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ENVIRONMENTAL BOARD

Sargent Enterprises, Inc.

732 Center Street
Jim Thorpe, Pa. 18229

COVER SHEET

TO: Environmental Appeals Board

DATE: February 24, 2010

RE: Docket No. CAA-03-2009-0189

FROM: Brian J. Sargent

PAGES: 12

Please find enclosed the Appeal request of Sargent Enterprises, Incorporated in regard to the above referenced matter.

Due to current economic conditions, as well as the structure of our business, we were financially unable to bare the considerable cost of legal representation to prepare this Appeal. Therefore, this Appeal has been prepared to the best of our ability, namely by Brian J. Sargent, President of Sargent Enterprises, Inc..

We hope and pray that the Appeals Board will look beyond any informalities in format and procedure with this filing.

We would like to thank you in advance for your time in reviewing this matter.

Yours very truly,



Brian J. Sargent
President

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

2010-01-29 9:43
ENVIRONMENTAL APPEALS BOARD


IN THE MATTER OF)
)
SARGENT ENTERPRISES, INC.)
)
RESPONDENT)
)

DOCKET NO. CAA-03-2009-0189

NOTICE OF APPEAL

Sargent Enterprises, Inc. seeks review of a decision of Administrative Law Judge Barbara A. Gunning, issued January 28, 2010, assessing a civil penalty of \$17,400.00, for violations of Section 112 of the Clean Air Act ("CAA"), 42 U.S.C. Section 7412.

An appeal brief is attached.



Dated: February 24, 2010

Brian J. Sargent
President
Sargent Enterprises, Incorporated
P.O. Box 193, 732 Center Street
Jim Thorpe, PA 18229
(570) 325-8000
(570) 325-8006 FAX

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

IN THE MATTER OF)
)
SARGENT ENTERPRISES, INC.) DOCKET NO. CAA-03-2009-0189
)
RESPONDENT)
)

APPEAL BRIEF

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TABLE OF AUTHORITIES

CASE:
SARGENT ENTERPRISES, INC.
Docket No. CAA-03-2009-0189

STATUTES:
Section 112 of the Clean Air Act

REGULATIONS:
42 U.S.C. Section 7412

INTRODUCTION

Sargent Enterprises, Incorporated (Sargent) appeals from an Initial Decision of Barbara A. Administrative Law Judge Gunning, Administrative Law Judge, assessing a civil penalty of \$17,400 for violations of Section 112 of the Clean Air Act. Judge Administrative Law Judge Gunning found that Sargent had violated Section 112 on one occasion, based on the Notice of Violation issued by the EPA . For the reasons stated below, the Administrative Law Judge reached her conclusion to issue a Default Order prior to Sargent and the EPA being able to reach a settlement in the matter.

* * *

ISSUES PRESENTED FOR REVIEW

In short, Sargent wished to reach a settlement with the EPA prior to the dates which the Administrative Law Judge requested additional information for the continuation of the legal proceedings (filing of prehearing exchange, etc.). Sargents' unfamiliarity with the legal proceedings, coupled with its inability to secure legal representation due to the significant costs, missed the deadline for filing the prehearing exchange, and subsequently, the Administrative Law Judge, having no knowledge of the ongoing settlement discussions, issued the Default Order.

FACTUAL AND PROCEDURAL BACKGROUND

The Complaint in this case was filed with the Regional Hearing Court on June 4, 2009. The Complaint alleges that the Respondent, along with two other parties who have since settled, violated Section 112 of the Clean Air Act ("CAA"), 42 U.S.C. SS 7412, by failing to dispose of friable asbestos, generated by renovation of the upper Dublin High School, in accordance with 40 C.F.R. SS 61.145(c) (6) (I). Complainant proposed an administrative penalty totaling \$21,900 for all three parties.

Respondent, unable to bare the significant cost of legal representation at the time, filed its own answer to the best of its' ability which was received by the Regional Hearing Clerk on July 6, 2009. On July 21, 2009, the Regional Judicial Officer granted the Motion for Extension of Time to file an Answer submitted by 1 Source Safety and Health ("1 Source"), one of the two other parties. On August 13, 2009, the RJO entered a Final Order accepting the Consent Agreement and Final Order ("CAFO") between Complainant and 1 Source. Under the CAFO, 1 Source agreed to pay a penalty of \$2,700. On September 17, 2009, the Chief Administrative Law Judge designated Barbara A. Gunning ("Administrative Law Judge Gunning") to preside in the above referenced matter.

On September 24, 2009, Administrative Law Judge Gunning issued a Prehearing Order that required Sargent to submit its prehearing exchange by November 24, 2009; that the Respondents Sargent and the School District of Upper Dublin ("Upper Dublin"), submit their prehearing exchanges by December 22, 2009, and that Complainant submit its rebuttal prehearing exchange by January 7, 2010.

Shortly there after (uncertain of exact date), as instructed, Sargent began communicating with Jennifer Abramson, Assistant Regional Counsel with the intent to reach a settlement agreement prior to the dates which prehearing exchange was required. Sargent was unfamiliar with the process of filing a prehearing exchange, or any other eventual legal exchange, on its' own. In addition, Sargent, due to the significant impending legal expenses which it would have been forced to incur to defend itself, was unable to retain counsel to perform these actions. Between the structure of the business, and the current economic conditions, this legal burden was one that Sargent could not bare. Sargent made this point very clear during its initial discussion with the Regional Counsel. It was for this primary reason that Sargent was so steady about intending to reach a settlement.

Upper Dublin subsequently settled with the Complainant. Under the CAFO, executed on September 29, 2009, Upper Dublin agreed to pay a penalty of \$1,800. Consequently, Sargent became the sole remaining respondent. Thereafter, complainant timely filed its prehearing exchange. On December 28, 2009, Complainant filed a motion entitled "Motion for Extension of Time to File Complainant's Rebuttal Prehearing Exchange, Issuance of Show Cause Order, and Other Appropriate Relief ("Complainant's Motion") in which Complainant affirmed that no prehearing exchange had been received from Sargent.

Employees from Sargent (Brian J. Sargent - President, Rick Searfoss - Project Manager, & Shawn Searfoss - Project Foreman) familiar with this matter engaged in a conference call with Ms. Abramson for the sole purpose of reaching a settlement

(uncertain of exact date, but sometime between November and December of 2009).

Sargent discussed its position in regard to the alleged violation, not wishing to debate the violation, but to reach a general conclusion which would lead to a settlement agreement. At the conclusion of the call, all three employees of Sargent were left with the same impression, that Ms. Abramson needed to speak with the site inspector, Stephen Forostiak, Environmental Specialist, U.S. EPA Region III, before a settlement could be reached, and that her office would be in touch.

Sargent, being unfamiliar with these settlement proceedings, in turn waited to hear from Ms. Abramson's office.

Upon Sargent's failure to file its prehearing exchange, and pursuant to Complainant's Motion, an Order to Show Cause was issued to Sargent on December 30, 2009 requiring it to explain why it failed to meet the deadline for filing its prehearing exchange or statement of election only to conduct cross-examination of Complainant's witnesses. Sargent was given until January 19, 2010 to show cause why it had failed to meet the prehearing exchange deadline and why a default order should not be entered for failing to meet the deadline.

Sargent failed to serve any response to the Order to Show Cause. The Order to Show Cause was sent to Sargent and was received on January 6, 2010, as evidenced by the certified mail return receipt signed by Tammy A. Hurley on January 6, 2010. Brian J. Sargent, the only employee of SEI with enough involvement in the matter, having been off of work for personal reasons from mid/late December to mid/late January, did not receive and review all of the correspondence until January 21, 2010. On that day, Sargent contacted Ms. Abramson's office via facsimile and

phone, and left a message in regard to needing to reach a settlement. Ms.

Abramson returned the phone call and fax on either January 22nd or 23rd. Ms.

Abramson indicated that although she was not in complete agreement with Sargents' impression of how our last conversation was left, she indicated that we could still discuss a settlement. In the time it took for Brian Sargent and Ms. Abramson to get in touch with one another, the Default Order had been issued.

An apparent miscommunication between Sargent and the office of Jennifer Abramson, Esq., Assistant Regional Counsel, U.S. EPA Region III resulted in Sargent missing the required deadlines for filing, and the subsequent Default Order for not submitting the filings. Sargent is a business which performs environmental remediation. The financial structure of the business coupled with the current economic conditions resulted in Sargent being unable to afford the significant costs of legal representation in this matter. It was for this primary reason that Sargent wished to settle this matter. At no time did Sargent admit to the allegations in the initial Notice of Violation, but did wish to reach a settlement that would have been in the best financial interest of its business. This point was made very clear at the onset of the settlement discussions. Sargent truly believes that this matter could have been settled with the Assistant Regional Counsel had Sargent and the Regional Counsel communicated more clearly.

ARGUMENT

Sargent does not argue that the Administrative Law Judge erred in his/her Initial Decision. Sargent has the utmost respect for the Environmental Protection Agency, and all of its agents. We also acknowledge that the Administrative Law Judge must issue his/her decisions as per the letter of the law. However, we also believe that the intent of the laws governing matters such as these is not to financially stiffen a business or individual, but to resolve matters in the best interest of all parties. Being unable to incur the substantial costs (costs that most likely would have exceeded the amount of the initial proposed penalty) of retaining counsel to defend itself in this matter, Sargent inevitably erred in not filing the prehearing exchange in a timely manner. Sargent only prays that upon thorough review of this matter, that they may be able to complete the Settlement process initiated with the Assistant Regional Counsel. We hope the Appeals Board will be able to look beyond any informalities in format and procedure with regards to this Appeal request. We believe an appeal of this motion is within the power of the Appeals Board, and pray it will be granted.

ALTERNATIVE FINDINGS OF FACT

None

ALTERNATIVE CONCLUSIONS OF LAW

None

CONCLUSION

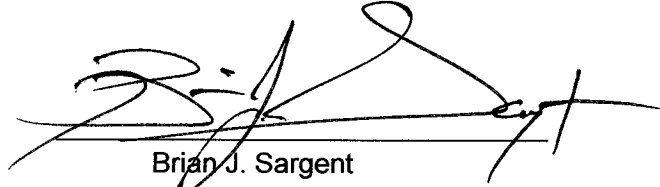
Sargent prays that upon review of this matter, that it may be able to conclude the settlement proceedings it began with Assistant Regional Counsel. A settlement of this matter would be the most fair and amicable resolution of this matter, in the best interest of the EPA, Sargent, and the American tax payers.

Dated: February 24, 2010

Brian J. Sargent
President
Sargent Enterprises, Incorporated
P.O. Box 193, 732 Center Street
Jim Thorpe, PA 18229
(570) 325-8000
(570) 325-8006 FAX

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Appeal in the matter of Sargent Enterprises, Incorporated (Respondent) Docket No. CAA-03-2009-0189, were served by United States First Class Mail and/or Federal Express carrier on the following persons, this 24th day of February, 2010.



Brian J. Sargent
President

Sargent Enterprises, Incorporated
P.O. Box 193, 732 Center Street
Jim Thorpe, PA 18229
(570) 325-8000

Original and Five (5) Copies by Federal Express (Carrier) to:

*U.S. Environmental Protection Agency
Clerk of the Board, Environmental Appeals Board
Colorado Building
1341 G Street, N.W., Suite 600
Washington, D.C. 20005*

One copy by US Mail to:

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

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

U.S. Environmental Protection Agency
Attn: Eureka Durr, Clerk of the Board
Environmental Appeals Board
Colorado Building
1341 G Street, N.W., Suite 600
Washington D.C. 2005