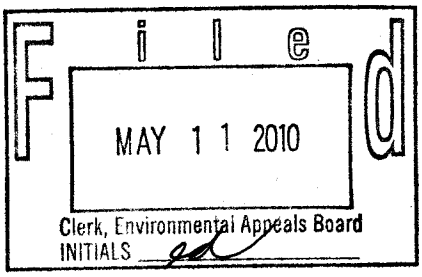
BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re: Sargent Enterprises, Inc. Docket No. CAA-03-2009-0189	)	CAA Appeal No. 10-02



FINAL DECISION AND ORDER

I. *INTRODUCTION*

Sargent Enterprises, Inc. ("Sargent") appeals a Default Order issued by Administrative Law Judge ("ALJ") Barbara A. Gunning assessing a $17,400 penalty against Sargent for Clean Air Act ("CAA") violations. The ALJ's entry of default was based on Sargent's failure to comply with the information exchange requirements of a Prehearing Order and failure to respond to an Order to Show Cause. For the reasons set forth below, the Environmental Appeals Board ("Board") affirms the ALJ's finding of default and upholds the Default Order.

II. *FACTUAL AND PROCEDURAL BACKGROUND*

This case arises from an administrative complaint ("Complaint") filed by U.S. EPA Region III ("Complainant" or "Region") alleging that Sargent, and two other parties, violated CAA § 112, 42 U.S.C. § 7412, and the National Emissions Standards for Asbestos regulations, codified at 40 C.F.R. pt. 61, subpt. M, by failing to keep regulated asbestos-containing material wet until disposal. *See* Complaint ¶¶ 19-49. The Complaint proposed a civil penalty of $21,900 against all the respondents. *Id.* at 9-10. Shortly after filing of the Complaint, the two other respondents – School District of Upper Dublin and 1 Source Safety & Health, Inc. – entered into

consent agreements with Complainant, which resulted in Sargent being the sole remaining Respondent.[1] *See* Final Order as to the 1 Source Safety & Health, Inc., (ALJ, Aug. 13, 2009); Final Order as to the School District of Upper Dublin, (ALJ, Sept. 29, 2009).

On September 24, 2009, the ALJ issued a Prehearing Order requiring the parties to submit their prehearing exchanges; the Complainant's exchange was due by November 4, 2009, and Sargent's was due by December 22, 2009. *See* Prehearing Order at 4 (ALJ, Sept. 24, 2009). Complainant timely filed its initial prehearing exchange, which included an adjustment to the penalty proposed in the Complaint to reflect the agreements reached with the other two respondents. *See* Complainant's Initial Prehearing Exchange at 9-10 (Nov. 24, 2009). Accordingly, as revised, the penalty the Region sought against Sargent amounted to $17,400. *Id.* at 10. Sargent, however, did not file its prehearing exchange.

On December 28, 2009, six days after Sargent's prehearing exchange deadline, Complainant filed a motion requesting, among other things, that the ALJ issue an Order to Show Cause requiring Sargent to explain why it failed to comply with the ALJ's Prehearing Order. *See* Motion for Extension of Time to File Complainant's Rebuttal Prehearing Exchange, Issuance of Show Cause Order and Other Appropriate Relief (Dec. 28, 2009) ("Motion to Show Cause").[2] On December 30, 2009, the ALJ issued the order requested and gave Sargent until January 19, 2010, to show cause why it failed to meet the prehearing exchange deadline and why a default

---

[1] Respondent 1 Source Safety & Health, Inc. agreed to pay a penalty of $2,700 and Respondent School District of Upper Dublin agreed to pay a penalty of $1,800.

[2] The record shows that the Motion to Show Cause was faxed and mailed to Sargent on December 28, 2009, and delivered to Sargent's address on December 29, 2010. *See* Appellee's Response Brief, Att. 1 (Mar. 15, 2010) (fax transmission confirmation and FedEx tracking sheet summarizing travel history and delivery details).

order should not be entered. *See* Order to Show Cause and Order Granting Complainant's Motion for Extension of Time to File Complainant's Rebuttal Prehearing Exchange (ALJ, Dec. 30, 2009) ("Order to Show Cause") at 2. Sargent did not file a response to the Order to Show Cause. Consequently, on January 28, 2010, ten days after Sargent's deadline to respond to the ALJ's order, the ALJ issued a Default Order against Sargent finding Sargent liable for the violation alleged in the Complaint and assessing a civil penalty of $17,400. *See* Default Order at 5.

On March 1, 2010, Sargent filed a timely Notice of Appeal and an Appeal Brief with the Board requesting that the Board set aside the Default Order to allow Sargent and the Region to continue settlement discussions.[3] *See* Appeal Brief (Mar. 10, 2010). On March 15, 2010, the Region filed its response brief requesting that the Board affirm the ALJ's decision. *See* Appellee's Response Brief (Mar. 15, 2010).

III. *DISCUSSION*

A. *Sargent's Appeal*

In its appeal, Sargent argues that the ALJ "reached her conclusion to issue a Default Order prior to Sargent and EPA being able to reach a settlement in the matter." Appeal Brief at 2. Sargent claims that it wished to reach a settlement with EPA prior to the issuance of the Prehearing Order but that its "unfamiliarity with the legal proceedings" and "its inability to secure legal representation due to significant costs" caused it to miss the deadline for filing the prehearing exchange. *Id.* Sargent also claims that misunderstandings with the Region in

[3] Sargent did not file a motion with the ALJ to set aside the Default Order. Thus, its appeal comes to the Board as a direct appeal of the Default Order under 40 C.F.R § 22.30.

connection with settlement communications were part of the reason why Sargent failed to comply with the Prehearing Order and the Order to Show Cause. *Id.* at 5-6.

With respect to its failure to comply with the Prehearing Order, Sargent explains that it contacted Jennifer Abramson, counsel for the Region, to work out a settlement before its prehearing exchange deadline and that, after speaking with Ms. Abramson, Sargent was under the impression that Ms. Abramson needed to speak with the site inspector before a settlement could be reached and that her office would be contacting Sargent. Sargent claims that due to its unfamiliarity "with these settlement proceedings," it waited to hear back from the Region and therefore missed the prehearing exchange deadline. *Id.* at 5.

With respect to its failure to respond to the Order to Show Cause, Sargent claims that the order was received by Sargent on January 6, 2010,[4] and that the only employee of Sargent "with enough involvement in the matter" – Mr. Sargent – did not receive and review all of the correspondence until January 21, 2010, because he was away from work from mid/late December to mid/late January. *Id.* at 5. Sargent adds that it contacted Ms. Abramson on January 21st to continue settlement discussions, that Ms. Abramson returned the call on January 22nd or 23rd indicating that they could still discuss a settlement, *id.* at 6, but that having no knowledge of the settlement discussions the ALJ issued the Default Order. *Id.* at 2.

Notably, Sargent does not argue that the ALJ erred in her Initial Decision. *See id.* at 7 ("Sargent does not argue that the Administrative Law Judge erred in his/her Initial Decision. Sargent has the utmost respect for the Environmental Protection Agency, and all of its agents.

---

[4] While Sargent did receive the order on January 6, 2010, the order was served on December 30, 2009. *See* Order to Show Cause (certifying that order was sent to Sargent by certified mail and regular mail on Dec. 30, 2009); *see also* 40 C.F.R. § 22.7 (noting that service of all documents, except for the complaint, is complete upon mailing).

[Sargent] also acknowledge[s] that the Administrative Law Judge must issue his/her decision as per the letter of the law."). However, Sargent requests that the Board set aside the Default Order to "be able to complete the [s]ettlement process initiated" with the Region. *Id.*

B. *Standard of Review for Entry of Default Judgment and to Overturn a Default Judgment*

The Consolidated Rules of Practice ("CROP"),[5] which govern this proceeding, provide that the failure to comply with information exchange requirements or any order from the presiding officer constitutes grounds for a default order. 40 C.F.R. § 22.17(a). The CROP further provide that a default by the respondent constitutes an admission of all facts alleged in the complaint and a waiver of the respondent's right to contest such factual allegations in the pending proceeding. *Id.* The rules direct a presiding officer, once a default finding has been made, to "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 should not be issued." *Id.* § 22.17(c).

While default judgments are generally disfavored as a means of resolving Agency enforcement proceedings, and the Board prefers to resolve close default cases in favor of allowing adjudication on the merits, it has not hesitated to affirm or enter default orders in cases where it is clear a default judgment is warranted. *See, e.g.*, *In re Las Delicias Community*, SDWA Appeal No. 08-07, slip op. at 8 n.7 (EAB Aug. 17, 2009), 14 E.A.D. ___; *In re Four Strong Builders, Inc.*, 12 E.A.D. 762, 766 (EAB 2006); *In re JHNY, Inc.*, 12 E.A.D. 372, 374,

[5] The full name of the Consolidated Rules of Practice ("CROP"), codified at 40 C.F.R. part 22, is: "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits."

382-401 (EAB 2005) (stating general principle); *In re Thermal Reduction Co.*, 4 E.A.D 128, 131 (EAB 1992) (same).

In considering an appeal of a default order, the Board applies a "totality of the circumstances" test to determine whether the default order has properly been entered.[6] *See JHNY*, 12 E.A.D. at 374, 384; *In re Jiffy Builders, Inc.*, 8 E.A.D. 315, 319 (EAB 1999); *In re Rybond*, 6 E.A.D. 614, 624 (EAB 1996). While the Board considers a number of factors in weighing the totality of the circumstances, "first and foremost" the Board will examine the nature of the procedural default that led to the issuance of a default order, including whether a procedural violation actually occurred, whether a particular procedural violation is proper grounds for a default order, and whether there is any valid excuse for failing to adhere to the procedural requirement. *JHNY*, 12 E.A.D. at 384; *see Jiffy Builders*, 8 E.A.D. at 320 & n.8; *Rybond*, 6 E.A.D. at 625 (citing respondent's lack of an adequate justification for its failure to comply with three separate procedural orders).

Under the totality of the circumstances test, the Board may also consider whether a defaulting party would likely succeed on the merits if a hearing were held. *JHNY*, 12 E.A.D. at 384, 391; *In re Pyramid Chem., Co.*, 11 E.A.D. 657, 662 (EAB 2004); *see Jiffy Builders*, 8 E.A.D. at 319; *Rybond*, 6 E.A.D. at 628 & n.20. Respondent bears the burden of establishing

---

[6] Although the "totality of the circumstances" test is also used to determine whether there is "good cause" to set aside a default order when a motion is filed before the Presiding Officer pursuant to 40 C.F.R. § 22.17(c), the "good cause" standard itself does not apply to direct appeals of an initial decision under 40 C.F.R. § 22.30(a). *See In re Jiffy Builders, Inc.*, 8 E.A.D. 315, 320 n.8 (EAB 1999) ("While * * * the 'good cause' standard in 40 C.F.R. § 22.17[c] technically does not apply to a case like this, which does not involve review of a motion filed under that provision, we would ordinarily expect some articulation of the 'cause' of the default to be part of a well-framed appeal of a default order."); *In re Rybond*, 6 E.A.D. 614, 625 n.19 (EAB 1996) (stating that when deciding a direct appeal of a default order, the Board is not bound by the "good cause" standard in 40 C.F.R. § 22.17[c], "which applies to ALJs and Regional Administrators").

that there is more than a mere possibility of a defense, and that there is a "strong probability" that litigating the defense will produce a favorable outcome. *JHNY*, 12 E.A.D. at 384; *Pyramid Chem.*, 11 E.A.D. at 662; *Jiffy Builders*, 8 E.A.D. at 322; *Rybond*, 6 E.A.D. at 628. As part of this inquiry, the Board has also examined whether the penalty assessed in the default order is reasonable. *JHNY*, 12 E.A.D. at 384.

C. *Should the Board Set Aside the Default Order?*

As explained in more detail below, the totality of the circumstances in this case do not warrant setting aside the ALJ's Default Order.

At the outset, we note that Sargent violated not one, but two procedural requirements, each of which constitutes grounds for a default order. *See* 40 C.F.R. § 22.17(a). Not only did Sargent fail to comply with prehearing exchange requirements, it also failed to respond to the ALJ's Order to Show Cause. Thus, the ALJ had proper grounds to issue the default order in this case, and, as explained more fully below, Sargent has not provided a valid excuse for having failed to comply with the prehearing requirements or the Order to Show Cause. Alleged unfamiliarity with the proceedings, misunderstanding with the Region in connection with settlement discussions, and the absence from work of the "only employee with enough involvement in the matter," do not justify setting aside the default order in this case.

Being a *pro se* litigant or lacking familiarity with the proceedings are not, without more, valid reasons to set aside a default order. The Board has stated on numerous occasions that *pro se* litigants are not excused from complying with the CROP. *See, e.g., Jiffy Builders*, 8 E.A.D. at 321 ("[P]arties who choose to proceed *pro se*, while held to a more lenient standard than parties represented by members of the bar, are not excused from compliance with the [CROP].");

Rybond, 6 E.A.D. at 627 ("[T]he fact that [respondent], who apparently is not a lawyer, chooses to represent himself * * * does not excuse respondent from the responsibility of complying with the applicable rules of procedure.") (quoting *In re House Analysis & Assocs.*, 4 E.A.D. 501, 505 (EAB 1993)). Moreover, in this case, Sargent cannot claim that it was unaware that the failure to comply with the Prehearing Order could result in the entry of default since the Prehearing Order, using unambiguous language, specifically warned the parties of this outcome. The Prehearing Order stated in relevant part that the "failure to comply with the prehearing exchange requirements set forth herein, * * * can result in the entry of a default judgment against the defaulting party." *See* Prehearing Order at 4.

Likewise, Sargent's alleged misunderstanding with the Region does not justify Sargent's failure to comply with the ALJ's orders. As explained above, Sargent alleges that part of the reason it failed to comply with the Prehearing Order was that it had been waiting to hear from the Region to continue settlement discussions. *See* Appeal Brief at 4. The Region, for its part, claims that at no point during settlement discussions did it represent or suggest that Sargent could ignore or disregard the Prehearing Order. *See* Appellee's Response Brief at 8. We are not persuaded by Sargent's arguments. As the Board recently stated in *Rocking BS Ranch*, settlement discussions provide no basis for failing to comply with the procedural rules. *In re Rocking BS Ranch, Inc.*, CWA Appeal No. 09-04, at 10 (EAB Apr. 21, 2010) (Final Decision and Order). Even assuming that Sargent may have been confused by the effect of the settlement discussions with the Region, a point on which the evidence is lacking, any doubts would have been clarified by reading the Prehearing Order, which unequivocally stated that "*the pursuit of settlement negotiation or the averment that a settlement in principle has been reached will not constitute good cause for failure to comply with the prehearing requirements or to meet the*

schedule set forth in this Prehearing Order." Prehearing Order at 2 (emphasis added). In the face of this admonition, Sargent cannot genuinely claim that it was not made aware that settlement discussions did not justify failure to comply with the Prehearing Order. At the very least, if Sargent were confused, it should have requested clarification from the ALJ. Sargent did not do so.

Similarly, Sargent has not provided a legitimate excuse for having failed to respond to the ALJ's Order to Show Cause. As grounds for failing to meet this deadline, Sargent explains that Mr. Sargent, the "only employee with enough involvement in the matter," did not receive and review all of the correspondence until January 21, 2010, two days after the deadline to respond to the ALJ's Order to Show Cause. However, the record shows that the Order to Show Cause was served on December 30, 2009, and that Sargent received the order on January 6, 2010, thirteen days before the deadline. Thus, the failure to respond to the Order to Show Cause did not stem from service problems. Rather, Sargent apparently did not ensure that this matter was adequately monitored during Mr. Sargent's absence and did not take the necessary measures to avoid being found in default.[7] In addition, when Mr. Sargent reviewed the documents, instead of contacting the ALJ directly to try to explain any delays, Mr. Sargent chose to contact the Region to "continue settlement discussions." In its communication to Sargent, the Region expressly encouraged Sargent to immediately respond to the ALJ's orders to avoid being issued a default order. *See* Appellee's Response Brief, Att. 2. Thus, Sargent's failure to respond to the Order to

---

[7] Notably, Sargent's appeal mentions two other employees "familiar with this matter," Mr. Rick Searfoss and Mr. Shawn Searfoss, who had been involved in settlement discussions with the Region. *See* Appeal Brief at 4. Thus, Mr. Sargent was not the only employee familiar with this matter, and arguably, Sargent could have delegated this matter to one of these employees during Mr. Sargent's absence, or asked that they seek an extension of time to respond to the Order to Show Cause.

Show Cause was not caused by either a misunderstanding with the Region or "miscommunications" between Sargent and the Region. The responsibility for failing to respond to the ALJ's orders rests solely with Sargent, and Sargent's arguments to the contrary provide no legitimate basis to overturn the Default Order.

As noted earlier, in considering whether to set aside a default order the Board also examines whether the defaulting party would likely succeed on the substantive merits if a hearing were held, and the reasonableness of the penalty. In this particular case, Sargent has not met its burden of showing that there is a "strong possibility" that litigating this case would lead to a different outcome. In fact, Sargent does not claim that the ALJ erred in issuing the default order. *See* Appeal Brief at 7. Neither does Sargent raise any defenses against liability or challenges to the penalty amount. Thus, without a showing of the likelihood of success, the Board has no basis to overturn the default order on this ground. In addition, the Board finds the penalty assessed to be reasonable. While the ALJ adopted the penalty that Complainant had proposed,[8] the ALJ noted that Complainant's proposed penalty considered the statutory factors set forth in section 113(e) of the CAA, 42 U.S.C. § 7413(e), and EPA's CAA Stationary Source and Asbestos Penalty Policies. *See* Default Order at 4; *see also* Complaint at 9-12. Upon review of the record, the ALJ concluded that the proposed penalty was not clearly inconsistent with the record of the proceedings or the Act. *Id.* at 5. The Board has also reviewed the record and agrees with the

[8] Under section 22.17(c), "the 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).

ALJ.[9] Thus, absent a challenge to the penalty amount, or a claim of inability to pay the penalty,[10] the Board has no basis to set aside the penalty assessment.

IV. *CONCLUSION*

In light of the above, the Board concludes that Sargent has failed to demonstrate why the Board should set aside the ALJ's Default Order.

V. ORDER

The Board affirms the Default Order and the penalty the ALJ assessed. Sargent's payment of the entire amount of the civil penalty of seventeen thousand four hundred dollars ($17,400)[11] shall be made within thirty (30) days of service of this Final Decision and Order, by cashier's check or certified check payable to the Treasurer, United States of America, unless the Region agrees to a different payment schedule. The check should contain a notation of the name and docket number of this case. 40 C.F.R. § 22.31(c). Sargent shall remit payment to:

---

[9] In addition, as the ALJ noted, the total penalty sought against all Respondents is less than the amount authorized under the CAA and implementing regulations. *See* 42 U.S.C.§ 7413(d)(1); 40 C.F.R. pt. 19 (allowing up to $32,500 per day of violation).

[10] In its Appeal Brief, Sargent mentions "its inability to secure legal representation due to significant costs," as a reason for having failed to comply with the ALJ orders. At no point, however, has Sargent claimed an inability to pay the assessed penalty. In any event, the Board has held in the past that by not complying with the prehearing exchange requirement to provide documentary evidence demonstrating its inability to pay the proposed penalty, a respondent has failed to raise its ability to pay as a cognizable issue. *See JHNY*, 12 E.A.D. at 398-99. Accordingly, the Board holds that by failing to comply with the prehearing exchange requirements Sargent waived its ability to contest the Region's penalty proposal on this basis.

[11] It is not uncommon for respondents in enforcement cases to work in conjunction with the Region to work out payment schedules in circumstances of verifiable cash flow difficulties. Nothing in this Order preclude the parties from discussing such a possibility.

U.S. Environmental Protection Agency (Region 3)
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000

Failure to pay the penalty within the prescribed time frame after the entry of the final order may result in assessment of interest on the civil penalty. *See* 31 U.S.C. § 3717; 40 C.F.R. § 22.31(c).

So ordered.[12]

ENVIRONMENTAL APPEALS BOARD

Dated: May 11, 2010

By: Kathie A. Stein
Kathie A. Stein
Environmental Appeals Judge

[12] The three-member panel deciding this matter is comprised of Environmental Appeals Judges Edward E. Reich, Anna L. Wolgast, and Kathie A. Stein.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Final Decision and Order, in the matter of Sargent Enterprises, Inc., CAA Appeal No. 10-02, were sent to the following persons in the manner indicated:

By Certified U.S. Mail,
Return Receipt Requested:

Brian J. Sargent, President
Sargent Enterprises, Inc..
732 Center Street
Jim Thorpe, PA 18229

By Pouch Mail:

Jennifer Abramson, Esq.
Assistant Regional Counsel (3LC26)
U.S. EPA Region 3
1650 Arch Street
Philadelphia, PA 19103-2029

Lydia Guy
Regional Hearing Clerk
U.S. EPA Region 3
1650 Arch Street
Philadelphia, PA 19103-2029

By EPA Interoffice Mail:

Honorable Barbara A. Gunning
Office of Administrative Law Judges
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Mail Code 1900L
Washington, D.C. 20460

Dated: MAY 11 2010

Annette Duncan
Secretary