IN RE JHNY, INC., A/K/A QUIN-T TECHNICAL PAPERS AND BOARDS

CAA Appeal No. 04-09

FINAL ORDER

Decided September 30, 2005

Syllabus

JHNY, Inc. ("JHNY") appeals a Default Order issued by Administrative Law Judge ("ALJ") William B. Moran assessing a $51,700 penalty against JHNY for Clean Air Act ("CAA") violations as well as the ALJ's denial of JHNY's motion to set aside the Default Order. The ALJ's entry of default was based on JHNY's failure to timely comply with the ALJ's Prehearing Order directing the parties to exchange prehearing information.

This case arises from a series of inspections that EPA Region III conducted at JHNY's asbestos manufacturing facility. Based on its inspections, the Region filed an administrative complaint alleging that the company violated the CAA's National Emission Standard for Hazardous Air Pollutants ("NESHAP") for asbestos by: (1) failing to properly operate control equipment and prevent visible emissions; (2) failing to monitor for emissions; and (3) failing to maintain records, make them available for inspection, and retain such records for at least two years. The administrative complaint proposed a $51,700 penalty against JHNY.

Following JHNY's filing of an Answer to the Complaint, the ALJ issued a Prehearing Order directing the parties to file prehearing information exchanges. The Prehearing Order directed, among other things, that JHNY "furnish" supporting documentation if the company intended to show that it could not pay the proposed penalty. The Prehearing Order established a deadline for both parties to file their prehearing exchanges.

Region III timely complied with the deadline, but JHNY did not. After the ALJ issued an Order to Show Cause, JHNY responded with a document styled as an "Initial Prehearing Exchange." This document explained that the company had not filed a "formal" prehearing exchange due to financial difficulties. The document did not provide supporting documents regarding financial or other matters the company intended to introduce into evidence.

On July 12, 2004, the ALJ entered a Default Order against JHNY on the grounds that the company had not complied with the Prehearing Order and had failed to demonstrate good cause why the Default Order should not be issued. The ALJ also denied JHNY's subsequent motion to set aside the Default Order.

On appeal, JHNY challenges the Default Order and the ALJ's denial of its motion to aside the Default Order. JHNY argues that: (1) it did not violate the ALJ's Prehearing

Order, considering that JHNY had previously furnished financial information to Region III during settlement negotiations; (2) applicable law does not support the imposition of the sanction of default in these circumstances; and (3) the ALJ's liability determination is not supported by the record. Finally, JHNY contends that the ALJ's penalty assessment is likewise not supported by the record.

Held: The Board upholds the ALJ's Default Order and denial of JHNY's motion to set aside the Default Order on the following grounds:

(1) The fact that JHNY may have previously furnished financial documentation to the Region during settlement negotiations between the parties did not satisfy JHNY's obligations under the ALJ's Prehearing Order and the applicable provisions of the Consolidated Rules of Practice ("CROP") that govern this proceeding. Further, although the CROP allows parties to submit evidence up to fifteen days before a hearing, these provisions do not exempt a party from complying with prehearing exchange requirements. Rather, this provision simply reflects that a party has a continuing obligation under the CROP to supplement previously exchanged information that is incomplete, inaccurate, or outdated. JHNY's previous provision of financial information to the Region did not comply with the Prehearing Order's clear requirement to send copies of filings and documents to the ALJ, Region, and Regional Hearing Clerk. Moreover, JHNY's belated "Initial Prehearing Exchange" did not include copies of documents and exhibits as required by the Prehearing Order and the CROP's prehearing exchange procedures. JHNY's arguments, if accepted, would have the effect of subverting the fair and efficient administration of the CROP. As the Board has observed, prehearing information exchange facilitates EPA administrative proceedings by informing parties of evidence that may be used against them at a hearing and providing ALJs with the basic information they need to administer and regulate proceedings.

(2) JHNY has failed to identify any applicable law establishing a *per se* rule that default may be entered only after a party has repeatedly failed to timely exchange prehearing information. Such a *per se* rule of this kind would run counter to the fact-contingent nature of the "totality of the circumstances" test we apply in these situations.

(3) JHNY has failed to meet its burden of demonstrating a strong probability that it would prevail on the merits of its liability defense. In particular, the Board rejects JHNY's assertion that the Region has failed to support its charge that the company had failed to prevent "visible emissions" from its asbestos manufacturing operations. Contrary to JHNY's arguments, the asbestos NESHAP does not require verification via laboratory analysis that "visible emissions" from asbestos manufacturing operations contain asbestos fibers. Rather, the language of the regulations presumes that visible emissions are problematic.

(4) The ALJ's $51,700 penalty assessment is reasonable and consistent with the CAA stationary source statutory requirements and applicable penalty policies.

Before Environmental Appeals Judges Scott C. Fulton, Edward E. Reich, and Kathie A. Stein.

Opinion of the Board by Judge Fulton:

I. *INTRODUCTION*

JHNY, Inc. ("JHNY"), a/k/a Quin-T Technical Papers and Boards, appeals from a Default Order Administrative Law Judge William B. Moran ("ALJ") entered on July 12, 2004, based on the company's failure to comply with a prehearing exchange order issued pursuant to the Consolidated Rules of Practice, 40 C.F.R. part 22 ("CROP"), the procedural rules that govern this proceeding. The Default Order determined that JHNY violated section 112 of the Clean Air Act ("CAA"), 42 U.S.C. § 7412, and its implementing regulations, as the Environmental Protection Agency Region III ("Region") charged in an administrative action it filed against the company on August 15, 2003. The ALJ also imposed on the company a $51,700 penalty proposed by the Region. JHNY subsequently filed a Motion to Reopen the Hearing, and on November 17, 2004, the ALJ issued an Order denying JHNY's motion.

This proceeding arises from a series of inspections that the Region conducted at JHNY's asbestos manufacturing facility in 2001 and 2002 and JHNY's responses to information requests the Region submitted to JHNY. Based on this information, the Region filed an administrative action against JHNY alleging that the company violated CAA § 112, 42 U.S.C. § 7412, and the National Emission Standard for Hazardous Air Pollutants for asbestos ("asbestos NESHAP") and seeking a penalty against the company. The NESHAP regulations that are at the heart of the Region's allegations, found at 40 C.F.R. part 61, subpart M, impose work practice and recordkeeping requirements for owners and operators of manufacturing operations using commercial asbestos.

As explained more fully below, we find that JHNY plainly failed to comply with an order requiring prehearing exchange and thereafter failed to demonstrate a good cause basis for having so failed. Under these circumstances, and in view of the Board's jurisprudence in this area and the importance of preserving ALJ authority to properly administer and regulate CROP proceedings, we uphold the ALJ's decisions both to find JHNY in default in the first instance and then not to reopen the proceeding after default was entered.

II. *FACTUAL AND PROCEDURAL BACKGROUND*

Because, as discussed below, we apply a "totality of the circumstances" test in considering appeals of default orders, we relate in some detail the facts and

procedures that gave rise to the instant proceeding before the Board. The factual account is drawn from the Region's Complaint. These facts were adopted by the ALJ as the basis for his Default Order and are not contested by JHNY in its Appeal Brief.[1]

Appellant JHNY is the owner of a facility in Erie, Pennsylvania, that manufactures paper, millboard, and/or felt using asbestos. Complaint ¶ 32. JHNY's manufacturing facility employs an air cleaning device that contains fabric filter bags to remove asbestos before the cleaning system is vented to the outside air. Complaint ¶¶ 27, 38, 39.

On the following dates: March 16, 2000; October 12, 2000; February 6, 2001; February 21, 2001; and June 26, 2001, the Region conducted inspections at JHNY's facility to determine the company's compliance with the asbestos NESHAP.

During the above inspection dates, the inspectors found no records of the results of visible emissions monitoring or of air cleaning device inspections. Complaint ¶ 6. In response to an August 22, 2002 information request that the Region submitted to JHNY pursuant to CAA § 114, 42 U.S.C. § 7414,[2] the company's environmental manager responded that no air monitoring was conducted during the production of asbestos products other than visual inspection of the discharge vents. Complaint ¶ 34.

During the February 6, 2001 inspection, the EPA inspector observed the facility's air cleaning system and two roof vents. *Id.* ¶ 27. The left roof vent is designed to serve as the primary means of ventilating the air cleaning system to the outside air.[3] *Id.* The EPA inspector observed what he suspected to be "asbestos-containing material" caked inside the left roof vent, and photographed and took three samples of the caked material. *Id.* ¶ 27. Polarized Light Microscopy tests of the samples revealed that each of the samples contained twenty percent asbestos. *Id.* Also on February 6th, the inspector observed "that one of the filter bags in the air cleaning device was collapsed, and dust suspected to contain asbestos covered the floor and catwalk in the room where the air cleaning device was located." *Id.* ¶ 28. The EPA inspector collected one sample of dust from the cat-

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[1] JHNY's default constitutes an admission of the factual allegations of the Complaint for purposes of the pending action. *See* 40 C.F.R. § 22.17.

[2] CAA § 114 authorizes the Agency to require any person who owns or operates an emissions source subject to the CAA § 112 hazardous air pollutants program to, among other things, establish and maintain records, make reports, and "provide such other information as the [Agency] may require" for the purpose of determining his or her compliance with the section. *See* 42 U.S.C. § 7414.

[3] The record below is unclear regarding the function of the right roof vent.

walk. Polarized Light Microscopy testing revealed the sample to contain twenty percent asbestos. *Id.*

Later the same month, on February 21, 2001, the inspector made a return visit to the facility and observed that "conditions were substantially the same as they were during the February 6, 2001 inspection," including a "collapsed filter bag." *Id.* ¶ 29. During the visit, the inspector asked that the air cleaning device be turned on so that he could observe the venting operation. The inspector reported observing "visible emissions" escaping the relevant roof vent when the air cleaning system was turned on. *Id.* The inspector collected two samples from the right roof vent and one sample from the catwalk in the room where the air cleaning device is located. Polarized Light Microscopy tests showed that the samples contained twenty percent asbestos.

According to the Region, its sampling on February 6 and 21, 2001, indicated that the sampled material constituted "asbestos-containing waste materials" as defined in 40 C.F.R. § 61.141, including "friable asbestos material."[4] Complaint ¶¶ 27, 29.

On August 15, 2003, based on the foregoing information, the Region, pursuant to CAA § 113(d),[5] 42 U.S.C. § 7413(d), filed a five-count administrative complaint against JHNY alleging violations of the asbestos NESHAP.[6] The Region alleged that JHNY violated asbestos NESHAP provisions that require owners and operators of asbestos manufacturing operations to properly operate air cleaning devices to avoid visible emissions; to monitor emissions to the outside air; and to keep records of emissions monitoring and cleaning devices. *See* 40 C.F.R. § 61.144. Specifically, the Region's five-count complaint alleged violations of the following five asbestos NESHAP requirements:

- Count 1: To prevent visible emissions and to properly install, use, operate, and maintain all air cleaning equipment on February 6 and 21, 2001, in

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[4] As defined in 40 C.F.R. § 61.141, "asbestos-containing waste materials" constitute, in pertinent part, "mill tailings or any waste that contains commercial asbestos and is generated by a source subject to the provisions of [the asbestos NESHAP]." This includes "filters from control devices, friable asbestos waste material and bags or other similar packaging contaminated with commercial asbestos." *Id.* Section 61.141 defines "commercial asbestos" as "any material containing asbestos that is extracted from ore and has value because of its asbestos content."

[5] CAA § 113(d), 42 U.S.C. § 7413(d), in relevant part, authorizes the Agency to issue an administrative order assessing a penalty of up to $25,000 per day of violation, against any person "who has violated or is violating any other requirement or prohibition of this subchapter * * *, including, but not limited to, a requirement or prohibition of any rule, order, waiver, permit, or plan promulgated, issued, or approved under this chapter * * *."

[6] CAA § 112, 42 U.S.C. § 7412, requires EPA to publish a list of air pollutants determined to be hazardous and promulgate emission standards for them.

violation of 40 C.F.R. §§ 61.144(b)(1)-(2)[7] and 61.152(2),[8] Complaint ¶¶ 37-43;

- Count 2: Failure to monitor each potential source of asbestos emissions to the outside air on March 16, 2000, and October 12, 2000, in violation of 40 C.F.R. § 61.144(b)(3), Complaint ¶¶ 37-43;[9]

- Count 3: Failure to maintain records of the results of visible emissions monitoring and air cleaning device inspections in violation of 40 C.F.R. § 61.144(b)(5),[10] Complaint ¶¶ 48-51;

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[7] Section 61.144(b)(1) of Title 40 of the Code of Federal Regulations specifically provides that each owner or operator of a manufacturing operation that makes paper, mill board, and felt shall either:

(1) Discharge no visible emissions to the outside air from these operations or from any building or structure in which they are conducted or from any other fugitive sources; or

(2) Use the methods specified by 40 C.F.R. § 61.152 to clean emissions from these operations containing particulate asbestos material before they escape to, or are vented to, the outside air.

[8] Pursuant to 40 C.F.R. § 61.152(a)(2), asbestos manufacturing operations using air cleaning as a method to prevent escape or venting of asbestos (as specified at 40 C.F.R. § 61.144(b)(2)) must "[p]roperly install, use, operate, and maintain all air-cleaning equipment." Section 61.152 requires, with limited exception, use of fabric filters as cleaning devices in such equipment. *See* 40 C.F.R. § 61.152(a)(1), (b). Section 61.152 also mandates that such filters not exceed certain standards of permeability. *Id.* § 61.152(a)(1)(i).

[9] As provided by 40 C.F.R. § 61.144(b)(3), each owner or operator of an asbestos manufacturer is required to:

> Monitor each potential source of asbestos emissions from any part of the manufacturing facility, including air cleaning devices, process equipment, and buildings housing material processing and handling equipment, at least once each day during daylight hours for visible emissions to the outside air during periods of operation.

[10] Pursuant to 40 C.F.R. § 61.144(b)(5), asbestos manufacturers must maintain records of the results of visible emissions monitoring and air cleaning device inspections that includes the following:

> (i) Date and time of each inspection.
>
> (ii) Presence or absence of visible emissions.
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> (iii) Condition of fabric filters, including presence of any tears, holes, or abrasions.
>
> (iv) Presence of dust deposits on clean side of fabric filters.
>
> (v) Brief discussion of corrective actions taken, including date and time.
>
> (vi) Daily hours of operation for each air cleaning device.

40 C.F.R. § 61.144.

- Count 4: Failure to furnish upon request and make available at the facility for inspection by the Administrator all records required under 40 C.F.R. § 61.144 on March 16, 2000; October 12, 2000; February 21, 2001, and June 26, 2001, in violation of 40 C.F.R. § 144(b)(6), Complaint ¶¶ 52-55; and

- Count 5: Failure to retain a copy of monitoring and inspection records for at least two years on March 16, 2000, October 12, 2000, February 21, 2001, and June 26, 2001, in violation of 40 C.F.R. § 61.144(b)(7), Complaint ¶¶ 56-59.

The Complaint proposed a $51,700 penalty against JHNY for the above-alleged violations.

On September 19, 2003, JHNY filed an Answer in response to the Complaint, in which it denied the above-alleged violations of the NESHAP regulations and requested an evidentiary hearing. Beginning in January 2004, the parties attempted to resolve this matter through Alternative Dispute Resolution ("ADR") procedures. A neutral person was appointed to conduct the ADR process. Order Initiating Alternative Dispute Resolution Process and Appointing Neutral (Jan. 7, 2004). The ADR process proved short-lived, however. At the request of the Region, on February 23, 2004, the neutral recommended termination of the ADR process. Report Recommending Termination of Alternative Dispute Resolution (Feb. 23, 2004).

With litigation having resumed, the ALJ, on February 23, 2004, issued a Prehearing Order requiring the parties to file their initial prehearing exchanges in accordance with 40 C.F.R. § 22.19 by April 23, 2004. In his Prehearing Order, the ALJ, *inter alia*, directed that the parties abide by the following procedures:

> 1. Each party shall submit a list of all expert and other witnesses it intends to call with a brief narrative summary of their expected testimony; and copies of documents and exhibits it intends to introduce into evidence. The exhibits should include a resume for each proposed expert witness.
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> 2. The Complainant shall submit a statement explaining in detail how the proposed penalty amount was determined, including a description of how the specific provision of any EPA penalty or enforcement policies or guidelines were applied in calculating the penalty.
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> 3. If the Respondent intends to take the position that it is unable to pay the proposed penalty, or that payment will

> have an adverse effect on Respondent's ability to continue in business, Respondent shall furnish supporting documentation such as financial statements or tax returns.

Prehearing Order at 1.

The Region filed its prehearing exchange on April 23, 2004, the deadline prescribed by the Prehearing Order. JHNY did not file its prehearing exchange as required by the ALJ's order.

On June 8, 2004, the Region filed a Motion for Default Judgment and Memorandum of Law in Support ("Motion for Default") seeking a default judgment against JHNY for the violations alleged in the Region's Complaint based upon JHNY's failure to comply with the Prehearing Order. On June 14, 2004, the ALJ issued an Order to Show Cause requesting that JHNY show good cause why a default order should not be issued against it. The ALJ required such response to be filed by June 24, 2004.

On June 23, 2004, JHNY faxed to the ALJ its Response to Order to Show Cause and Opposition to Motion for Default ("Response to OSC") as well as an Initial Prehearing Exchange ("JHNY's Initial P.E."). In this document, JHNY conceded that it had filed "no formal Prehearing Exchange" because of "significant financial difficulties [affecting] JHNY's ability to continue to retain counsel." Response to OSC at 1-2. Although it did not include any documents in the exchange, the company explained that it had "previously exchanged" information with the EPA regarding the company's financial condition, including "tax returns for the periods ending March 31, 2001, and March 31, 2002," "three years of Balance Sheets and Statements of Operations," and a "financial statement for the period April 1, 2003, to November 30, 2003." *Id.* at 2. JHNY related that it had provided this financial information to the Region in January and February 2004, in advance of the ALJ's Prehearing Order. The company asserted that the above documents evidence that "[it] ha[s] been losing money for years" and that EPA "was well aware of JHNY's precarious financial position." *Id.* at 3. JHNY also contended that the Region "has not been prejudiced by this information not being resubmitted as part of a formal Prehearing Exchange." *Id.* In the attached Initial P.E., JHNY listed the names of two hearing witnesses, James Grotty, JHNY's Manager, and David Britton, the company's Production Manager. JHNY's Initial P.E. at 1. JHNY stated that Mr. Grotty had knowledge relating to the "financial status of JHNY, as well as JHNY's compliance with EPA regulatory issues" and could "testify as to plant conditions at the time of the inspections as well as emissions for the facility." *Id.* Mr. Britton, according to JHNY, could "testify as to plant conditions at the time of the inspections as well as emissions for the facility." *Id.* In addition, the company identified as "hearing exhibits" the above-mentioned tax returns, balance sheets, and financial statements. *Id.* at 3.

On July 12, 2004, the ALJ entered a Default Order because JHNY had not complied with the April 23, 2004 deadline for filing a prehearing exchange as prescribed in his Prehearing Order, and because JHNY had failed to demonstrate sufficient "good cause" why the Default Order should not be issued.[11] In particular, the ALJ stated that the company had not provided any evidence to "demonstrate its 'significant financial difficulties' or 'precarious financial position,' but appear[ed] to rely solely on documents previously submitted to EPA in the context of settlement negotiations to support this position." Default Order at 2. In this respect, the ALJ noted that the CROP generally precluded admission of documents or exhibits that have not been included in a prehearing exchange. *Id.* (citing 40 C.F.R. § 22.19(a)).[12] He also observed that the company "disregarded the Prehearing Order by filing its prehearing exchange without copies of any documents or exhibits." *Id.* Citing the CROP, the ALJ adopted the facts alleged in the Region's Complaint as his Findings of Fact,[13] and concluded that the facts "establish by a preponderance of the evidence that Respondent violated the asbestos NESHAP for manufacturing operations using commercial asbestos as charged in the Complaint." *Id.* Furthermore, the ALJ assessed JHNY a penalty of $51,700, the amount proposed by the Region, concluding the penalty was "consistent with the record" and "calculated in accordance with the statutory penalty factors in 42 U.S.C. § 7413(e) and the CAA Penalty Policy." *Id.* at 8-9.

On August 2, 2004, JHNY filed a Motion for Reconsideration of the Default Judgment and to Reopen the Hearing ("Motion for Reconsideration"). Subsequently, the Region filed an opposition, which was followed by Respondent's filing a Memorandum of Law in Opposition to Complainant's Motion in Opposition to Respondent's Motion for Reconsideration and to Reopen the Hearing. The company submitted as Exhibit 1 of its Memorandum the aforementioned financial documents, which it claimed show its inability to pay the penalty, and which the company claimed the Region had already received from it.

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[11] The CROP provides that "[w]hen the Presiding Officer finds that default has occurred, he 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." 40 C.F.R. § 22.17(c) (emphasis added).

[12] As provided by 40 C.F.R. § 22.19(a), "[e]xcept as provided in § 22.22(a), a document that has not been included in prehearing information exchange shall not be admitted into evidence * * *." CROP § 22.22(a) provides in relevant part that "[i]f * * * a party fails to provide any document, exhibit, witness name or summary of expected testimony required to be exchanged under § 22.19(a), (e) or (f) to all parties at least 15 days before the hearing date, the Presiding Officer shall not admit the document, exhibit or testimony into evidence, unless the non-exchanging party had good cause for failing to exchange the required information and provided the required information to all other parties as soon as it had control of the information, or had good cause for not doing so."

[13] Pursuant to 40 C.F.R. § 22.17(a), "[d]efault by respondent constitutes * * * an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations."

On November 17, 2004, the ALJ issued an Order Denying Motion for Reconsideration and to Reopen the Hearing ("Order Denying JHNY's Motion"). In the Order Denying JHNY's Motion, the ALJ stated that setting aside the Default Order was not appropriate because "[JHNY] failed to comply with the Court's Prehearing Order and thereafter failed to provide an adequate basis for excusing that failure." Order Denying JHNY's Motion at 5.

On December 16, 2004, JHNY filed with the Environmental Appeals Board ("EAB") a Notice of Appeal and attached Appeal Brief ("A.B.") challenging the ALJ's Default Order and his Order Denying JHNY's Motion. JHNY's appeal raises the following issues:

> (1) That JHNY complied with the ALJ's February 16, 2004 Prehearing Order in accordance with the applicable regulations, or if there was a violation, it was "technical"; (2) The "factual findings" in the Default Order are not supported by the record even if JHNY's documentary evidence is excluded; and (3) "Applicable law does not support the imposition of the harsh sanction of default."

A.B. at 4-11. JHNY also challenged the ALJ's penalty assessment as not supported by the record. *Id.* at 9.

On January 7, 2005, the Region filed a Motion to Dismiss JHNY's Appeal.[14] As explained below, we reject JHNY's Appeal of the ALJ's Initial Decision and impose upon JHNY a penalty of $51,700.

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[14] In its Motion to Dismiss the Appeal, the Region does not address the substance of JHNY's appeal. Instead, the Region asserts that JHNY's December 12, 2004 appeal is untimely because it did not meet the 30-day time limit for filing an appeal after service of an initial decision, as provided by 40 C.F.R. § 22.30. The Region thus contends that JHNY "had until August 12, 2004[,] to file its appeal to the Board" following the ALJ's July 12, 2004 Initial Decision.

We reject the Region's argument that JHNY's appeal is not properly before the Board because the ALJ's Default Order had already become a final order through the running of time. *See* Motion to Dismiss at 4-6. The CROP provides for appeal of an "initial decision within 30 days after the initial decision is served." 40 C.F.R. § 22.30. The ALJ's July 12, 2004 Default Order constitutes the "initial decision" in this case, because it imposes liability and assesses a penalty against JHNY, thus resolving all outstanding issues and claims.

In our view, JHNY's filing of its appeal is timely. Consistent with our previous holdings, we determine that the date of the Initial Decision should properly be set at November 17, 2004, the date that the ALJ denied JHNY's Motion for Reconsideration. Just as the applicable regulations at 40 C.F.R. § 22.28(b) provide that a motion to reopen a hearing will automatically stay the running of the time period for an initial decision becoming final under 40 C.F.R. § 22.27(c) and for appeal under § 22.30, then, by analogy, a Motion for Reconsideration to set aside a default order should likewise stay the running of time period for appeal to the Board. *See In re B&L Plating, Inc.,* 11 E.A.D. 183,

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III. *ANALYSIS*

A. *Introduction and Summary of Decision*

At its heart, this case concerns the authority of ALJs to regulate administrative proceedings in a manner that is transparent, predictable, allows for meaningful preparation by parties and the court, and permits timely repose. In particular, it concerns an ALJ's authority to sanction through default a party's disregard of a procedural order — one directing the parties' prehearing exchange. JHNY's arguments notwithstanding, we do not regard the prehearing exchange as a procedural nicety. Rather, because federal administrative litigation developed as a truncated alternative to Article III courts that intends expedition and does not allow for the kind of discovery available, for example, under the Federal Rules of Civil Procedure, the prehearing exchange plays a pivotal function — ensuring identification and exchange of all evidence to be used at hearing and other related information (e.g., identification of witnesses). By compelling the parties to provide this information in one central submission, the prehearing exchange clarifies the issues to be addressed at hearing and allows the parties and the court an opportunity for informed preparation for hearing. Given the key role of the prehearing exchange to administrative practice, it is not surprising that the regulations recognize that failure to comply with an ALJ's order requiring exchange is one of the primary justifications for entry of default. *See* 40 C.F.R. § 22.17(a); *infra* Part III.B.

As noted below, defaults can be avoided when a party demonstrates a good cause basis for not complying with the prehearing exchange order. Likewise, once entered a default can be set aside with a good cause justification. In this case, however, JHNY ignored the ALJ's order directing the prehearing exchange and then offered no meaningful justification for having done so. JHNY rather asserted, without support or elaboration, that certain financial issues prevented it from filing earlier.[15] The ALJ found that this justification fell well short of a good

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190 (EAB 2003) (holding that a motion for reconsideration of a default order stayed the running of the 30-day time period for appeal of an initial decision and that the ALJ's order to dismiss a motion to reconsider marked the starting point for running of the 30-day time period for appeal). Indeed, requiring a respondent to file an appeal with the Board while at the same time seeking reconsideration from the ALJ makes no practical sense and would frustrate the objective of judicial economy. Accordingly, consistent with our holding in *B&L Plating,* JHNY's December 16, 2004 Notice of Appeal falls within the 30-day time frame if November 17, 2004, is set as the date of the Initial Decision.

[15] JHNY's response to the ALJ's Order to Show Cause references, without further elaboration or support, "significant financial difficulties effecting [sic] JHNY's ability to continue to retain counsel." Response to OSC at 1. While it is regrettable that during the pendency of this proceeding financial issues may have emerged between JHNY and its counsel — who has served as JHNY's counsel throughout this proceeding — it is not apparent to the Board why the administrative litigation process should be held hostage to such a dispute, particularly where, as here, JHNY has neither substantiated
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cause showing, and we agree. Indeed, the paucity of the explanation suggests that the oversight was the product of neglect rather than good cause.

JHNY's arguments, which contend that the ALJ's prehearing exchange order was ambiguous in its direction and that JHNY had complied in spirit with the ALJ's directive, are ultimately unable to overcome the essential fact that JHNY failed to comply, without good cause, with the ALJ's order. To set aside default under such circumstances would, in our view, seriously undermine the capacity of ALJs to administer the proceedings before them.

The soundness of upholding the imposition of default here is bolstered by our determination that JHNY has neither raised a serious challenge to liability nor mounted an argument of substance that it is unable to pay a penalty. While we accept at face value the suggestion that JHNY has been running at a loss over the past several years, this generalized picture of financial difficulty does not mean an entity of JHNY's size cannot pay a penalty or should be absolved from having to do so. Even financially challenged entities need to toe the line of compliance, and only those entities demonstrating a genuine inability to pay should be removed from the compliance-inducing influence that civil penalty assessment affords. *See In re Steeltech, Ltd.*, 8 E.A.D. 577, 587 (EAB 1999) (stating that "[c]ompliance with [the Emergency Planning and Community-Right-To-Know Act] or any other environmental or safety regulation, is not limited only to those businesses that are experiencing no financial strain; environmental and safety regulations are basic requirements of operating any business"). In the final analysis, JHNY has failed to demonstrate an inability to pay a penalty of the size ordered by the ALJ.

B. *Legal Background: Standard of Review for Entry of Default Order and Denial of a Motion to Set Aside Default*

According to the CROP, a party's failure to adhere to procedural requirements may be grounds for a finding of default by a Presiding Officer. In particular, the CROP provides, *inter alia*, that a "party may be found to be in default: after motion, upon failure to file a timely answer to the complaint," and, in relevant part, "*upon failure to comply with the information exchange requirements of § 22.19(a) or an order of the Presiding Officer*." 40 C.F.R. § 22.17(a) (emphasis added). The CROP further provides that "[d]efault 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.*

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the alleged "difficulties" nor offered legal support for this as a cognizable basis for setting aside default.

The CROP directs 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) (emphasis added). In addition, the CROP provides that once default has been entered, "[f]or good cause shown, the Presiding Officer may set aside a default order." *Id.* Thus, the issue of "good cause" informs both the inquiry whether a default order should be entered in the first place and, whether once entered, a default order should be set aside. *See In re Pyramid Chem. Co.*, 11 E.A.D. 657, 661 (EAB 2004).

We have observed that "when fairness and balance of the equities so dictate, a default order will be set aside," and we have endorsed the general principle of law disfavoring default as a means of concluding cases. *In re Thermal Reduction Co.*, 4 E.A.D. 128, 131 (EAB 1992); *accord In re Rybond, Inc.*, 6 E.A.D. 614, 616 (EAB 1996). In keeping with this orientation, where a respondent fails to adhere to a procedural requirement, the Board has traditionally applied a "totality of the circumstances" test to determine whether a default order should be or has properly been entered, or whether a motion to set aside a default order has been properly denied. *See Rybond*, 6 E.A.D. at 625; *Thermal Reduction*, 4 E.A.D. at 131; *Pyramid Chem*., 11 E.A.D. at 661.

We have considered a number of factors under the "totality of the circumstances" test. First and foremost, we have examined the alleged procedural omission that prompted the default order, considering such issues as whether a procedural requirement was indeed violated, whether a particular procedural violation is proper grounds for a default order, and whether there is a valid excuse or justification for not complying with the procedural requirement. *See Rybond*, 6 E.A.D. at625; *In re Midwest Bank & Trust Co.*, 3 E.A.D. 696, 698 (CJO 1991); *Pyramid Chem.*, 11 E.A.D. at 661-62.

Beyond this, we have considered as relevant to the question whether to set aside default whether the defaulting party would likely succeed on the substantive merits if a hearing were held. *In re Jiffy Builders, Inc.*, 8 E.A.D. 315, 319 (EAB 1999); *Rybond*, 6 E.A.D. at 625; *Midwest Bank & Trust*, 3 E.A.D. at 699. In other words, as we explained in *Rybond*, the Board may "consider whether the administrative action in question would have had a different outcome had there been a hearing." 6 E.A.D. at 625. It is the respondent's burden in this context to demonstrate there is more than the mere possibility of a defense, but rather a "strong probability" that litigating the defense will produce a favorable outcome." *Pyramid Chem.*, 11 E.A.D. at 662; *Jiffy Builders*, 8 E.A.D. at 322; *Midwest Bank & Trust*, 3 E.A.D. at 701. As part of this inquiry, we have also examined whether the penalty assessed in the default order is a reasonable one.

While we are mindful of the general principle of law disfavoring defaults, it has been the Board's longstanding practice to accord substantial deference to

ALJs in conducting proceedings under the CROP, particularly with regard to prehearing exchange and discovery. As we have observed, "'[o]ur rules depend on the presiding officer to exercise discretion throughout an administrative penalty proceeding.'" *In re CDT Landfill Corp.*, 11 E.A.D. 88, 107-08 (EAB 2003) (quoting *In re Lazarus, Inc.*, 7 E.A.D. 318, 334 (EAB 1977)); *accord In re Carroll Oil Co.*, 10 E.A.D. 635, 650 (EAB 2002).

JHNY's appeal focuses initially on the procedural omissions — failure to comply with the prehearing information exchange — that gave rise to the Default Order, and argues that the Default Order was not properly issued on this basis. Second, the company argues that the merits of the case do not support the Region's case for liability or the penalty assessment.

As explained below, we uphold the ALJ's Default Order, concluding that JHNY's arguments do not demonstrate that the Default Order should be set aside based on the "totality of the circumstance" test. With regard to the penalty imposed by the ALJ, we examine that issue in a final section, and uphold the ALJ's assessment.

C. *JHNY's Challenge to the Default Order Regarding Its Alleged Failure to Respond to the ALJ's Prehearing Order*

1. *JHNY's Argument That It Substantially, if Not Technically, Complied with the ALJ's Prehearing Order*

JHNY challenges the ALJ's conclusion that the company's failure to adhere to the prehearing exchange requirements of 40 C.F.R. § 22.19, including compliance with his prehearing order, warranted issuance of a Default Order pursuant to 40 C.F.R. § 22.17(c). *See* Default Order at 2. Instead, the company avers that it substantially, if not technically, complied with the Prehearing Order and the CROP's prehearing requirements, in particular the requirement to provide documentation regarding its ability to pay the penalty. JHNY asserts, "[T]he prehearing information exchange was complied with in accordance with the terms of the prehearing order, or at most there was a technical violation of the prehearing order that would not warrant a default judgment." A.B. at 4.

In support of this argument, JHNY first contends that the ALJ's Default Order misread the prehearing exchange requirements of 40 C.F.R. § 22.19(a) whereby "a document or exhibit that has not been included in [the] prehearing information exchange shall not be admitted into evidence" to exclude from evidence financial information the company had previously provided the Region during their earlier period of ADR negotiations. According to JHNY, the above restriction on evidence must be read in tandem with the requirements of 40 C.F.R. § 22.22(a). In the company's view, this section requires the ALJ to "admit all relevant evidence" and "only provides that a Presiding Officer may exclude informa-

tion not provided pursuant to Section 22.19 if the information or exhibit is not provided to the other side at least 15 days before a trial, and only if the party attempting late disclosure cannot show good cause for the late disclosure." *Id.* Here, the company states, "the financial information was provided months before the [April 23, 2004] deadline for the Prehearing Information Exchange." *Id.* at 2. JHNY contends that what it considers to be the ALJ's restrictive reading of the prehearing exchange regulations imposes a "harsh" result upon it because it "would require documents already exchanged [with the Region] to be 'reexchanged' as part of a formal prehearing exchange, and if not so reexchanged, not simply preclude those documents from introduction into evidence, but warrant a default." *Id.* at 5.

Furthermore, the company challenges as grounds for the Default Order the company's failure to attach copies of documents or exhibits to its prehearing exchange. *See* Default Order at 2. JHNY counters that it reasonably complied with the ALJ's Prehearing Order as prescribed by the CROP, which establishes that "prehearing exchange must be made "[i]n accordance with an order issued by the Presiding Officer." A.B. at 5 (citing 40 C.F.R. § 22.19(a)). The company argues that it complied with this regulation by reasonably relying upon the Prehearing Order's use of the words "furnish" and "submit" to refer to different items of requested information. The company explains that the Prehearing Order required the company to "furnish" documentation supporting its claim "that it was unable to pay the proposed penalty or that payment of the penalty would harm its ability to continue in business" and that the Prehearing Order in contrast required parties to "submit" other items of information. *Id.* (citing Prehearing Order at 1). As JHNY states, "[c]ertainly there is a distinction between 'submitting' documents, and 'furnishing' documents, otherwise the Prehearing Order would have required the financial information to be submitted." *Id.* Based on the foregoing, the company argues that it complied with the Prehearing Order by "furnishing" to the Region documentation on the company's finances during the parties' negotiations in January and February 2004, noting that the Prehearing Order "only required that the parties 'make their * * * exchanges by Friday, April 23, 2004.'" *Id.* (quoting Prehearing Order at 2).

In a related argument, JHNY maintains that the ALJ, rejecting a reasonable interpretation of his Prehearing Order, is unfairly requiring it to physically attach to its Prehearing Exchange financial information that it had previously provided to the Region. *Id.* at 6-7. JHNY explains that the documentary information that the Region relied upon to consider JHNY's financial situation was in fact provided by JHNY and included in the Region's prehearing exchange. *Id.* at 7.[16] The

[16] As part of this argument, JHNY objects to the ALJ's statement that JHNY's previous provision of tax returns and other financial information was not admissible as "evidence related to settle-
Continued

company contends that it is "patently unfair" that the "Presiding Officer on the one hand excludes the financial information provided by JHNY from consideration of JHNY's financial situation, but relies upon that very evidence to establish that the EPA sought and considered JHNY's financial condition." *Id.* at 6-7.

We are not persuaded by JHNY's foregoing arguments that it complied with the prehearing information exchange requirements. First, we agree with the ALJ that the company has "contorted" the meaning of 40 C.F.R. § 22.22(a) by arguing that it could submit the information required by the Prehearing Order at any time "15 days" before the hearing. Order Denying JHNY's Motion at 6. This fifteen-day requirement, as the ALJ notes, does not exempt a party from complying with a prehearing order deadline in the first instance; rather, as he notes, it carries out a party's "continuing obligation" under the CROP to "promptly supplement [an information] exchange when the party learns that the information exchanged or response provided is incomplete, inaccurate or outdated and the additional or corrective information has not otherwise been disclosed to the other party pursuant to this section." *Id.* (quoting 40 C.F.R. § 22.19(f)).

Furthermore, we regard JHNY's distinction between the words "furnish" and "submit" as strained because it ignores the context in which these words occur. The Prehearing Order indeed uses the word "furnish" to refer to these financial documents, but as one among a list of procedures that constitutes the *filing* of

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ment" pursuant to 40 C.F.R. § 22.22(a), which "specifically precludes the admission of evidence relating to settlement that would be excluded in the federal courts under Rule 408 of the Federal Rules of Evidence." *See* A.B. at 6; Default Order at 2; Order Denying Motion at 5; 40 C.F.R. § 22.22(a) (stating that "evidence relating to settlement which would be excluded in the federal courts under Rule 408 of the Federal Rules of evidence is not admissible"). JHNY complains that it is unfair for the ALJ to preclude JHNY's use of this financial information because it is settlement-related, but then allow the Region to use the same evidence in support of its case. A.B. at 7. As the company states, "[I]f the financial information provided by JHNY is evidence related to settlement, the EPA should not have included it in its exhibits, and the Presiding Officer should not have relied upon that information as evidence * * * ." *Id.* at 7-8.

The Board need not address the scope of admissibility of such financial information with regard to its role in settlement, since the Board concludes that the Default Order is warranted on the basis that JHNY did not comply with prehearing exchange procedures, regardless whether that financial information is inadmissible for other reasons. The ALJ makes clear the non-admissibility of this evidence as being settlement-related is not the sole basis for his issuing the Default Order. Indeed, the ALJ explains that the most important reason for entering default is that the company did not comply with the Prehearing Order and prehearing exchange regulations by submitting the financial information in a timely manner. *See* Default Order at 2. We should also note that had JHNY complied with the prehearing exchange order, it would have been clear to the ALJ and the Region whether JHNY intended to use at hearing information that otherwise was at least arguably subject to the settlement exclusion.

prehearing exchanges in accordance with 40 C.F.R. § 22.19."[17] Furthermore, the Prehearing Order instructs that the "original and one copy of all *filings*, with attachments, shall be sent to the Regional Hearing Clerk, and copies sent to the opposing party and the Administrative Law Judge." *Id.* at 2 (emphasis added). The company clearly did not comply with this directive within the April 23, 2004 deadline. Thus, even if we accept, *arguendo*, that somehow the company exchanged financial documents with the Region during an earlier period, it nevertheless fell short of the Order's filing requirements by failing to send copies of filings and documents to the Administrative Law Judge and Regional Hearing Clerk.[18] As the ALJ noted, when JHNY did file a belated "Prehearing Exchange" in response to the ALJ's Order to Show Cause, JHNY "once again disregarded the Prehearing Order by filing its prehearing exchange *without* copies of any documents or exhibits."[19]

Also, JHNY's response to the Prehearing Order did not comply with prehearing exchange procedures at 40 C.F.R. § 22.19 in accordance with which the ALJ issued his Prehearing Order. *See* Prehearing Order at 1. These provisions not only require a respondent, when contesting a penalty amount, to include "copies of all documents and exhibits which it intends to introduce into evidence at the hearing" (i.e., financial documents in this case), but also specifically direct a respondent to "explain in its prehearing information exchange why the proposed penalty should be reduced or eliminated." 40 C.F.R. § 22.19 (a)(2), (3). Thus, even if for argument's sake, JHNY somehow provided copies of its documents or any evidence earlier, the company failed to comply with the section 22.19 require-

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[17] The ALJ's Prehearing Order introduces the request to "furnish" financial documents, along with the request to "submit" documents in the following manner:

> The schedule can now be set for the *filing* of prehearing exchanges under 40 C.F.R. § 22.19 in accord with the following procedure.

Prehearing Order at 1 (emphasis added). The Prehearing Order further provides:

> The original and one copy of all filings, with attachments, shall be sent to the Regional Hearing Clerk, and copies sent to the opposing party and the Administrative Law Judge.

Id. at 2.

[18] The ALJ's directive in the Prehearing Order for copies of filings to be sent to the Regional Hearing Clerk, opposing party, and the ALJ is consistent with the instruction in the CROP that "a copy of each document filed in the proceeding shall be served on the Presiding Officer or the Environmental Appeals Board, and on each party." 40 C.F.R. § 22.5. Thus, JHNY's filing omissions contravene the CROP.

[19] The CROP also gives parties specific instruction on how to file documents in EPA administrative proceedings, such as in the current proceeding. *See* 40 C.F.R. § 22.5 (filing, service, and form of all filed documents; business confidentiality claims). The instructions, among other things, prescribe filing and service of copies on the parties, Presiding Officer, and the Regional Hearing Clerk, which the company did not carry out in timely fashion.

ment to provide an *explanation* based on that information of why its penalty should be reduced or eliminated. The fact that the Agency may have already been provided some of the same information, *see* A.B. at 8, does not excuse JHNY from supplying copies of the information and explaining how the information supported eliminating or lowering the penalty.

We are moreover not persuaded that JHNY suffered any unfairness or inequity as a result of the ALJ refusing to consider JHNY's tardily submitted financial information on the ground that it would not be admissible as evidence. The Prehearing Order and regulations provided JHNY with clear directions on how to file documents and other information in support of its case. Also, the CROP imposes on each party in an administrative enforcement proceeding the responsibility of marshaling evidence in support of its case, and JHNY's arguments, if accepted, would have the effect of subverting the fair and efficient administration of proceedings under the CROP. As we have observed, prehearing information exchange facilitates Agency administrative proceedings by informing parties of evidence that may be used against them at a hearing and providing ALJs with the basic information they need to administer and regulate proceedings. *See* 40 C.F.R. § 22.19.

Based on the foregoing, we are not persuaded by JHNY's arguments that it complied with the ALJ's Prehearing Order and information exchange requirements. Therefore, JHNY's arguments in this regard provide no basis for setting aside the ALJ's Default Order.

2. *JHNY's Argument That Applicable Law Does Not Support the Imposition of the Default in This Case*

JHNY asserts that "the case law cited in the Default Judgment and in the EPA's Motion for Default do not support the imposition of default against JHNY." A.B. at 11. In particular, JHNY avers that the Board's case law reserves the entrance of default only for the most "egregious" cases, such as repeated failures to file a prehearing information exchange. *Id.* at 11-12 (citing *In re B&L Plating, Inc.*, 11 E.A.D. 183 (EAB 2003); *In re Jiffy Builders, Inc.*, 8 E.A.D. 315 (EAB 1999); *see also In re Rybond, Inc.*, 6 E.A.D. 614, 624 (EAB 1996) (upholding an ALJ's Default Order against respondent where respondent failed to meet an extended deadline to file a prehearing exchange).

However, contrary to JHNY's proposition, there is no hard and fast rule in our jurisprudence upholding default only upon a party's repeated failure to timely exchange prehearing information. The Agency has in other instances upheld a default order upon a party's single failure to file a timely prehearing exchange. *See In re Detroit Plastic Molding Co.*, 3 E.A.D. 103, 107 (CJO 1990) (issuing a default order upon a single failure to comply with a prehearing exchange order); *see also In re House Analysis & Assocs.*, 4 E.A.D. 501, 505-08 (EAB 1993) (same).

The Board has never adopted the axiomatic principle that default is only warranted after a repeated failure to meet a prehearing deadline,[20] and not adopting a *per se* rule in this regard is consistent with the fact-contingent nature of the "totality of the circumstances" test we apply in these situations.[21]

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[20] In its arguments, JHNY glosses over important distinctions between the instant case and those that the company cites to demonstrate that the Board upholds defaults orders only in cases of repeated failure by a party to file a prehearing exchange. For example, although in *Jiffy Builders* and *Rybond,* the ALJ indeed entered default orders after the respondents in these cases had failed to meet repeated, extended deadlines for filing their prehearing exchanges, we noted in these cases that the respondents were proceeding *pro se* at the time they received order to file prehearing exchanges. *See Jiffy Builders,* 8 E.A.D. at 321; *Rybond,* 6 E.A.D. at 627. In contrast, here, as noted by the ALJ, "the Respondent has been represented by the same legal counsel throughout this proceeding and [] such counsel never filed any document seeking to withdraw from representation." Default Order at 2. We have observed in the past that even *pro se* parties "while held to a more lenient standard than parties represented by members of the bar, are not excused from compliance with the [CROP]." *Jiffy Builders,* 8 E.A.D. at 321. Here, where JHNY was represented by counsel throughout, it was not in our view unreasonable for the ALJ to hold the company to scrupulous observance of the CROP from the beginning.

[21] As part of its argument that "applicable law" does not support imposition of the default in this situation, JHNY states that "EPA's position with regard to the default is of note." Explaining the Region's "position," JHNY contends that "[the Region's] argument as set forth in its Motion for Default and its Opposition to JHNY's Motion for Reconsideration" fails to assert that:

- The Region had been "prejudiced" in any way;
- Financial documents that "pursuant to the Prehearing Order were required to have been furnished by JHNY were not furnished to the EPA prior to the time period set forth in the Prehearing Order."
- Financial documents provided by JHNY were "evidence of settlement" and should be excluded;
- The Region "did not incorporate that very financial information furnished by JHNY into its Prehearing Information Exchange";
- "[The Region's] financial expert did not conclude that JHNY had significant financial difficulties"; and
- JHNY's arguments that certain facts and conclusions contained in the Default Order "were not supported by the record" were not correct.

A.B. at 12. JHNY's arguments concerning the Region's "briefing position" do not identify any "applicable law" with which the ALJ's Default Order was incompatible and thus do not demonstrate "good cause" to set aside the default order on this basis. This is especially so in light of the language in 40 C.F.R. § 22.17 that clearly allows a party to move for default based upon a party's failure to comply with the information exchange requirements of § 22.19. We note the CROP nowhere requires that a party moving for default demonstrate it has suffered "prejudice" as a result of the opposing party's failure to comply with procedural obligations. Rather, the grounds for entry of default here is JHNY's prejudice to the objectives of the CROP, which is designed to promote the efficient and fair handling of the administrative litigation process by presiding officers. As we have noted earlier, the information exchange requirement is an integral part of that process, and appropriately the CROP imposes the sanction of default for neglect of this requirement. Nor does the CROP require that a complainant demonstrate a respondent's ability to pay in order to justify a default order against it. *See* 40 C.F.R.

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Moreover, we are not convinced by JHNY's argument that "there is not a single case cited by EPA, relied upon in the [Default Order], or relied upon in the [Order to Dismiss] where information was provided but a default resulted from the failure to file a prehearing information exchange." A.B. at 12. Rather, it is JHNY's failure to cite supporting case law that is damaging to its argument. As we indicated previously, the company did not provide information documenting its financial condition as prescribed by the prehearing information exchange requirements, and its failure to do so interfered with the purpose of the CROP. In addition, the applicable regulations clearly authorize a Presiding Officer to issue a default order when a party fails to comply with prehearing information exchange requirements, as has JHNY in the instant case. *See* 40 C.F.R. § 22.17. The company's failure here to identify any case law contradicting this regulatory authorization undermines the company's law-based challenge to the ALJ's issuance of the Default Order.

In sum, because JHNY has not demonstrated that the ALJ's entrance of default against it is contrary to law, we reject this argument as grounds for setting aside the Default Order.

D. *Probability of JHNY's Success on the Merits*

JHNY asserts that the factual record in the case does not support its liability under Count 1 for not allowing "visible emissions" from its asbestos manufacturing operations. A.B. at 9. JHNY states that the factual findings in the Default Judgment "are not supported by the Record even if the documents and other evidence sought to be considered are excluded." *Id.*

As we mentioned earlier, under the "totality of the circumstances" test, the Board may take into consideration the alleged defaulting party's likelihood of success on the merits if in fact the case had been litigated. *In re Jiffy Builders*, Inc., 8 E.A.D. 315, 319 (EAB 1999). As we explained in *Rybond*, the Board, as part of the "totality of the circumstances" inquiry, may "consider whether the administrative action in question would have had a different outcome had there been a hearing." *In re Rybond, Inc.*, 6 E.A.D. 614, 625 (EAB 1996). The burden falls on a respondent to demonstrate there is a more than the mere possibility of a defense, "but rather a 'strong probability' that litigating the defense will produce a favorable outcome." *In re Pyramid Chem. Co.*, 11 E.A.D. 657, 662 (EAB 2004); *Jiffy Builders*, 8 E.A.D. at 322.

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§ 22.17. Finally, whether the financial information that JHNY "furnished" to the Region was "evidence of settlement" is irrelevant to our determination that the company violated the Prehearing Order. See *supra* note 16.

Regarding JHNY's alleged liability, the company's challenge is meager and conclusory. The company's challenge is limited to Count 1 of the Complaint in which the Region charges, among others, that JHNY had failed to prevent "visible emissions" to the air on February 6, 2001, and February 21, 2001. *See* Complaint ¶¶ 27-29. The company maintains that the Region lacks evidence for its Count 1 charge that the company failed to prevent "visible emissions" at its asbestos manufacturing facility because on February 21, 2001, the Agency "chose to not collect and sample the actual emissions," with the result that "there is no evidence in the record that the actual emissions contained asbestos." A.B. at 10. In further support of this argument, JHNY observes that samples of the material lining the JHNY facility's left roof vent, which the company determined contained asbestos, were not "tested on [February] 21, 2001, the day of the alleged emissions, but rather on [February] 6, 2001."[22] *Id.* Based on the foregoing, JHNY contends that default should not have been entered because EPA's Complaint fails to state a "cause of action." *Id.*

However, contrary to JHNY's assertion that the facts observed by the inspectors do not support the determination of liability, there is nothing in the work practice regulations that requires verification via laboratory analysis that visible emissions from asbestos manufacturing operations contain asbestos. Instead, the applicable regulations at 40 C.F.R. § 141 define "visible emissions" in the following manner:

> Visible emissions means *any* emissions, which are visually detectable without the aid of instruments, coming from * * * any asbestos milling, manufacturing, or fabricating operation.

40 C.F.R. § 61.141 (emphasis added). The use of the word "any" clearly signifies that visible emissions are not restricted to those emissions in which asbestos is actually detected; rather, given the nature of the activity itself, the regulation presumes that visible emissions are problematic. Therefore, we regard as lacking merit JHNY's argument that the Region did not present sufficient evidence that the company violated 40 C.F.R. § 61.144(b)(1) by failing to prevent visible emissions from its asbestos manufacturing operations. *See In re Echevarria*, 5 E.A.D. 626, 641 (EAB 1994) (rejecting as a defense to 40 C.F.R. part 61, subpart M liability Respondent's argument that emissions were not determined to contain asbestos in light of regulatory definition of "visible emissions," which does not require that such emissions contain asbestos); *see also In re Lyon County Landfill*, 10 E.A.D. 416, 435 (EAB 2002), *aff'd*, No. 02-907, 2004 U.S. Dist. LEXIS 10650 (D. Minn. June 7, 2004) (explaining that EPA does not have to

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[22] In its appeal brief JHNY mistakenly refers to these February 6 and 21, 2001 dates as November 6 and 21, 2001. *See* A.B. at 10.

detect asbestos within visible emissions in order to establish a NESHAP visible emissions violation).[23]

Moreover, the company's arguments on appeal fail to challenge the content of any of the other Counts 2 through 5 of the Complaint, which allege the company's failure to monitor emissions, maintain monitoring and inspection records, and furnish and archive such records. These counts form the bulk of the Region's Complaint, and the company's failure to address these in any way renders untenable its suggestion that it has mounted a serious case of non-liability.

In sum, since JHNY fails to meet its burden of showing that it would prevail with respect to these charges at an evidentiary hearing, JHNY consequently fails to establish that there is a "strong probability" that litigating this case would also produce a different outcome.

E. *Penalty Amount*

In its appeal, JHNY asserts that the ALJ, in adopting the Region's penalty proposal of $51,700, erred by not considering its limited ability to pay the assessed penalty in light of its allegedly poor financial condition. A.B. at 9. In particular, JHNY maintains that such a determination is justified based solely on the financial information the Region supplied, even excluding the financial information sought to be introduced by the company. *Id.* In particular, the company states that the Region and the ALJ erroneously relied upon a Dun and Bradstreet Report showing the company had garnered "$10,000,000 in sales" when the Region"admit[ted] * * * that the information contained in the Dun & Bradstreet report 'may not be accurate.'" *Id.* In addition, the company argues that the evidence shows that the company lost $277,769 in 2002 and that consequently "JHNY should be in bankruptcy." *Id.* In its discussion, JHNY refers to a financial consultant's letter to the EPA in which the consultant, analyzing financial information submitted to the Region by the company, including the above financial loss, stated that this information "suggests that JHNY was in poor financial health." A.B. at 9 (citing Region's Prehearing Exchange ("P.E."), Exhibit ("Ex.")

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[23] We note in any event that the Region related in its Complaint that on the day of the alleged emissions, February 21, 2001, "conditions were substantially the same as they were during the February 6, 2001 inspection," the date the left roof vent samples were taken. Complaint ¶ 29. Thus, even if the Region were required to verify that visible emissions contain asbestos, the circumstantial evidence points compellingly in this direction, and JHNY has offered nothing to rebut this circumstantial evidence. We observe, moreover, that Count 1 is not confined to the "visible emissions" charge. This Count also alleges that JHNY failed to "properly install, use, operate, and maintain all air cleaning equipment." *Id.* ¶ 42. However, JHNY completely fails to address this portion of Count 1. In our view, the Region's allegations that "caked" asbestos-containing material lined the facility's key air cleaning system, that the system's bag filter was in a collapsed condition, and that asbestos-containing material covered the facility catwalk further support the charges in Count 1. *See id.* ¶ 28.

50 (Letter from Joan K. Meyer, Industrial Economics, to Region III (Jan. 27, 2004))).

In accordance with 40 C.F.R. § 22.31(a), the Board can increase or decrease an ALJ's penalty assessment on appeal except that in the case of a default order, as the instant case, the Board may not increase the penalty. The rules governing initial decisions provide that an ALJ determine a penalty "based on evidence in the record and in accordance with any civil penalty criteria set forth in the act." 40 C.F.R. § 22.27. In his Initial Decision, the ALJ ratified the Region's application of the applicable CAA penalty criteria and penalty guidelines for stationary sources of air emissions. In this case, as explained below, we uphold the ALJ's penalty assessment as reasonable and consistent with the CAA stationary source statutory objectives and applicable penalty policies.

In its Complaint, the Region explained that it derived its proposed penalty by applying the penalty factors at CAA § 113, 42 U.S.C. § 7413, U.S. EPA's Clean Air Act Stationary Source Civil Penalty Policy, and Modification to EPA Penalty Policy to Implement the Civil Monetary Penalty Inflation Rule (pursuant to the Debt Collection Improvement Act of 1996), dated May 9, 1997.[24] Complaint at 12.

Section 113(d)(1) of the Act authorizes the Administrator to assess administrative civil penalties of "up to $25,000[25] per day of violation" against violators of the Act. 42 U.S.C. § 7413(d)(1). Section 113 also prescribes a list of penalty assessment criteria that the Agency must apply in assessing a penalty in civil administrative actions. These criteria are as follows: :

> [T]he Administrator * * * shall take into consideration (in addition to such other factors as justice may require) the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence * * * , payment by the violator of penalties previously assessed for

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[24] The maximum CAA administrative penalties have been increased to $32,500 per day and $270,000 total, in accordance with EPA regulations promulgated pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, 104 Stat. 890 (1990) (codified at 28 U.S.C. § 2461 note), amended by the Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, § 31001(s), 110 Stat. 1321, 1321-373 (1996) (codified at 31 U.S.C. § 3701). *See* 40 C.F.R. pt. 19 (EPA's inflation-adjusted maximum penalties); Civil Monetary Penalty Inflation Adjustment Rule, 69 Fed. Reg. 7121 (Feb. 13, 2004); 61 Fed. Reg. 69,360 (Dec. 31, 1996). These two penalty-related congressional acts direct EPA (and other federal agencies) to adjust maximum civil penalties on a periodic basis to reflect inflation.

[25] *See supra* note 24.

> the same violation, the economic benefit of noncompliance, and the seriousness of the violation.

CAA § 113(e)(1), 42 U.S.C. § 7413(e)(1).

The Clean Air Act Stationary Source Civil Penalty Policy ("CAA Penalty Policy") has been designed as guidance to facilitate the consistent application of the statutory penalty factors by courts and the EPA Administrator. CAA Penalty Policy at 1. The CAA Penalty Policy establishes two bases for calculating a penalty amount in EPA civil administrative actions. These are: (1) a minimum deterrence amount, which in turn consists of (a) a gravity component, reflecting the violation's seriousness, and (b) an economic benefit component, capturing the economic benefit that the respondent gained through its noncompliance; and (2) a set of adjustment factors to modify upwards or downwards the gravity component. These adjustment factors are based on a respondent's wilfulness or negligence, degree of cooperation, history of compliance, the environmental damage caused by the violation, and the respondent's ability to pay the penalty. *Id.* at 15-22.

The gravity component is further subdivided into measurement factors, such as the actual or potential harm of the violation, the length of time, size of the violator, and the "importance of the requirement to the regulatory scheme," which the Penalty Policy defines as the "importance of the requirement to achieving the goals of the Clean Air Act and its implementing regulations." *Id.* The Penalty Policy assigns recommended dollar values commensurate with the degree to which a factor is reflected in a particular violation and the violation's nature. *Id.* at 9-15. For example, for the "importance of the requirement to the regulatory scheme" factor, the CAA Penalty Policy assigns a range of dollar values for different violations of CAA requirements (e.g., operating and maintaining pollution control equipment, monitoring, and recordkeeping) according to the harm the particular violation causes to the regulatory scheme. *Id.* at 12-13.

As presented in its Prehearing Exchange, and Motion for Default, the Region closely followed the methodology of the CAA Penalty Policy to calculate the $51,700 penalty. Region's P.E. at 12-18; Motion for Default at 6-14. For purposes of calculating the penalty, the Region compressed the five counts of its Complaint into three violations: (1) failure to properly operate control equipment and to prevent visible emissions; (2) failure to monitor emissions to the outside air; and (3) failure to maintain records, make them available for inspection, and retain such records for at least two years.[26] Complaint at 13. The Region proposed an

[26] Thus, the Region treated Counts 1 (discharge of visible emissions and failure to properly install, use, and operate and maintain air pollution control equipment) and 2 (failure to monitor each

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inflation-adjusted penalty amount of $16,500 for each violation to reflect these violations' harm to the regulatory scheme, yielding a subtotal of $49,500. Complaint at 12; Region's P.E. at 18; *see* CAA Penalty Policy at 12-13. To this amount, the Region added an inflation-adjusted $2,200 based on the size of JHNY's business. Complaint at 13; Region's P.E. at 18; *see* CAA Penalty Policy at 14. This yielded the Region's final proposed penalty of $51,700. Complaint at 13; Region's P.E. at 18.

In arriving at its proposed Penalty, the Region, however, did not include all possible measurement and adjustment factors allowed by the CAA Penalty Policy. For example, despite a set of Dun and Bradstreet reports indicating that the company had sales in the amount of $10 million — which would have warranted a $20,000 increase under the "size" factor — the Region increased the penalty by the lowest possible amount provided under the Policy to reflect a company's size — $2,200. Region's P.E. at 12, Exs. 47-49. Also, the Region explained that although the company's violations arguably occurred over a fifteen-month period,[27] it decided to "forgo" an upward adjustment of the penalty based on its duration and instead "group[] the violations into one day in duration."[28] Region's P.E. at 14; Motion for Default at 9. Moreover, the Region chose not to further adjust the penalty in light of such factors as the company's degree of willfulness or negligence and degree of cooperation. Region's P.E. at 16. In short, it appears that JHNY's penalty exposure was substantially greater than the amount sought by the Region.

With respect to "economic impact of the penalty" on its business, JHNY's sole grounds for contesting the penalty amount, the Region remarked that it had "gone to great lengths to determine the economic impact" on Respondent's business and the company's ability to pay but that it had received "lukewarm responsiveness from the Respondent in making such a determination," providing an inadequate basis for downward adjustment of the penalty on this ground. *Id.* at 13.

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potential source of asbestos) as separate violations. The Region consolidated Counts 3, 4, and 5 (failure to properly keep records; make records available for inspection, and retain a copy of records for at least two years, respectively) into a single recordkeeping violation. Complaint at 12.

[27] In support of its statement that JHNY was in violation of the NESHAP continually for "approximately 15 months," the Region noted that its inspections spanned a time "from March 16, 2000, to June 26, 2001," and that "the same type of violations were found during each of the inspections." Region's P.E. at 13.

[28] Furthermore, the Region did not include within its penalty calculation a figure for "economic benefit," stating that the Region lacked "complete information" on the economic benefit JHNY derived from its noncompliance and "did not believe [the company's economic impact] exceeded $5,000." Region's P.E. at 14; Motion for Default at 9.

In his Default Order, the ALJ accepted the Region's methodology for imposing the $51,700 penalty, stating that "the Complaint, Motion for Default Judgment, and [Region's P.E.] demonstrate that the proposed penalty was calculated in accordance with the statutory factors in 42 U.S.C. § 7413(e) and the CAA Penalty Policy * * * ." Default Order at 8.

The ALJ, in his Order Denying JHNY's Motion, rebuffed JHNY's argument that the Region had failed to consider JHNY's "precarious" financial situation bearing on its ability to pay the proposed penalty. Referring to the information the Region filed on JHNY's finances as part of its Prehearing Exchange, the ALJ stated that the Region "has demonstrated on the record that it sought financial information from [JHNY] and considered [JHNY's] ability to pay in determining the appropriateness of the penalty." Order Denying JHNY's Motion at 8 (citing Region's P.E., Exs. 47-51). With regard to the financial consultant's letter indicating that JHNY might be in poor financial health, the ALJ noted that the company reported sales of $6.2 million and $6.3 million in 2002 and 2003, respectively, and that the letter indicated that JHNY "submitted only 'fragmentary information'" and that the consultant "concluded that she was 'unable to understand the company's current financial outlook.'" Order Denying Motion at 7 (citing Region's P.E., Ex. 50, at 5). Upon considering JHNY's arguments, the ALJ concluded that the Region had met its burden of showing that the $51,700 penalty was appropriate in light of "its impact on JHNY's business" and that JHNY had failed to meet its countervailing burden of providing specific evidence that it was incapable of paying the penalty. *Id.* at 7-8. In support of his conclusion, the ALJ referred to the Board's ample jurisprudence on parties' evidentiary burdens with respect to the penalty criteria of "ability to pay" or "economic impact." *Id.*

As explained below, we agree with the ALJ's interpretation of Board jurisprudence in this regard and the conclusions he drew from it. First, "a respondent's ability to pay may be presumed until it is put at issued by a respondent." *In re Spitzer Great Lakes, Ltd.*, 9 E.A.D. 302, 321 (EAB 2000) (citing *In re New Waterbury, Ltd.*, 5 E.A.D. 529, 541 (EAB 1994)). As we stated in *New Waterbury*, "the Rules governing penalty assessment proceedings require a respondent to indicate whether it intends to make an issue of its ability to pay, and if so, to submit evidence to support is claim as part of the pre-hearing exchange." *New Waterbury*, 5 E.A.D. at 542. And as we further explained:

> In this connection, where a respondent does not raise its ability to pay as an issue in its answer, or fails to produce any evidence to support an inability to pay claim after being apprised of that obligation during the pre-hearing process, the Region may properly argue and the presiding officer may conclude that any objection to the penalty based upon ability to pay has been waived under the Agency's

> procedural rules and thus this factor does not warrant a reduction of the proposed penalty.

New Waterbury, 5 E.A.D. at 542.

Also, as the ALJ explained, where a respondent does place its ability to pay in issue, the Region is required to present some evidence to show that it *considered* the respondent's ability to pay a penalty as part of Region's *prima facie* case that a proposed penalty is appropriate taking all penalty criteria into consideration.[29] *See id.*, 5 E.A.D. at 542. However, as we stated in *New Waterbury*:

> The Region need not present any *specific* evidence to show that the respondent *can pay* or obtain funds to pay the assessed penalty, but can simply rely on some *general* financial information regarding the respondent's financial status which can support the *inference* that the penalty assessment need not be reduced. Once the respondent has presented *specific* evidence to show that despite its sales volume or apparent solvency it cannot pay any penalty, the Region as part of its burden of proof in demonstrating the "appropriateness" of the penalty must respond either with the introduction of additional evidence to rebut the respondent's claim or through cross examination it must discredit the respondent's contentions.

Id. at 542-43; *accord In re Commercial Cartage Co.*, 7 E.A.D. 784, 807 (EAB 1998) (applying the *New Waterbury* analysis regarding parties' burdens of proof on "ability to pay" to CAA penalty assessment criteria); *CDT Landfill*, 11 E.A.D. at 120-24 & n.60 (same).

In accordance with our jurisprudence on the "ability to pay" penalty criterion, it is our view that JHNY, by not complying with the prehearing exchange

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[29] This formulation is consistent with our statement in a recent CAA case that "where an environmental statute lists a number of factors that the Agency 'shall take into consideration' [such as the CAA] while assessing a penalty, the Board has explained that 'the burden of proof goes to the appropriateness of the penalty taking *all* [statutory] factors into account.'" *In re CDT Landfill Corp.*, 11 E.A.D. 88, 121 (EAB 2003) (citing *New Waterbury*, 5 E.A.D. at 529). This articulation of the Agency's burden of proof regarding ability to pay a penalty stems from our statement in *New Waterbury* that, while EPA "bears both the burden of going forward and the burden of persuasion with respect to the appropriateness of the proposed penalty," which must include "some consideration of each of the statutory factors, including the ability to pay," EPA does not bear a specific burden with respect to any individual factor. *New Waterbury*, 5 E.A.D. at 539; *accord CDT Landfill*, 11 E.A.D. at 121. Rather, the Region's burden of proof "goes to the appropriateness of the penalty as a whole taking all factors [including ability to pay] into account." *New Waterbury*, 5 E.A.D. at 538.

requirement to provide documentary evidence demonstrating its inability to pay the proposed penalty, failed to raise its ability to pay as a cognizable issue. Thus, the company waived its ability to contest the Region's penalty proposal on this basis. *See New Waterbury*, 5 E.A.D. at 542.

Furthermore, we conclude that even if JHNY had successfully placed its ability to pay at issue, it would nevertheless have failed to meet its evidentiary burden of providing specific information to rebut the Region's *prima facie* case that its proposed penalty was appropriate based on "ability to pay" considerations. *See id.*, 5 E.A.D. at 541-43. Concretely, the information submitted by the Region as part of its Prehearing Exchange revealed sales figures for 2002 and 2003 of $6.2 million and $6.3 million, respectively. Absent rebuttal evidence, this information supported an inference that JHNY could afford to pay the $51,700 proposed penalty. Indeed, these sales figures constitute the very type of "general financial information" that we recognized in *New Waterbury* as supporting a complainant's *prima facie* case that a proposed penalty is appropriate based on ability to pay. *Id.* at 542-43. Consequently, JHNY is incorrect in asserting that the ALJ's penalty assessment is not supported by the record even if the financial evidence that JHNY sought to introduce is excluded. *See* A.B. at 9.

Once the Region had made its *prima facie* case though submission of JHNY's sales figures, it was incumbent upon JHNY to rebut the Region's *prima facie* case with detailed evidence demonstrating it could not afford the penalty. *New Waterbury*, 5 E.A.D. at 542. However, as we determined earlier, JHNY did not submit a prehearing exchange documenting why the proposed penalty should be reduced. For this reason, JHNY failed to overcome the Region's *prima facie* case on ability to pay and thus forfeited the opportunity to seek mitigation on this ground.

Another way to analyze the question of whether JHNY met its evidentiary burden here is to accept for argument's sake the company's contention that the financial information "furnished" by JHNY but not admitted into evidence by the ALJ — information largely identical to the information Region provided in its prehearing exchange — had in fact been "furnished" by JHNY in satisfaction of the prehearing exchange. *See* A.B. at 7. Even in this circumstance, JHNY's argument would fail. First, in our view, the information does not amount to the "specific" information respondents must present in order to overcome the Agency's *prima facie* case on ability to pay. *See New Waterbury*, 5 E.A.D. at 543. The primary argument that JHNY makes in opposing the penalty is that the company suffered a net income loss of $277,760 in 2002 "and therefore should be in bankruptcy." A.B. at 8-9 (citing Region's P.E., Ex. 50). In fact, JHNY is *not* in bankruptcy, and we have held in other cases involving statutes with penalty assessment criteria similar to those of the CAA that evidence of net income losses alone is not specific evidence of inability to pay sufficient to rebut the Region's contrary *prima facie* case. *See New Waterbury*, 5 E.A.D. at 547 (interpreting "ability to

pay" in TSCA case); *In re Lin*, 5 E.A.D. 595, 601 (EAB 1994)(interpreting "ability to pay" in FIFRA case).

Second, we have in the past observed that, in the absence of clearer proof, four percent of gross income can serve as the measure of a company's ability to pay a penalty. *See In re Cutler*, 11 E.A.D. 622, 654-55 n.32 (EAB 2004); *In re Chempace Corp.*, 9 E.A.D. 119, 138-39 (EAB 2000); *Lin*, 5 E.A.D. at 601; *New Waterbury*, 5 E.A.D. at 547 (all assessing a penalty based on 4% of gross income). As we stated in *New Waterbury*, "[e]ven where the net income is negative, four percent of gross sales should still be used as the 'ability to pay' guideline, since companies with high sales will be presumed to have sufficient cash to pay penalties even where there have been net losses." *New Waterbury*, 5 E.A.D. at 547; *accord Lin*, 5 E.A.D. at 601.[30] In other words, we have presumed ability to pay in circumstances in which a penalty amount does not exceed 4% of gross income. Here, the $51,700 penalty that the ALJ has assessed is less than 1% of the average of JHNY's average total sales for 2002 and 2003.[31] Applying the 4% guideline we used in *New Waterbury* and *Lin*, above, JHNY presumptively has enough cash flow to pay the penalty. This analysis, therefore, supports our determination that the Region established a *prima facie* case that its proposed penalty was appropriate in light of the company's ability to pay and that JHNY failed to rebut the Region's case on this point.

In the absence of a bona fide ability to pay issue, the penalty imposed by the ALJ appears quite reasonable. As we described earlier, the Region, in its Complaint and Prehearing Exchange, carefully followed the CAA Penalty Policy methodology to justify its proposed penalty, explaining as well how implementing the Policy would carry out the CAA penalty assessment criteria. *See* Region's P.E. at 12-18; Motion for Default at 6-14. We note that the Region explained at considerable length how the company's failure to prevent visible emissions; to properly operate air cleaning equipment; to monitor air emissions, and to maintain records of emissions and inspections carried a risk of substantial harm to workers and nearby residents through exposure to asbestos fibers. Motion for Default at 6-9; Region's P.E. at 14-16. As such, the Region convincingly argued that the

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[30] The 4% of gross income rule that we applied in *New Waterbury* and *Lin* derives from the applicable penalty policies for these TSCA and FIFRA cases. *See* Guidelines for the Assessment of Civil Penalties Under Section 16 of TSCA;PCB Penalty Policy, 45 Fed. Reg. 59,770 (Sept. 10, 1980); FIFRA Enforcement Response Policy at 23 (July 5, 1990). The CAA Penalty Policy does not provide for such a specific percentage guideline to assess a respondent's ability to pay. *See* CAA Penalty Policy at 20-21 (discussing how to calculate a penalty based on ability to pay). Nevertheless, because the TSCA and FIFRA penalty policies implement statutory ability to pay criteria that are similar to that of the CAA, we regard it as reasonable to use the 4% rule of thumb here as a measure of JHNY's presumptive ability to pay the penalty.

[31] The average of JHNY's total sales for 2002 and 2003 is $6.25 million, based on total sales of $6.3 million and $6.2 million for these years. Region's P.E., Ex. 50.

company's violations merited a high penalty reflecting their "seriousness" in accordance with the statutory penalty criteria. Nevertheless, as we observed, the Region showed considerable lenience by not increasing the penalty based on factors such as the duration of the penalty and size of the company's business. It bears mentioning that JHNY through the course of this proceeding has not challenged the application of any of the statutory penalty criteria with the exception of the "economic impact" of the penalty on its business.

For the reasons above, we determine that the ALJ correctly endorsed and adopted as his own the Region's application of the statutory penalty criteria and the CAA Penalty Policy. As we have discussed, the penalty the ALJ assessed is appropriate taking all criteria, including JHNY's ability to pay, into consideration. Therefore, we will not disturb his penalty assessment and hereby reject JHNY's penalty challenge. *See CDT Landfill*, 11 E.A.D. at 117 (stating that the Board "will not substitute its judgment for that of an ALJ absent a showing that the ALJ committed clear error or an abuse of discretion in assessing a penalty."); *accord In re Carroll Oil Co.*, 10 E.A.D. 635, 656 (EAB 2002); *In re M.A. Bruder & Sons, Inc.*, 10 E.A.D. 598, 610 (EAB 2002).[32]

IV. *CONCLUSION*

Based on the totality of the circumstances, as explained above, we determine that the Appellant, JHNY, Inc., has failed to demonstrate good cause to vacate the ALJ's Default Order. Accordingly, the Default Order is affirmed, and JHNY is assessed a civil penalty of $51,700, which we determine to be an appropriate penalty in light of the statutory penalty criteria and the CAA Penalty Policy. Payment of the full amount of the penalty assessed shall be made by forwarding a cashier's or certified check, payable to the Treasurer of the United States, to the following address within thirty (30) days of the date of receipt of this decision:

EPA-Region III
Regional Hearing Clerk
P.O. Box 360515
Pittsburgh, PA 15251-6515

A transmittal letter identifying the subject case and the EPA docket number, plus JHNY's name and address, must accompany the check. Failure on the part of Appellant to pay the penalty within the prescribed statutory time frame after the

[32] It is not uncommon for respondents in enforcement cases to work out payment schedules in circumstances of verifiable cash flow difficulties. In the event that JHNY can demonstrate such difficulties to the Region's satisfaction, such an arrangement may be appropriate here.

entry of the final order may result in assessment of interest on the civil penalty. *See* 31 U.S.C. § 3717; 4 C.F.R. § 102.13.

So ordered.