

**ENVIRONMENTAL APPEALS BOARD  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C.**

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In re:	)	
	)	RCRA Appeal No. 21-02
Silky Associates, LLC	)	
	)	
Docket No. RCRA-03-2018-0131	)	
	)	

**ORDER ELECTING TO EXERCISE SUA SPONTE REVIEW  
AND ESTABLISHING BRIEFING SCHEDULE**

The Regional Judicial Officer (“RJO”) for the U.S. Environmental Protection Agency, Region 3 (“Region”) issued an Initial Decision and Default Order (collectively, “Default Order”) in this matter on February 9, 2021. *See In re Silky Associates, LLC*, Dkt. No. RCRA-03-2018-0131 (RJO Feb. 9, 2021). The Default Order found Silky Associates, LLC, (“Respondent”) in default for failing to file an Answer to the Administrative Complaint (“Complaint”) filed by the Region, which alleged five violations of the Underground Storage Tank program of Subtitle I of the Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. §§ 6991-6991m, and the federally authorized Underground Storage Tank regulations of the Commonwealth of Virginia, 9 Va. Admin. Code §§ 25-580-10 *et seq.* *Id.* at 1-2. The dates of the alleged violations span from August 2013 to April 2018. *Id.* at 11-17. The Default Order found Respondent liable on all counts alleged in the Region’s Complaint and assessed a \$186,095 penalty. *Id.* at 2.

On March 10, 2021, Respondent (who is not represented by legal counsel) filed with the Environmental Appeals Board (“Board”) a “Request Against the Default Order.” Request Against Default Order (Mar. 10, 2021). Upon examination of the Default Order, the Board has decided to exercise sua sponte review. Accordingly, this order constitutes notice, required under

40 C.F.R. § 22.30(b), of the Board's intent to review the Default Order. At issue is whether (1) the Administrative Law Judge ("ALJ") properly concluded that Respondent failed to file an Answer and hence whether Respondent can be found in default based on the sequence of events that occurred here and (2) whether Respondent can be held liable on Count IV for failure to have overfill prevention equipment based on the applicable regulations and the facts as alleged in the Region's Complaint.

As to the first issue, some procedural context is necessary. The Region filed its Complaint with the Regional Judicial Officer on July 24, 2018. Complaint (July 24, 2018) ("Compl."). On August 21, 2018, Lakhmir Bagga (i.e., Respondent's owner and registered agent) sent a letter in response to the Complaint to Underground Storage Tank Program Officer Melissa Toffel. Respondent's Letter to EPA's Program Officer and Cover Letter by EPA's Counsel 2 (Aug. 27, 2018). On August 27, 2018, counsel for the Region contacted Mr. Bagga and, based on Mr. Bagga's request, the Region filed Mr. Bagga's August 2018 letter with the Regional Judicial Officer as Respondent's Answer to the Complaint. *Id.* Pursuant to regulation, the Regional Hearing Clerk forwarded the casefile to the EPA Office of Administrative Law Judges and on August 30, 2018, Chief Administrative Law Judge Susan L. Biro was designated as the ALJ to preside over this proceeding. 40 C.F.R. § 22.21(a); Order of Designation 1 (ALJ Aug. 30, 2018). On August 31, 2018, the ALJ issued a Prehearing Order directing the parties to engage in a prehearing exchange under a specified schedule. Prehearing Order 1-4 (ALJ Aug, 31, 2018); Order of Remand 1 (ALJ Dec. 10, 2018).

The Region timely filed a Preliminary Statement and Initial Prehearing Exchange. Order of Remand at 1; *see also* Motion for Default 19 (July 23, 2020). On October 22, 2018, in advance of the November 2, 2018 due date for Respondent's prehearing exchange, Silky Bagga,

on behalf of Lakhmir Bagga, filed a letter with the ALJ asking for an extension of the deadlines in the prehearing order because Lakhmir Bagga was in India seeking medical treatment until November 11, 2018. Order of Remand at 1-2.

On October 29, 2018, the ALJ issued an Order for Respondent to file an Answer to the Complaint, stating that Respondent's August 27, 2018 letter did not constitute an Answer pursuant to the Consolidated Rules of Practice because it "was not filed directly with the Regional Hearing Clerk, did not request a hearing upon the issues, and d[id] not clearly and directly admit, deny, or explain *each* of the factual allegations contained in the Complaint." Order for Respondent to File Answer 2 (ALJ Oct. 29, 2018). The ALJ ordered that Respondent file an Answer by November 16, 2018, that conformed with the applicable rules and that clearly stated if Respondent requested a hearing. *Id.* On November 16, 2018, Silky Bagga, on behalf of Lakhmir Bagga, filed a letter (dated November 14, 2018) with the ALJ stating that Respondent would not be able to meet the deadlines specified by the ALJ due to Lakhmir Bagga's health problems and requested an "extension of 3-4 weeks to comply with any requirements." *See* Order of Remand at 2 (quoting letter). On November 23, 2018, the Region filed with the ALJ its rebuttal prehearing exchange, specifying the penalty amount of \$186,095. *Id.* On December 7, 2018, the Region filed with the ALJ a Motion seeking leave to file a Joint Motion for Appointment of a Neutral. *Id.*

On December 10, 2018, the ALJ issued an Order of Remand which provided that "[b]ecause an Answer has not been filed [by Respondent], it is inappropriate for this Tribunal to retain jurisdiction of this matter or to continue to serve as Presiding Officer," and remanded the matter to the Regional Judicial Officer. *Id.* The ALJ declined to rule on the Respondent's

request for additional time and the Region's motion seeking leave to file the parties' joint motion for appointment of a Neutral. *Id.* at 2-3.

On remand from the ALJ, the Regional Judicial Officer amended the docket on February 7, 2019, to reflect that Respondent had not filed an Answer to the Complaint. Order to Amend EPA's Administrative Enforcement Docket 1-2 (RJO Feb. 7, 2019). Almost a year and a half later, on July 23, 2020, the Region filed with the Regional Judicial Officer a Motion for Default. Motion for Default (July 23, 2020). Then, almost seven months later, on February 9, 2021, the Regional Judicial Officer issued the Default Order. Default Order at 1-2. The Regional Judicial Officer concluded that, because "the [ALJ] ruled that an Answer was not filed in this matter, Respondent is held to be in default." *Id.* at 6. The Regional Judicial Officer explained that, under the applicable regulations, Respondent's default "constitutes, for purposes of this proceeding only, an admission by the Respondent of all of the facts alleged in the Complaint \* \* \* and a waiver of Respondent's right to contest such factual allegations." *Id.* at 7. The Regional Judicial Officer proceeded to find Respondent liable for the alleged violations and assessed a \$186,095 penalty. *Id.* at 11-27.

Given the sequence of events that transpired here, particularly that Respondent's letter was at least initially treated as an Answer, the ALJ issued a Prehearing Order, the Region timely filed a Preliminary Statement and Prehearing Exchange, Respondent requested for additional time to comply with any requirements, and the Region filed a motion seeking leave to file the parties' joint motion for appointment of a neutral, the Board has determined that supplemental briefing would be helpful in its deliberations regarding whether the ALJ correctly concluded that Respondent failed to file an Answer and that the subsequent Default Order issued by the Regional Judicial Officer was proper under the totality of the circumstances.

The second issue is whether the Regional Judicial Officer erred in determining that Respondent is liable for violating Count IV as alleged by the Region for failure to have overfill prevention equipment. In the Complaint, the Region alleged that:

From at least August 1, 2013 through at least April 9, 2018, Respondent failed [to] use overfill prevention equipment that automatically shuts off flow into the tank when the tank is more than 95 percent full or alerted the transfer operator when the tank is no more than 90 percent full by restricting the flow into the tank or triggering a high level alarm for the UST-001, UST-002, UST-003, UST-004 and UST-005 UST systems.

Compl. ¶ 49. The Region further alleged that failure to use the overfill prevention equipment specified above constitutes a violation of 9 Va. Admin. Code § 25-580-60(4) and 9 Va. Admin. Code § 25-580-50(3)(a)(2). *Id.* ¶ 50. The Region reiterated its allegation in its Motion for Default, and cited to an undated copy of the Virginia regulations in support, attached as Exhibit P. Motion for Default at 5 (citing Exhibit P). The Regional Judicial Officer determined that Respondent was liable for the violation as alleged by the Region. Default Order at 15-16. However, as amended since 2004,<sup>1</sup> 9 Va. Admin. Code § 25-580-50(3)(a)(2) states that owners and operators “must use the following overfill prevention equipment”:

Overfill prevention equipment that will:

- (a) Automatically shut off flow into the tank when the tank is no more than 95% full;
- (b) Alert the transfer operator when the tank is no more than 90% full by restricting the flow into the tank or triggering a high-level alarm; *or*

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<sup>1</sup> See 20 Va. Reg. 1505, 1505 (Feb. 23, 2004) (finalizing amendments) (<http://register.dls.virginia.gov/vol20/iss12/v20i12.pdf>); see also 19 Va. Reg. 3486, 3493 (Aug. 11, 2003) (language of proposed and ultimately finalized amendments) (<http://register.dls.virginia.gov/vol19/iss24/v19i24.pdf>).

*(c) Restrict the flow 30 minutes prior to overfilling, alert the operator with a high level alarm one minute before overfilling, or automatically shut off flow into the tank so that none of the fittings located on top of the tank are exposed to product due to overfilling.*

9 Va. Admin. Code § 25-580-50(3)(a)(2) (emphasis added). The type of equipment specified in 9 Va. Admin. Code § 25-580-50(3)(a)(2)(c) is not identified in the Region's Complaint, Motion for Default, or the Regional Judicial Officer's Default Order, and the copy of the regulations attached as Exhibit P to the Region's Complaint appears to be outdated because it does not include subsection (c), quoted above. Thus, it is not readily apparent whether the Region or the Regional Judicial Officer has squarely addressed whether Respondent can be held liable for Count IV based on the facts alleged in the Region's Complaint in light of the additional language in 9 Va. Admin. Code § 25-580-50(3)(a)(2)(c), emphasized above.

Based on the foregoing, the Board has determined that additional briefing will assist its deliberation. The Board establishes the following briefing schedule:

- (1) On or before **April 12, 2021**, the Region shall file with the Clerk of the Board and all parties its response to Respondent's appeal filed with the Board on March 10, 2021, and further address in its brief:
  - a. The Board has previously noted that it considers the "totality of the circumstances" in an appeal of a default order. *In re Burrell*, 15 E.A.D. 679, 687 (EAB 2012); *In re Hagerstown Aircraft Servs., Inc.*, RCRA (3008) Appeal No. 14-01, at 1-2 (EAB July 24, 2014) (Order Directing Supplemental Briefing); *see also In re Hagerstown Aircraft Servs., Inc.*, RCRA (3008) Appeal No. 14-01, at 1-3 (EAB Oct. 8, 2014) (Final Order).

How should the Board evaluate the “totality of the circumstances” in this case and whether the ALJ correctly concluded that Respondent failed to file an Answer and that the subsequent Default Order issued by the Regional Judicial Officer was proper. In addressing that issue, the Region should explain what the record reflects occurred between February 7, 2019 (when the Regional Judicial Officer amended the docket to reflect that Respondent had not filed an Answer) and July 23, 2020 (when the Region filed its Motion for Default with the Regional Judicial Officer) and whether it reflects any efforts to contact the Respondent or resolve this matter prior to filing of the Motion for Default.

- b. Whether Respondent can be held liable on Count IV based on the language contained in 9 Va. Admin. Code § 25-580-50(3)(a)(2) and the facts as alleged in the Region’s Complaint.

(2) On or before **April 22, 2021**, Respondent may file with the Clerk of the Board and serve on all parties a reply brief, if any, responding to the Region’s brief.


So ordered.<sup>2</sup>

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<sup>2</sup> The three-member panel deciding this matter consists of Environmental Appeals Judges Aaron P. Avila, Mary Kay Lynch, and Kathie A. Stein.

**ENVIRONMENTAL APPEALS BOARD**

Dated: **Mar. 23, 2021**

By:   
Aaron P. Avila  
Environmental Appeals Judge



## CERTIFICATE OF SERVICE

I certify that copies of the foregoing *Order Electing to Exercise Sua Sponte Review and Establishing Briefing Schedule* in the matter of Silky Associates, LLC, RCRA Appeal No. 21-02, were sent to the following persons in the manner indicated.

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Dated: Mar 23, 2021



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Eurika Durr  
Clerk of the Board