court Action further alleges that the government incurred response costs in performing certain response actions at the Facility. *Id.* In addition to the civil action in the district court, on June 10, 2004, the United States Attorney's Office for the Eastern District of Pennsylvania and EPA's Criminal Division issued a Grand Jury subpoena to Respondent, seeking documents relating to the materials Respondent shipped from the Facility to the Netherlands. *Id.* ¶¶ 3-4.[41]

The Board denies Respondent's Motion to Stay these administrative proceedings. In the Stay Memorandum, Respondent argues that the Board's failure to stay will force Respondent's President, Joel D. Udell, to choose between his right

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[40] The issue of Complainant's authority to issue a RCRA section 3008(a) compliance order with reimbursement provisions is not squarely presented to the Board; although Respondent seeks to avoid imposition of the compliance order sought by Complainant, Respondent does not challenge Complainant's authority to issue a compliance order providing for reimbursement. Under the limited context in which the Board is evaluating Complainant's Compliance Order, the reimbursement provisions do not appear to be outside the scope of Complainant's authority. *See In re A.Y. McDonald Indus.*, 2 E.A.D. 402, 428 (CJO 1987) ("[RCRA] confers *broad discretion* on the Administrator (and derivatively to his delegatees) to fashion appropriate compliance orders for RCRA violations. *See* 42 U.S.C. § 6928(a).") (emphasis added); *accord In re Arrcom, Inc.*, 2 E.A.D. 203, 210-14 (CJO 1986). The Board reserves any further consideration of this issue for a future case.

[41] On June 30, 2004, Respondent applied to the District Court for a stay of the District Court Action, pending the determination of the Grand Jury proceeding; the government did not oppose that request to stay the District Court Action. Motion to Stay ¶ 11.

against self-incrimination and Respondent's defense in this administrative proceeding. Stay Memorandum at 1. In particular, Respondent's Stay Memorandum contends that Respondent's actions in responding to Complainant's allegations in these administrative proceedings would create evidence against Respondent and Mr. Udell that could be used by the government to obtain an indictment in the criminal proceedings. *Id.* As discussed *supra* in detail, the Board is granting Complainant's Motion for Default, and thus there is no need for the Board to receive any further evidence. The Board agrees with Complainant's contention that these proceedings will not impose an additional burden on Respondent. Stay Opposition at 6. Any evidence upon which the Board relies was already part of the record before the Board at the time Respondent filed its Motion to Stay these administrative proceedings. Accordingly, the Board's denial of the Motion to Stay will not infringe upon Respondent's right against self-incrimination.[42] Moreover, the Board notes Complainant's concern that any additional delay in this matter may jeopardize Complainant's cooperation with the Netherlands Ministry for the Environment, considering that the Netherlands "[h]ave borne the burden of Respondent's continued noncompliance, first with large amounts of hazardous waste in their harbor, and second with the costly and difficult cleanup." *Id.* at 6-7.

III. *CONCLUSION*

The Board does not find good cause to excuse Respondent's untimely response to the Complaint, and therefore Respondent is found to be in default and is

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[42] The Board observes that, generally, there is no double jeopardy bar to adjudicating the same conduct through both a civil and a criminal proceeding. *In re Alaska Pulp Corp.*, Docket No. 10-97-0042-CAA, 1998 WL 220035, "Order Denying Joint Motion for Stay or in the Alternative Dismissal Without Prejudice to Refile," (ALJ, Mar. 26, 1998) (citing *Hudson v. United States*, 522 U.S. 93, 102-03 (1997); *United States v. Ward*, 488 U.S. 242, 248 (1980)). In *Alaska Pulp*, the Administrative Law Judge denied a request to stay the administrative proceedings pending the resolution of a criminal investigation.

Distinguishable from the present proceedings is the Board's "Order Granting Stay" in the case *In re Tiger Shipyard, Inc.*, CERCLA 106(b) Petition No. 96-3 (EAB, May 21, 1998). In *Tiger Shipyard* EPA Region VI ("Region VI") moved for a stay of the Board's potential evidentiary hearing pending the resolution of criminal indictments brought by the State of Louisiana, in conjunction with Region VI, against Tiger Shipyard, Inc. ("Tiger") and several of its employees. *Id.* at 1. Region VI maintained that going forward with the Board's evidentiary hearing would enable Tiger to obtain broader discovery of evidence than Tiger was permitted under the criminal procedures of Louisiana. *Id.* at 3. In addition, Region VI argued that a stay would make any evidentiary hearing before the Board more efficient, because individuals named in the indictment — if called to testify before the Board — could assert a Fifth Amendment privilege against self-incrimination, thereby hindering the effectiveness of the evidentiary hearing, and possibly jeopardizing Region VI's ability to cross-examine those witnesses on information in the affidavits they had already provided. *Id.* at 3-4. Accordingly, upon considering Region VI's concerns, the Board exercised its discretion to grant the stay request. *Id.* at 4. The matter presently before the Board does not impinge upon the same concerns at issue in *Tiger Shipyard*.

thus liable on all counts. Accordingly, Respondent must comply with the Compliance Order, except the terms at A.(1)-(2), which have become moot due to the Netherlands' cleanup of Respondent's materials.

As for any further review of this default order and final decision by the Board, the parties shall have thirty (30) days to file a motion to reconsider this default order.[43] In this matter, the parties' administrative remedies before EPA shall not be exhausted until such motion is filed and the Board has ruled on such motion, or the time for filing such motion has passed without a motion being filed.[44]

So ordered.

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[43] Typically, a party's recourse before EPA from the Board's final decision would be to file a motion to reconsider, pursuant to 40 C.F.R. § 22.32, which would have to be filed within ten (10) days after service of the final decision. However, most default orders are issued by either an ALJ or a Regional Judicial Officer ("RJO"), as they are typically the initial decision maker. Under the latter procedural stance, the parties would have thirty (30) days to file an appeal before the Board or file a motion before the ALJ or RJO to set aside the default order. *Id.* §§ 22.27(c), .30(a)(1). In the interests of uniformity and providing adequate time for the parties to alert the Board of any potential errors, the Board is providing thirty (30) days to file a motion to reconsider the default order in this situation where the Board acts both as EPA's initial and final decision maker. *See* 40 C.F.R. § 22.1(c) (questions not clearly addressed by the Consolidated Rules may be resolved at the discretion of the Board); *id.* § 22.4(a)(2) (Board may do all acts and take all measures as are necessary for the fair, efficient, and impartial adjudication of issues arising in a proceeding).

[44] The Board is exercising its discretionary authority to require a motion to reconsider as a prerequisite to judicial review as an additional safeguard fostering a fair determination. *See* 40 C.F.R. § 22.4(a)(2).

Appendix A

COMPLIANCE ORDER

Respondent shall perform the following Compliance Tasks within the time periods specified. "Days" as used herein shall mean calendar days unless specified otherwise.

A. Pursuant to the authority of Section 3008(a) of RCRA, 42 U.S.C. § 6928(a), Respondent is hereby ordered to:

(1) Within five days of receipt of this Compliance Order,

a) Instruct the transporter to return to Pyramid in the United States all materials shipped by Pyramid to Rotterdam and stored in the European Combined Terminal, or designate another receiving facility in the United States as required under 25 PA Code § 262.a10, which incorporates 40 C.F.R. § 262.54(g); or

b) Provide the Netherlands Environment Ministry and the EPA with all written information required under RCRA § 3017, 42 U.S.C. § 6938, 25 PA Code § 75.262 and 40 C.F.R. § 262 Subpart E for export of hazardous waste, for all shipments identified in Paragraph 15 of this order. This information includes, but is not limited to: the name and address of the ultimate treatment, storage or disposal facility (Notification of Export) and a copy of the receiving country's written consent to the import of the material (Acknowledgment of Consent).

(2) Within 20 days of notification as required under III.A.1.b) of this order, Pyramid shall remove all of its materials from the European Combined Terminal in Rotterdam. Pyramid may comply with this provision by either:

a) Selling all or part of such materials subject to prior approval of the buyer by EPA and the Netherlands Environment Ministry; or

b) Disposing of materials Pyramid is unable to sell, consistent with applicable law and all prior orders.

(3) If the Netherlands Environment Ministry or its designated agent pays for the disposal of all or part of the materials sent by Pyramid and stored at the European Combined Terminal, Pyramid shall reimburse such paying entity for all costs associated with the disposal, including but not limited to storage, waste characterization, repackaging, removal, and treatment.

B. Within 45 days of the effective date of this Compliance Order, Respondent shall certify to EPA in writing that it is in compliance with the Compliance Tasks described in Section A above. Such certification shall be made in the manner specified in Section E below.

C. Pursuant to Section 22.37 of the Consolidated Rules of Practice, this Compliance Order shall automatically become a final order unless, no later than 30 days after this Compliance Order has been served, Respondent requests a hearing as described in Section V of this Complaint.

D. The effective date of a Final Order issued pursuant to this Compliance Order shall be determined in accordance with Section 22.31(b) of the Consolidated Rules of Practice.

E. **Submissions to EPA** - Any notice, report, certification, data presentation, or other document submitted by Respondent pursuant to this Compliance Order, including, but not limited to, the document referred to in Paragraph B, above, shall include a certification by a responsible corporate officer of Respondent. For purposes of such certification, a responsible corporate officer of Respondent means: (1) a president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy or decision-making functions for the corporation; or (2) the manager of one or more manufacturing, production, or operating facilities employing more than 250 persons or having gross annual sales or expenditures exceeding $25 million (in second quarter 1980 dollars), if authority to sign documents has been assigned or delegated to the manager in accordance with corporate procedures. The aforesaid certification shall provide the following statement above the signature of the responsible corporate officer signing the certification on behalf of Respondent:

> I certify under penalty of law that this document and all attachments were prepared under my direction or supervision according to a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on

my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

Signature: _____

Name: _____

Title: _____

F. **Mailings to EPA** - Documents to be submitted to EPA pursuant to or concerning this Compliance Order shall be sent via certified mail, return receipt requested, or overnight commercial delivery service to the attention of:

Kelly Ann Kaczka
Multimedia Enforcement Division
Office of Regulatory Enforcement
United States Environmental Protection Agency
Pennsylvania Ave, NW (MC 2248-A)
Washington, DC 20460

and:

Cheryl L. Jamieson (3RC30)
Senior Assistant Regional Counsel
United States Environmental Protection Agency
Region III
1650 Arch Street
Philadelphia, PA 19103

G. Respondent is hereby notified that failure to comply with any of the terms of this Compliance Order may subject him to imposition of a civil penalty of up to $27,500 for each day of continued noncompliance, pursuant to Section 3008(c) of RCRA, 42 U.S.C. § 6928(c).