BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

In the Matter of:	:	
	:	
Hagerstown Aircraft Services, Inc.	:	
	:	Docket No. RCRA-03-2011-0112
RESPONDENT	:	
	:	
	:	Proceeding under Section
Hagerstown Aircraft Services,	:	3008(a) and (g), 42 U.S.C. Inc.
	:	§ 6928(a) of the Resource
14235 Oak Springs Road Hagerstown, MD 21742	:	Conservation and Recovery Act
	:	
FACILITY	:	

ORDER ON RESPONDENT'S MOTION TO SET ASIDE DEFAULT ORDER AND TEMPORARILY STAY PROCEEDINGS

On June 27, 2013 the undersigned issued an Initial Decision and Default Order holding Hagerstown Aircraft Services ("Respondent") liable for violating the Resource Conservation Recovery Act. On August 5, 2013 "Respondent" filed a Motion to Set Aside Default Order and Temporarily Stay Proceedings ("the Motion").

The Motion was initially filed with the Environmental Appeals Board ("the Board"). The Board determined that Respondent filed the Motion in the wrong forum and issued an Order Transferring Motion to Set Aside Default Order. *See also* 40 C.F.R. § 22.16(c). Consequently, Respondent's Motion is before the undersigned. On

August 15, 2013, Complainant filed and, on August 16, 2013, served on Respondent, via UPS Next Day Air, Complainant's Reply to Respondent's Motion to Set Aside Default Order and Temporarily Stay Proceedings ("the Reply"), opposing Respondent's Motion. Respondent had ten (10) days to respond to the Reply but no response has been filed. *See* 40 C.F.R. 22.16(b). On March 13, 2014, the undersigned issued an Order to Show Cause as to why the Respondent's Motion should not be denied. On March 20, 2014, Respondent filed a Response to the Order to Show Cause. The only new issue raised by Respondent was regarding their ability to pay. On March 25, 2014, Complainant filed its Response to the Order to Show Cause. The undersigned finds that that Respondent has failed to show that there is good cause to set aside the entry of default. For the following reasons, Respondent's Motion is therefore denied.

Discussion

In its Motion, Respondent makes three assertions: (1) that Respondent is unable to question past management or assess documents regarding, presumably, compliance and procedural issues raised in the Complaint; (2) that there is a lack of ongoing compliance issues and a corresponding lack of ongoing environmental danger; and (3) that Respondent is now interested in exploring settlement options. The Motion at 4. Respondent asserts that its business has undergone a managerial transition; specifically, its former owner, Tracey L. Potter, passed away in March 2013 and his

wife, Kimberly A. Potter ("Mrs. Potter"), who allegedly had no knowledge of the violations until recently, is now in control of the corporation and is expected to acquire her late husband's shares in the firm as well. The Motion at 1-2. Respondent's new management further asserts a purported interest in settlement. The Motion at 4. In Respondent's Response to the Order to Show Cause, the Respondent cites two occassions that Respondent contacted Complainant in an attempt to initiate settlement negotiations. Respondent's Response to the Order to Show Cause at 2. To date, all attempts to resolve the Complaint have been unsuccessful. Respondent's Response to the Order to Show Cause at 3.

1. Legal Standard

Despite the circumstances that Respondent has found itself in, Respondent has failed to meet its burden to establish good cause sufficient to set aside the Default Order. The Consolidated Rules of Practice state "[f]or good cause shown, the Presiding Officer may set aside a default order." 40 C.F.R. § 22.17. "[S]etting aside a default order is essentially a form of equitable relief." *Midwest Bank & Trust Co., Inc.*, 3 E.A.D. 696, 1991 WL 258202, at *3 (EAB 1991). "When fairness and a balance of the equities so dictate, a default order will be set aside." *Thermal Reduction Co., Inc.*, 4 E.A.D. 128,1992 WL 190247, at *2 (EAB 1992).

However, "[a]s a general principle, default orders are not favored and doubts are usually resolved in favor of the defaulting party." *Thermal Reduction Co., Inc.*, 4 E.A.D. 128, 1992 WL 190247,

at *2 (EAB 1992). Notwithstanding the general disfavor of default orders, "[t]he governing rules do not support the notion that a Presiding Officer must show inexhaustible patience in reckoning with a party's inattentiveness; rather, they suggest the contrary—that default is an essential ingredient in the efficient administration of the adjudicatory process." *Jiffy Builders, Inc.*, 8 E.A.D. 315, 1999 WL 345280, at *4 (EAB 1999); *see generally Turner Copter Services, Inc.*, 2 E.A.D. 96, 1985 WL 57126, at *2 (EAB 1985) ("The Rules provide for the entry of a default order to avoid indefinitely prolonged litigation and a consequent subversion of the orderly process of this administrative system.")

In determining whether to set aside a default order, the totality of the evidence must be considered. *E.g., Thermal Reduction Co., Inc.*, 4 E.A.D. 128, 1992 WL 190247, at *2 (EAB 1992). "Factors traditionally considered under the 'totality of the circumstances' include whether a procedural requirement was violated, whether the 'violation is proper grounds for a default order, and whether there is a valid excuse or justification for not complying with the procedural requirement.'" Barry, 2011 EPA ALJ LEXIS 25, at *6 (ALJ 2011) (citation omitted). Notably, "a lack of willful intent to delay proceedings is not, by itself, sufficient to excuse noncompliance." *Jiffy Builders, Inc.*, 8 E.A.D. 315, 1999 WL 345280, at *5 (EAB 1999). The presiding officer may also consider whether the defaulting party would be likely to succeed on the merits and whether the penalty assessed in the default order is

reasonable. *JHNY, Inc.*, 12 E.A.D. 372, 2005 WL 2902519, at *14 (EAB 2005); *see also Midwest Bank & Trust Company, Inc*, 3 E.A.D. 696, 1991 WL 258202, at *4 (EAB 1991).

Despite the standard elucidated by the case law,[1] Respondent has presented a number of ancillary reasons as to why good cause is established, reasons that have not been sufficiently analyzed by, let alone supported, by the case law. The Motion at 4; Respondent's Response to Order to Show Cause at 2-4. Respondent's Motion and supplemental filings fail to cite any supportive cases establishing the persuasiveness of these theories.

2. Lack of Explanation regarding Failure to File an Answer

The Complaint was served upon Respondent over two years ago, on March 25, 2011. The Respondent has entirely failed to explain its procedural failure to respond to the Complaint. Respondent has not simply neglected to explain its failure to respond, it has claimed that it is wholly unable to make an inquiry into said failure because it is unable to interview former management or find documents regarding the Complaint's procedural and substantive underpinnings. The Motion, at 4. However, the fact that a firm's

[1] It should be noted that while the Federal Rules of Civil Procedure include a somewhat similar standard regarding default orders, "[a]dministrative agencies are not bound by the standards of the Federal Rules of Civil Procedure." *Detroit Plastic Molding Co.*, 3 E.A.D. 103, 1990 WL 657310, at *3 (EAB 1990) (citing *Oak Tree Farm Dairy, Inc. v. Block*, 544 F. Supp. 1351, 1356 n.3 (E.D.N.Y. 1982)).

management has changed or current management was unable to access relevant documents kept by prior management does not in any sense excuse the Respondent's failure to respond to the Complaint. *See generally JHNY, Inc.*, 12 E.A.D. 372, 2005 WL 2902519, at *8 (EAB 2005) (Finding that "the paucity of the [respondent's] explanation suggest[ed] that the oversight [of not complying with the Consolidated Rules of Practice] was the product of neglect rather than good cause.").

Instead, these admissions show that Respondent's ability to establish good cause is largely illusory if not wholly unachievable, a fact that weighs heavily against setting aside the Default Order. *Pyramid Chem. Co.*, 11 E.A.D. 657, 2004 WL 3214481, at *4 (EAB 2004) ("[A] significant factor is . . . whether the purported defaulting party has any valid excuse for the procedural violation."); *see also Detroit Plastic Molding Co.*, 3 E.A.D. 103, 1990 WL 657310, at *3 (EAB 1990) ("To satisfy the good cause requirement, it is not enough to attribute a default to mere neglect of counsel. A showing of good cause must point to some extenuating circumstance that excuses such neglect."). To hold otherwise would allow firms to turn a blind eye to environmental compliance, ignore administrative complaints, exploit a competitive advantage over market rivals in compliance, and later avoid consequent default orders by virtue of a simple change in management.

3. Respondent's Current Compliance Does Not Alter Their Past Violations

Respondent's argument that it has since complied with the environmental regulations underlying the Complaint is similarly unavailing. The Motion at 4; Respondent's Response to Order to Show Cause at 4. The fact that Respondent has complied with the law is encouraging; nevertheless, this does not change the fact that significant substantive violations still occurred over a considerable period of time. *See generally*, Default Order. To excuse Respondent's substantive violations simply because they came into compliance years after prior violations would, as alluded to previously, encourage entities to exploit the regulatory regime by avoiding compliance until caught, all the while avoiding the monetary penalties so elemental to environmental enforcement. *See generally Sav-Mart, Inc*, 5 E.A.D. 372, 1995 WL 129854, at *5 (EAB 1995) ("Clearly, a primary purpose of civil penalties is deterrence."). Present compliance with the law does not excuse the fact that Respondent was under an affirmative duty to follow the law in the past.

4. Hagerstown Aircraft Services is the Respondent

Respondent's Motion sets forth the unfortunate situation that Mrs. Potter, Respondent's new chief officer, has an alleged lack of culpability. The Motion, at 1-2. However, it is the corporation, not Mrs. Potter in an individual capacity, that is the focus of the underlying Complaint. The fact that Mrs. Potter has acted

appropriately to come into compliance does not alter the acts and omissions of the corporation's managerial predecessors.

5. Respondent's Interest in Settlement does not Establish Good Cause

Respondent further argues that it is now interested in settling and this establishes good cause. Respondent cites no case law in support of this assertion and the undersigned has also found no case law establishing that a desire to settle would establish good cause. Further, the Complaint itself explicitly "encourage[d] settlement of the proceedings" and provided instructions on how to effectuate such a compromise. The Complaint, at 10.

However, Respondent's management at the time the Complaint was served, did not explore settlement. It was not until July 26, 2013, approximately one month after issuance of the Default Order and over 2 years after the Complaint had first encouraged settlement, that the subject was raised. The Complaint, at 10. The fact that Respondent has changed management personnel, as noted previously, cannot excuse this undue delay for reasons of both policy and practicality. Respondent had every incentive to explore settlement for the last several years but management did not do so. The fact that the current management may be more amenable to settlement does not alter the history of the case which demonstrates a corporation whose former management ignored its responsibilities under the law.

6. There is No Indication that Respondent Would Have a Strong Probability of Success on the Merits

Furthermore, Respondent has not provided any indication that it would be likely to succeed on the merits. Under this inquiry of good cause, "[t]he burden is on the defaulting party to demonstrate that there is more than the mere possibility of a defense, but rather a strong probability that litigating the defense will produce a favorable outcome." *Barry*, 2011 EPA ALJ LEXIS 25, at *6 (ALJ 2011) (internal quotation marks and citations omitted); *see also Midwest Bank & Trust Co., Inc*, 3 E.A.D. 696, 1991 WL 258202, at *3 (EAB 1991) ("In some circumstances, the presence of a meritorious defense alone can constitute good cause for setting aside a default order, particularly if there is a strong probability that the action would have had an outcome different from that produced by the default order had there been a hearing."). Having avoided the issue of the merits completely, Respondent has failed to sustain its burden here. Further, Respondent's statements that current management is unable to investigate the circumstances underlying the case at hand appears to indicate that Respondent would be unable to come forth with evidence substantiating a meritorious defense, let alone a "strong probability" of winning on the merits. *See Barry*, 2011 EPA ALJ LEXIS 25, at *6 (ALJ 2011).

7. The Penalty is Reasonable and Respondent Has Failed to Challenge the Reasonableness of the Penalty

Lastly, Respondent had not challenged the reasonableness of the penalty imposed by the Default Order until Respondent's

Response to the Order to Show Cause. The Default Order sets forth a detailed analysis of the penalty. Default Order at 11-14. Respondent has offered no additional information to change or alter that analysis.

Respondent's decision not to challenge the underlying liability or challenge the penalty's reasonableness prior to the Respondent's Response to the Order to Show Cause favors upholding the Default Order. *See JHNY*, 12 E.A.D. 372, 2005 WL 2902519, at *8 (EAB 2005) ("The soundness of upholding the imposition of default here is bolstered by our determination that JHNY[, the respondent,] has neither raised a serious challenge to liability nor mounted an argument of substance that it is unable to pay a penalty."). In light of the fact that the Respondent did not raise its ability to pay prior to the Response to the Order to Show Cause and failed to produce any evidence to support its inability to pay, the issue of Respondent's ability to pay has been waived. *See New Waterbury, Ltd.*, 5 E.A.D. 529, 542 (EAB 1994).

CONCLUSION

Based on the forgoing, Respondent's Motion to Set Aside Default Order and Temporarily Stay Proceedings is hereby denied.2 Respondent has thirty days from the date of service (plus five days if served by a method slower than overnight or same-day delivery) to appeal the decision to the Environmental Appeals Board. *JHNY*, 12

2 On April 2, 2014, the undersigned received a Notice of Withdrawal of Appearance from Respondent's counsel. Therefore, this decision is being served on Respondent directly in accordance with former Respondent's Counsel's instructions and not Respondent's Counsel.

E.A.D. 372, 2005 WL 2902519, at *7 n. 14 (EAB 2005) ("a Motion for Reconsideration to set aside a default order should likewise stay the running of time period for appeal to the Board."); *B&L Plating, Inc.*, 11 E.A.D. 183, 2003 WL 23019919, at *5 (EAB 2003)(finding that the date of a default order is changed to correspond to the date of the order denying motion to set aside the default order); *see also* 40 C.F.R. §§ 22.7c, 30(a)(1) (regarding appeal and mailing time periods).

IT IS SO ORDERED.

4/3/14
Date

Renée Sarajian

Renée Sarajian
Regional Judicial Officer/
Presiding Officer
U.S. EPA, Region III

CERTIFICATE OF SERVICE

This Initial Decision and Default Order (Docket No.: RCRA-03-2011-0112) was served on the date below, by the manner indicated, to the following people:

VIA HAND DELIVERY:

Joyce Howell (3RC30)
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