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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ENVIRONMENTAL APPEALS BOARD

WASHINGTON, DC

IN THE MATTER OF: **Wasatch Propane** **201 West 2700 South** **South Salt Lake City, UT 84106** **Docket No. EPCRA-08-2004-0004** **Respondent**	**EPCRA Appeal No. 05-02**

COMPLAINANT-APPELLEE'S REPLY BRIEF

Pursuant to section 22.30(a)(2) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Rules of Practice"), 40 C.F.R. § 22.30(a)(2), and the Order issued in this matter by the Environmental Appeals Board ("Board") dated January 6, 2006, the United States Environmental Protection Agency, Region 8, (the "Region"), files this Reply Brief.

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I. Scope of Review

Under the Rules of Practice, a party may file with the Board a response brief responding to argument raised by the appellant, together with reference to relevant portions of the record, initial decision or opposing brief. 40 C.F.R. §22.30(a)(2).

The parties' right to appeal is "limited to those issues raised during the course of the proceeding and by the initial decision, and to issues concerning subject matter jurisdiction." 40 C.F.R. §22.30(c). The Board, then, is to " adopt, modify, or set aside the findings of fact and conclusions of law or discretion contained in the decision or order being reviewed, and shall set forth in the final order the reasons for its actions." 40 C.F.R. §22.30(f). As this matter concerns review of a default order, the Board "may not increase the penalty above that proposed in the complaint or in the motion for default, whichever is less." Id.

In matters of default, the Board has applied a "totality of the circumstances" approach to determine whether 'good cause' has been established to excuse a respondent's failure to file a timely answer to the Complaint and whether procedural unfairness would result from entering a default judgment against the respondent. The Board has provided great detail in this area. *See In re Pyramid Chemical Company, RCRA-HQ-2003-0001,* slip op. at 33-34 (EAB September 16, 2004):

> A. *Standards Governing Default*
>
> EPA's Consolidated Rules of Practice ("Consolidated Rules") provide that a party "may be found to be in default: after motion, upon failure to file a timely answer to the complaint." 40 C.F.R. § 22.17(a). Furthermore, "Default 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.* When the presiding authority over a matter -- the Board in this instance -- finds that default has occurred, it "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." *Id.* § 22.17(c) (emphasis added). Our "good cause" determination, predicate to finding a party in default, takes the "totality of the circumstances" into consideration. *In re Thermal Reduction Co.,* 4 E.A.D. 128, 131 (EAB 1992); *see also In re B&L Plating,* CAA Appeal No. 02-08, slip op. at 12-13 (EAB, Oct. 20, 2003), 11 E.A.D. ___; *In re*

Jiffy Builders, Inc., 8 E.A.D. 315, 319 (EAB 1999).

> In terms of the relief to be granted upon a finding of default, "[t]he relief proposed in the complaint or the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act [authorizing the proceeding at issue]." 40 C.F.R. § 22.17(c). Default issues arise most typically before the Board in penalty cases, where we review the penalty proposed in the complaint to ensure that it is appropriate in view of the nature of the case. *E.g., In re Rybond, Inc.*, 6 E.A.D. 614 (EAB 1996). But the requirement that we review the proposed relief generally applies as well to other forms of relief sought through administrative enforcement action, including the elements of a compliance order. Our determination in the default setting as to whether to impose proposed relief is equitable in nature, as is our consideration of whether to set aside default once entered. *See id.* at 624 (quoting *In re Midwest Bank & Trust Co.*, 3 E.A.D. 696, 699 (CJO 1991)); *cf. B&L Plating*, slip op. at 11 n.14, 11 E.A.D. ___.
>
> When a party commits a procedural violation that can give rise to a default, such as an untimely answer, a significant factor in the good cause determination is whether the purported defaulting party has any valid excuse for the procedural violation. For instance, in *Jiffy Builders*, in evaluating whether to overturn a default order, the Board expressed that it would "[o]rdinarily expect some articulation of the 'cause' of the default * * * ." 8 E.A.D. at 320 n.8; *accord B&L Plating*, slip op. at 13, 11 E.A.D. ___ (respondent failed to articulate a good cause basis for setting aside the default) (dicta).

Slip op. at 6-7(emphasis original; footnotes omitted).

Simply put, in a default setting the Board's determination will be based on its equitable evaluation, which evaluation also applies to setting aside defaults that have been entered. Id.

II. Brief Statement of Facts

On September 14, 2004, the Region filed a Complaint and Notice of Opportunity for Hearing with the Regional Hearing Clerk, citing Wasatch Propane (the Respondent-Appellant herein, hereafter "Wasatch") for violating section 312 of the Emergency Planning and Community Right to Know Act ("EPCRA"), 42 U.S.C. § 11022. EPCRA requires regulated parties that store hazardous chemicals, in excess of established threshold amounts, to file and submit annual inventory reports to designated state and local offices. The complaint alleged

Wasatch failed to file the required report for the 2003 calendar year. Wasatch failed to file an Answer. On March 15, 2005, the Region filed a motion to find Wasatch in default. On June 16, 2005, the Presiding Officer issued an Order to Show Cause why the matter should not be dismissed for failure to state a *prima facia* case against Wasatch. On July 14, 2005, the Region filed a responsive pleading to the Order to Show Cause. On November 15, 2005, the Presiding Officer issued Default Order/Initial Decision. The Default Order/Initial Decision made findings of facts and conclusions of law which include:

- Wasatch was obligated to file the subject EPCRA report for calendar year 2003;
- Wasatch failed to file the subject EPCRA report for calendar year 2003;
- As of November 15, 2005, Wasatch had failed to file an answer to the complaint; and
- After considering applicable statutory factors, EPA "Penalty Policies," and the entire Administrative Record in the matter, a penalty of $13,751 was assessed against Wasatch.

Initial Decision at 12-13.

III. Issues Presented

1. In light of the totality of the circumstances, does good cause exist to excuse Wasatch's failure to answer the Complaint timely, and would procedural unfairness result from entering a default judgment against Wasatch?

2. Did the Presiding Officer err in failing to consider prior history of violations in fixing the proposed penalty assessment contained in the complaint?

3. Did the Presiding Officer err in failing to consider other matters as justice may require in fixing the proposed penalty assessment contained in the complaint?

Response to Issue 1.

No. Wasatch has provided no basis for the Board to find good cause exists. In 40 C.F.R. §22.17(c) the Administrator provides that "[f]or good cause shown, the Presiding Officer may set

aside a default order." Because Wasatch failed to request a hearing and failed to raise any issue for hearing, as required by the Rules of Practice, the Presiding Officer issued an "initial" decision on Wasatch's default, ordering it to pay the penalty amount proposed. As Wasatch has made no effort to demonstrate "good cause" which would justify setting aside the default order, thereby allowing it to proceed with filing an Answer and challenging the proposed penalty order, its appeal to the Board must fail.

While Wasatch attempts to raise certain issues in its appeal brief -- the very first, and only, document which it has filed in these proceedings to challenge the proposed penalty order -- these issues are raised contrary to law, and are not ripe for review. First, the issues are not raised consistent with the Rules of Practice cited above.

Second, federal reviewing courts have recognized that,

> [w]hen one party utterly fails to raise a significant issue before the ALJ, the record developed with regard to that issue will usually be inadequate to support a substantive finding in its favor and, generally speaking, neither the ALJ nor the Board should consider the issue."

Trident Seafoods, Inc. v. NLRB, 101 F.3d 11, at 116 (D.C. Cir. 1996). As Wasatch raised no issue whatsoever before the Presiding Officer, and attempts to do so for the first time, on appeal, the Board should not consider any issue raised.

Third, the only document in the record by which Wasatch attempts to challenge the Default Order, or "Initial Decision," is the brief its attorney filed with the Board, initiating this appeal. As "[l]egal memoranda and oral argument are not evidence and do not create issues of fact capable of defeating an otherwise valid summary judgment," Estrella v. Brandt,682 F.2d 814, at 819-820, (9th Cir. 1982), Wasatch's brief cannot be considered evidence sufficient to defeat the Default Judgment, or any portion of that judgment, and Wasatch has not "otherwise" challenged the validity of the Default Judgment. Any facts by which Wasatch attempts to defeat the Default Judgment must, like efforts to defeat a summary judgment in a federal court, "be established through one of the vehicles designed to ensure reliability and veracity – deposition, answers to interrogatories, admission and affidavits." Martz v. Union Labor Life Ins. Co., 757 F.2d 135, at 138 (7th Cir. 1985). While there are significant distinctions between the federal court process and administrative process, both processes must be equally concerned with "ensuring reliability and veracity."

In conclusion, given the ample procedural due processes available to Wasatch as provided to it in the Rules of Practice, due processes which Wasatch has ignored or rejected by its conduct, and given the importance of judicial economy and judicial efficiency, the only issue for review before the Board is whether "good cause" exists for vacating the Default Judgment, and allowing Wasatch to proceed by filing an Answer. There is no such "good cause" here. Nothing in the record supports any basis to set aside the Initial Decision. Moreover, Wasatch's brief provides no basis to set aside the Initial Decision. The Board has indicated previously that this is an expected threshold. For instance, in *Jiffy Builders,* the Board, in evaluating whether to overturn a default order, expressed that it would "[o]rdinarily expect some articulation of the 'cause' of the default ...." *In re Jiffy Builders, Inc.*, 8 E.A.D. 315, at 320 n.8 (EAB 1999).

With no cause for the default articulated, the Board should terminate its evaluation of Wasatch's brief, without addressing the specious arguments contained in that brief, and decide and rule that the Initial Decision was procedurally sound and properly determined.

Response to Issue 2.

The Board may base its ruling on this appeal without deciding this question. The Region respectfully suggests that fashioning its ruling consistent with such a basis is proper here.

However, should the Board evaluate this issue in reaching its decision, the Region emphatically observes that facially, the facts and testimony contained in the record support the findings of fact and conclusions of law found in the Initial Decision, specifically, that the proposed penalty assessment contained in the Region's pleadings is consistent with the record of this proceeding and EPCRA. *Initial Decision* at 13.

The Region relied upon and employed the EPCRA Enforcement Response Policy in determining the appropriate penalty in the complaint. This policy, attached as Exhibit 1 to Administrative Complaint and Exhibit 4 to Motion for Default Order, states:

> **Prior History of Violations is an upward adjustment only.** The penalty amounts reflected in the penalty matrices apply to first time violators. Where a violator has demonstrated a history of prior violations, the penalty may need to be adjusted upward. (*EPCRA ERP* at pp.25, emphasis supplied.)

Wasatch argues that the 'prior history of violation' factor should have resulted in a *downward* adjustment to the penalty. This argument is contrary to the explicit words contained in the ERP. The interpretation Wasatch seeks would be arbitrary and capricious and in direct opposition to the ERP. The argument Wasatch makes is without merit and is based on a hope, not any law, rule or policy. In fact, Wasatch's argument is topsy-turvy. The Board should reject this argument, if it considers it at all.

Response to Issue 3.

The Board may base its ruling on this appeal without deciding this question. The Region respectfully suggests that fashioning its ruling consistent with such a basis is proper here.

However, should the Board evaluate this issue in reaching its decision, the facts and testimony contained in the record support the findings of fact and conclusions of law found in the Initial Decision, specifically, that the proposed penalty assessment contained in the Region's pleadings is consistent with record of this proceeding and EPCRA. Initial Decision at 13.

In its efforts to raise this issue to the Board, Wasatch ventures into a dangerous realm. It makes reference to an undated, unattributed assertion, unsupported by testimony of any kind, that, among other things, "a Region 8 officer" indicated to Wasatch that the Complaint would be dismissed. The reasoning goes further, that Wasatch reasonably relied on this undated, unattributed, unsupported assertion in its election to not file an answer. Wasatch claims that this constitutes an "other factor as justice may require" and provides a basis for the Board to reduce the penalty.

The Board must reject this argument, and the others characterized by Wasatch as 'other factors as justice may require' as a predicate for penalty reduction. Again, Wasatch has offered no evidence of any kind to support these assertions. The legal brief filed by Wasatch is not and cannot be evidence. The legal brief filed by Wasatch attempts to supply and argue facts that are

not in the record. The Board should disregard Wasatch's improper attempt to manipulate the record herein[1].

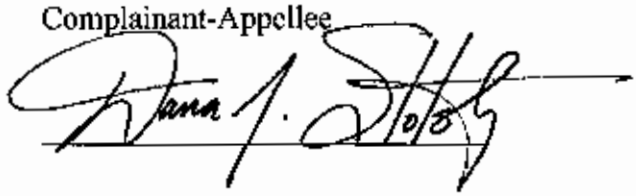
IV. Conclusion

Wasatch was given the opportunity to contest the allegations in the Complaint after it was filed, after the Motion for Default was filed, and after the Order to Show Cause was filed. Wasatch chose not to. Wasatch has not shown at all any defect in the record or process of this matter that warrants setting aside the default of the Initial Decision. Wasatch misdirects the Board by its assertion the EPCRA ERP allows for downward penalty adjustments based on a history of prior violations. Just the opposite- the EPCRA ERP only allows for upward penalty adjustments based on a history of violations. Finally, in an ill-conceived attempt to establish some variant of detrimental reliance, Wasatch attempts to insert into the record as facts, among other things, unasserted, unattributed statements without any testimonial or documentary support that it relied on statements of an EPA officer that the complaint would be dismissed.

For all the reasons set out above, the Initial Decision should be upheld and the penalty assessed therein of $13,751 should be imposed against and upon Wasatch.

Respectfully submitted,

Dana J. Stotsky
Senior Enforcement Attorney
Complainant-Appellee

By: 

[1] The Region respectfully reserves it right to substitute counsel in the event that the Board remands this matter requiring a fact hearing so that the undersigned may appear as a witness for the express purpose of rebutting the undated, unattributed, unsupported assertions contained in Wasatch's brief regarding "a Region 8 officer." The undersigned avers and states that he is the "Region 8 officer" referenced in Wasatch's brief, and the statements so attributed are wholly incorrect.

OF COUNSEL:

David Janik, EPA Region 8;
Dean Ziegel, EPA HQS;
Gary Jonesi, EPA HQS

CERTIFICATE OF SERVICE

I hereby certify that, on the 17th day of January, 2006, I caused a true and correct copy of the foregoing COMPLAINANT-APPELLEE'S REPLY BRIEF, to be sent by first class mail, postage prepaid, upon the following:

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Clerk of the Board, Environmental Appeals Board (MC 1103B)
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Washington, D.C. 20460-0001
(via FAX @ (202) 233-0121)

and

Scott C. Rosevear, Esq.
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SNELL & WILMER, L.L.P.
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(Fax #: 801-257-1800)

And via hand-delivery, to:

Regional Hearing Clerk
U.S. EPA Region 8
999 18th Street, Ste. 300
Denver, CO 80202-2455.

And that the original and one copy of the foregoing COMPLAINANT-APPELLEE'S REPLY BRIEF has been sent via hand-delivery via overnight courier service, to:

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BY: Dana J. Stotsky

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