UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
SARGENT ENTERPRISES, INC.,[1]	)	DOCKET NO. CAA-03-2009-0189
	)	
	)	
RESPONDENT	)	
	)	

DEFAULT ORDER

Respondent Sargent Enterprises, Inc., ("Respondent") is hereby found in default for failure to submit a prehearing exchange, motion for extension of time, or statement that it is electing only to conduct cross-examination of the Complainant's witnesses, as required by an Order of the undersigned. In addition, Respondent has failed to respond to an Order to Show Cause issued December 30, 2009.

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

Respondent filed its own Answer,[2] which was received by the

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[1] Respondents 1 Source Safety and Health, Inc. and School District of Upper Dublin, having each executed their respective Consent Agreement and Final Orders with Complainant, are no longer part of the caption and are unaffected by this Order.

[2] Brian J. Sargent, President of Sargent Enterprises, submitted an Answer as representative for the Respondent in a *pro*

Regional Hearing Clerk on July 6, 2009. On July 21, 2009, the Regional Judicial Officer ("RJO") granted the Motion for Extension of Time to File an Answer submitted by 1 Source Safety and Health, Inc. ("1 Source"). 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 the undersigned to preside in the above captioned matter.

On September 24, 2009, I issued a Prehearing Order that required the Complainant to submit its prehearing exchange by November 24, 2009; that Respondents, Sargent Enterprises, Inc. and 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. That Prehearing Order stated, in part:

> If either Respondent elects only to conduct cross-examination of Complainant's witnesses and to forgo the presentation of direct and/or rebuttal evidence, that Respondent shall serve a statement to that effect on or before the date for filing its prehearing exchange. Each party is hereby reminded that **failure to comply with the prehearing exchange requirements set forth herein, including Respondent's statement of election only to conduct cross-examination of Complainant's witnesses, can result in the entry of a default judgment against the defaulting party.**

Prehearing Order at 4 (emphasis supplied).

Upper Dublin subsequently settled with Complainant. Under the CAFO, executed on September 29, 2009, Upper Dublin agreed to pay a penalty of $1,800. Consequently, Sargent Enterprises, Inc., 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 Respondent.

Upon Respondent's failure to file its prehearing exchange,

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se capacity.

and pursuant to Complainant's Motion, an Order to Show Cause[3] was issued to Respondent 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.[4] Respondent 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 this deadline. Respondent has failed to serve any response to the Order to Show Cause on the undersigned.

Section 22.17 of the Rules of Practice applicable to this proceeding, 40 C.F.R. § 22.17, provides, in pertinent part:

> (a) *Default.* A party may be found in default ... upon failure to comply with the information exchange requirements of § 22.19(a) or an order of the Presiding Officer; ... Default by the respondent constitutes, for the purpose 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.
> * * *
> (c) *Default order.* When the Presiding Officer finds that a 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. If the order resolves all outstanding issues and claims in the proceeding, it shall constitute the initial decision under these Consolidated Rules of Practice. The relief proposed in the complaint ... shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act.
> * * *
> (d) *Payment of penalty; effective date of compliance...* Any penalty assessed in the default order shall become due and payable by respondent without further proceedings 30 days after the default order becomes final under § 22.27(c).

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[3] The Order to Show Cause also granted Complainant's request for an extension of time to file its rebuttal prehearing exchange, tied to Respondent's successful filing of its overdue prehearing exchange.

[4] The Order to Show Cause sent to Respondent was received on January 6, 2010, as evidenced by the certified mail return receipt signed by Tammy A. Hurley on January 6, 2010.

40 C.F.R. § 22.17.

The Complaint in this case seeks $21,900 against all three respondents, which is less than the amount allowed pursuant to the regulation.[5] Complainant stated in the Complaint that the penalty amount takes into account the factors identified in Section 113(e) of the CAA, 42 U.S.C. § 7413(e), including: 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 credible evidence, payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation. In addition, Complainant stated that it has taken into account the particular facts and circumstances of this case with specific reference to EPA's Asbestos Penalty Policy as well as the CAA Penalty Policy. *See* Compl. at 11.

The Complaint also states that it "will consider, among other factors, Respondents' ability to pay to adjust the proposed civil penalty assessed in this Complaint." *Id.* Respondent's Answer did not address the ability to pay issue. A respondent's ability to pay may be presumed until it is put at issue by a respondent. *See In the Matter of New Waterbury, Ltd.*, 5 E.A.D. 529, 541. (EAB 1994).

Additionally, the Prehearing Order specifically states that "[i]f either Respondent intends to take the position that it is unable to pay the proposed penalty or that payment will have an adverse effect on its ability to continue to do business, that Respondent shall furnish supporting documentation such as certified copies of financial statements or tax returns." Preh'g Order at 3. Respondent has furnished no such supporting documentation. Thus, Respondent is deemed to have waived any objection to the penalty based upon the factor of ability pay. *Id.* Moreover, the Rules of Practice at Section 22.17(c), 40 C.F.R. § 22.17(c), provide that when the Administrative Law Judge finds that default has occurred, the relief proposed in the complaint shall be ordered unless the penalty requested is "clearly inconsistent" with the record of the proceeding or the Act.

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[5] Pursuant to Section 113(d) of the CAA, 42 U.S.C. § 7413(d), and 40 C.F.R. parts 19 and 27, Respondent may have been liable for civil penalties of up to $32,500 for each violation.

In conclusion, I find Respondent to be in default for its failure to file a prehearing exchange as required under the September 24, 2009 Prehearing Order and its failure to respond to the December 30, 2009 Order to Show Cause. Default by Respondent constitutes admissions of all facts alleged in the Complaint and waivers of Respondent's rights to contest such factual allegations. *See* 40 C.F.R. § 22.17(a). The facts alleged in the instant Complaint establish Respondent's violation of the CAA as charged. Upon review, I find that the penalty requested by Complainant is not "clearly inconsistent" with the record of the proceeding or the Act. *See* 40 C.F.R. § 22.17(c). However, settlements with 1 Source and Upper Dublin have resulted in partial payment of the penalty. Under these CAFOs, $4,500 has been paid. Therefore, the balance, $17,400, is assessed against Respondent.

ORDER

I. Respondent is found in default for failing to comply with the Prehearing Order and the Order to Show Cause of the Administrative Law Judge and no good cause is shown why a default order should not be issued.

II. Respondent Sargent Enterprises, Inc., is assessed a civil administrative penalty in the amount of $17,400.

III. Payment of the full amount of this civil penalty shall be made within thirty (30) days of the effective date of the final order by submitting a cashier's check or a certified check in the amount of $17,400, payable to "Treasurer, United States of America," and mailed to:

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

Contacts: Craig Steffen (513-487-2091),
Eric Volck (513-487-2105)[6]

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[6] Alternatively, Respondent may make payment of the penalty as follows:

WIRE TRANSFERS:

Wire transfers should be directed to the Federal Reserve Bank of New York

Federal Reserve Bank of New York
ABA = 021030004
Account = 68010727
SWIFT address = FRNYUS33
33 Liberty Street
New York, NY 10045
(Field Tag 4200 of the Fedwire message should read "D 68010727 Environmental Protection Agency")

OVERNIGHT MAIL:

U.S. Bank
Government Lockbox 979077
US EPA Fines & Penalties
1005 Convention Plaza
SL-MO-C2-GL
St. Louis, MO 63101

Contact: (314-418-1028)

ACH (also known as REX or remittance express):

Automated Clearinghouse (ACH) for receiving US currency

U.S. Treasury REX/Cashlink ACH Receiver
ABA = 051036706
Account No. 310006
Environmental Protection Agency
CTX Format
Transaction Code 22 - checking
Contact: Jesse White (301-887-6548)

ON LINE PAYMENT:

This payment option can be accessed from the information below:

Visit http://www.pay.gov

IV. A transmittal letter identifying the subject case and EPA docket number (CAA-03-2009-0189), as well as Respondent's name and address, must accompany the check.

V. If Respondent fails to pay the penalty within the prescribed statutory period after the entry of the Order, interest on the civil penalty may be assessed. 31 U.S.C. § 3717; 40 C.F.R. § 13.11.

APPEAL RIGHTS

Pursuant to Sections 22.27(c) and 22.30 of the Rules of Practice, 40 C.F.R. §§ 22.27(c) and 22.30, this Default Order, which constitutes an Initial Decision pursuant to 40 C.F.R. § 22.17(c), shall become the Final Order of the Agency unless an appeal is filed with the Environmental Appeals Board ("EAB") within thirty (30) days after service of this Order, or the EAB elects, *sua sponte*, to review this decision.

Barbara A. Gunning
Administrative Law Judge

Dated: January 28, 2010
Washington, D.C.

Enter "sfo 1.1" in the search field.
Open form and complete required fields.

IMO ***Sargent Enterprises, Inc.*** **Respondent.**
Docket No. CAA-03-2009-0189

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Default Order**, dated January 28, 2010, was sent this day in the following manner to the addressees listed below.

Mary Angeles
Legal Staff Assistant

Original and One Copy by Pouch Mail to:

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

One Copy by Pouch Mail to:

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

One Copy by Certified Return Receipt and One Copy by Regular Mail to:
[Certified Mail No. 7005 0390 0002 5028 8405]

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

One Copy by Interoffice Mail Delivery to:

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

Dated: January 28, 2010
Washington, D.C.