



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

Ms. Eurika Durr
Clerk of the Board
U.S. Environmental Protection Agency
Environmental Appeals Board
1200 Pennsylvania Avenue, NW
Mail Code 1103M
Washington, DC 20460-0001

September 9, 2014

ENVIR. APPEALS BOARD

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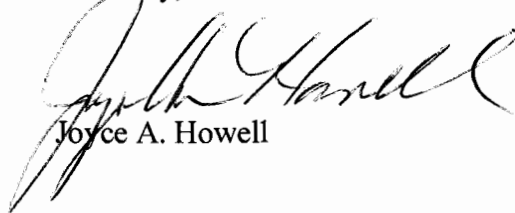
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Re: Hagerstown Aircraft Services
Docket Number RCRA-03-2011-0112
Appeal Number RCRA (3008) 14-01

Dear Ms. Durr:

Please accept the enclosed Appellee's brief submitted in response to the Board's June 24, 2014 Order (original and one copy) for filing in this matter. Under cover of this letter I am serving Appellant's counsel with a copy the same. Thank you.

Sincerely,



Joyce A. Howell

cc: Andrew Wilkinson, Esq.
Kenneth Cox 3LC70



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

In re:)
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Hagerstown Aircraft Services, Inc.)
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Docket No. RCRA-03-2011-0112)
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RCRA (3008) Appeal No. 14-01

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SUPPLEMENTAL BRIEF OF APPELLEE,
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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TABLE OF AUTHORITIES

Cases

In re Ag-Air Flying Services, Inc., FIFRA Appeal No. 06-01.

In re Andrew B. Chase, 16 E.A.D. ___, (EAB 2014).

In re Bil-Dry Corp., 9 E.A.D. 575, 612 – 614 (EAB 2001).

In re Carroll Oil Co., 635, 663 – 665 (EAB 2002).

In re Four Strong Builders, Inc., 12 E.A.D. 762, 766 (EAB 2006).

In re JHNY, 12 E.A.D. 372 (EAB 2005).

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

In re Rocking BS Ranch, Inc., CWA Appeal 09-04.

In re Rybond, Inc., 6 E.A.D. 614, 624 (EAB 1996).

In re Willie P. Burrell, 15 E.A. D. ___, (EAB 2012).

Statutes

Resource Conservation and Recovery Act, as amended, 42 U.S.C. § 6928(a)(1) and (g).

Rules

40 C.F.R. § 22.17(a)

40 C.F.R. § 22.30(f)

I. ISSUES PRESENTED FOR REVIEW

By Order of the Board dated July 24, 2014, the Board ordered the parties to file briefs addressing the following issues:

1. How does the “totality of circumstances” test set forth in *In re Willie P. Burrell*, TSCA Appeal No. 11-05, apply to the fact that the person who could provide an excuse for the procedural failure is deceased?
2. What evidence can Appellant produce to demonstrate an inability to pay any or all of the \$64,000 assessed penalty? If Appellant has such evidence, why did Appellant fail to present this evidence in responding to the RJO’s Order to Show Cause?

II. NATURE OF THE CASE

This case is an regulatory enforcement action brought under the Resource Conservation and Recovery Act (“RCRA”), as amended, 42 U.S.C. § 6928(a)(1) and (g) (“RCRA”). The case was developed after an inspection and subsequent investigation by EPA Region III of the Appellant’s facility in Hagerstown, Maryland.

III. PROCEDURAL HISTORY

1. This matter was commenced by the filing of an Administrative Complaint (“Complaint”) pursuant to Section 3008(a) and (g) of RCRA, as amended, 42 U.S.C. § 6928(a)(1) and (g), and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. Part 22 (“Consolidated Rules”) on March 24, 2011. Appellant received the Complaint and its attachments on March 25, 2011.
2. The basis for the Complaint was an EPA Compliance Evaluation Inspection performed on April 28, 2010. The Complaint was filed when Appellant failed to respond to Appellee’s Request to Show Cause dated November 16, 2010.
3. Appellant failed to file an Answer or otherwise respond to the Complaint, and accordingly, Appellee filed a Motion for Default Order on June 23, 2011. Appellant received the Motion for Default Order on June 24, 2011.
4. On June 27, 2013, the Regional Judicial Officer issued an Initial Decision and Default Order. The Order for Default requires Appellant to immediately comply with the Compliance Tasks contained in paragraphs 29 through 35 of the Complaint, namely: 1) respond to an Information Request Letter dated May 28, 2010 issued pursuant to Section 3007(a) of RCRA, 42 U.S.C. § 6927(a); 2) identify all solid wastes generated at the Facility in accordance with COMAR 26.13.03.02A; and 3) certify any submissions in the form set forth in paragraph 32 of the Complaint. Appellant has not made any submissions to EPA in response to the Initial Decision and Default Order.
5. The Default Order further requires Appellant to pay a penalty in the amount of \$64,000 30 days after the Default Order becomes final.

6. Appellant subsequently filed a Motion to Set Aside the Default Order and to Temporarily Stay the Proceedings dated August 5, 2013 with the Clerk of the Environmental Appeals Board.
7. On August 15, 2013, the Environmental Appeals Board ("Board") issued an Order transferring the Motion to Set Aside the Default Order to the Presiding Officer.
8. Appellee filed a Reply to Appellant's Motion to Set Aside the Default Order and Temporarily Stay Proceedings on August 15, 2013 with the Regional Hearing Clerk.
9. Appellant filed a supplement to its original motion by letter dated October 18, 2013.
10. On March 13, 2014, the Presiding Officer issued an Order to Show Cause why the Presiding Officer should not deny Appellant's Motion to Set Aside the Default Order and Temporarily Stay Proceedings.
11. Appellant submitted a response to the Order to Show Cause dated March 20, 2014.
12. Appellee submitted a response to the Order to Show Cause on March 25, 2014.
13. On April 3, 2014, the Regional Judicial Officer issued an Order on Respondent's Motion to Set Aside the Default Order and Temporarily Stay Proceedings. The Regional Judicial Officer denied Appellant's motion to set aside the Default Order, finding that Appellant had: 1) failed to explain why it failed to file an Answer; 2) Appellant's return to compliance did not excuse prior noncompliance; 3) Hagerstown Aircraft Services, Inc., is the named Respondent to the Complaint, not Mrs. Potter (*nee* Goetz); 4) Appellant's expressed interest in settlement discussions was not a basis for good cause to set aside the default; 5) there was no indication Appellant would have a strong probability of success on the merits; 6) the assessed penalty is reasonable.

14. On May 15, 2014, the Board issued an Order electing to exercise *sua sponte* review of the Default Order and the Order denying Respondent's Motion to Set aside the Default Order and Temporarily Stay Proceedings.
15. On July 24, 2014, the Board issued an Order directing Supplemental Briefing.
16. On August 22, 2014, Appellant filed a Supplemental Brief.
17. Appellee, the United States Environmental Protection Agency, now respectfully submits its Supplemental Brief in response to the Board's July 24, 2014 Order.

IV. ARGUMENT

A. Standard of Review

40 C.F.R. § 22.30(f) provides that the Board shall adopt, modify, or set aside findings of fact or conclusions of law or discretion contained in the decision or order being reviewed. The "totality of circumstances" test is applied to appeals of default orders. *In re Willie P. Burrell* at 11, citing *In re Four Strong Builders, Inc.*, 12 E.A.D. 762, 766 (EAB 2006); *In re Jiffy Builders, Inc.*, 8 E.A.D. 315, 319 (EAB 1999); *In re Rybond, Inc.*, 6 E.A.D. 614, 624 (EAB 1996). This test requires 1) whether the party challenging the default order violated a procedural requirement; 2) whether the particular procedural violation constitutes proper grounds for a default order; and, 3) whether the party challenging the default order has demonstrated a valid excuse or justification for noncompliance with the procedural requirement. *In re Willie P. Burrell* at 11. Last, and in addition to this inquiry concerning a procedural violation, the Board will consider the defaulting party's likelihood of success on the merits of the underlying case. *In re Willie P. Burrell* at 11-12 (emphasis added).

B. The Totality of Circumstances Support the Entry of Default

In this appeal, the fact of the procedural violation is uncontested. Appellant failed to file a timely answer to the Complaint. Likewise, the Consolidated Rules expressly provide that a party may be found in default upon failure to file a timely answer to the complaint, and thus such failure is a valid ground for the entry of a default order. 40 C.F.R. § 22.17(a); *In re Willie P. Burrell* at 11.

The Board has not previously identified many facts which would constitute valid excuses for procedural violations leading to default. *See e.g. In re Willie P. Burrell* (attorney negligence does not excuse untimely filing); *In re JHNY 12 E.A.D. 372, 383* (EAB 2005)(unsupported claim of financial issues not an excuse for failure to file prehearing exchange); *Ag-Air Flying Services, Inc.*, FIFRA Appeal No. 06-01 (neglect of both attorney and of the party does not excuse procedural defect); *In re Rocking BS Ranch, Inc.*, CWA Appeal 09-04 (*pro se* litigant's phone calls and letters do not constitute answer to the complaint). In this context, the undersigned acknowledges the unfortunate circumstances that serve as a back drop to the examination of the facts in this matter. Nonetheless, Mr. Potter's death in April 2013 does not excuse his failure, as president of Hagerstown Aircraft Services, Inc., to respond to the Complaint two years earlier in April 2011. Put another way, if Mr. Potter had lived, what excuse would he proffer for his failure to answer the Complaint that would suffice to excuse such failure during that two year period? It is respectfully submitted that Mr. Potter's death has no bearing on his management of Hagerstown Aircraft Services from April 2011 to April 2013, and as such, no weight should be given to Mr. Potter's unavailability now.

Appellant's obligation to answer the Complaint arose on April 25, 2011. Hagerstown Aircraft Services, under Mr. Potter's management, was further afforded an opportunity to explain this procedural violation when Hagerstown Aircraft Services was served with the Motion for Default in June 2011, but Mr. Potter, as president of Hagerstown Aircraft Services, did not elect to respond to the Motion for Default. Two years elapsed during which the company, by and through Mr. Potter, continued to choose not to answer the Complaint, respond to the default motion or come into compliance with the underlying environmental regulations. Although succeeding management avers it would have acted differently and in fact did, taking steps to eventually come into compliance with RCRA, even Appellant acknowledges that the company shirked its legal obligations for a period of time.¹ What Appellant does not seem to accept is that there are consequences to the corporation for its previous choices. *In re Four Strong Builders* at 772 (parties disregard [procedural requirements] at their peril).

Appellant's brief does not address whether there is any underlying likelihood it would succeed on the merits, and it is respectfully submitted that Appellant has conceded liability. *See* Appellant's Motion to Set Aside Default p.2; Ex. A. Appellant's Supplemental Filing, Ex. A p. 2 showing return to compliance as of September 18, 2013.² Against the totality of the circumstances test set forth in *In re Willie P. Burrell*, Appellant has not demonstrated it has a valid excuse for the procedural violation of failing to answer the Complaint nor has Appellant shown it would be likely to succeed on the merits.

¹ Appellant's brief at 2, listing nearly a half million dollars in unpaid taxes.

² Even so, contrary to Appellant's suggestion, return to compliance can never serve as a justification for negotiating a reduction in penalty after a complaint has been filed. Doing so would just encourage other regulated entities to force litigation in hopes of getting a better offer of settlement and reward regulated entities for simply fulfilling their legal obligations.

C. Appellant's Evidence of Inability to Pay is Inadequate

In response to the Board's Order inviting evidence of Appellant's inability to pay the assessed penalty, Appellant submits a list of debts and the argument of counsel. Such summary recitations have been previously rejected by the Board as inadequate. *In re Andrew B. Chase*, 16 E.A.D. __, (EAB 2014); *In re Carroll Oil Co.*, 635, 663 – 665 (EAB 2002); *In re Bil-Dry Corp.*, 9 E.A.D. 575, 612 – 614 (EAB 2001). The list of sums presented by counsel are not evidentiary, and absent supporting documentation, fall far short of the information needed for a comprehensive analysis of Appellant's financial condition. Appellant's list does not demonstrate Appellant is unable to pay the assessed penalty, but instead raises more questions than it supplies answers.³

Moreover, it would be implausible for the Board to conclude, as Appellant has, that but for settlement discussions resulting in a reduction of the assessed penalty, Hagerstown Aircraft Services would remain in business. Twenty minutes on the internet indicates that Hagerstown Aircraft Services still lists itself as a business with \$1-5 million in annual sales, has several Cessna aircraft registered with the Federal Aviation Administration, and operates an associated aircraft sales brokerage. One can speculate as to whether this information is currently accurate, but is only offered here to illustrate Appellant's consistent indulgence in unsubstantiated claims and its reluctance to submit evidentiary grade documentation that would afford a true financial analysis. While Appellant's counsel cannot provide an explanation as to why inability to pay evidence was not submitted in prior filings (Appellant brief at 4), the unsubstantiated claims put forth in Appellant's present brief prompt renewal of the Board's question: having been invited to make an inability to pay argument, why has Appellant now passed on the Board's invitation to

³ For example, an \$80,000 loan to the owner listed as a liability to the company. Appellant's brief at 2.

hear out its claim? The only facts on this score now before the Board are that Appellant has chosen to forego yet another post-default opportunity to make an inability to pay claim, for reasons known only to Appellant.

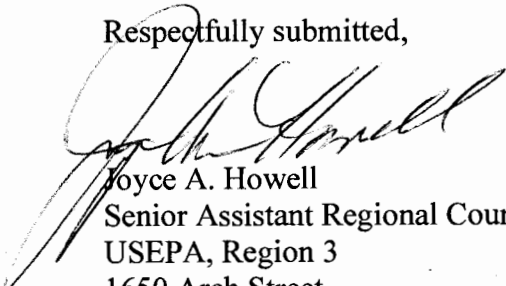
V. CONCLUSION

This appeal was opened by the Board to facilitate review of the Regional Judicial Officer's Order for Default and the Order denying Respondent's Motion to Set Aside the Default Order and Temporarily Stay Proceedings. The Board's Order for briefing specifically invited Appellant to provide the Court with facts and legal argument to substantiate claims it made or failed to make in previous post-default pleadings in the context of Board precedent for appeals from Default Orders. Consistent with its previous post-default filings, Appellant has failed to demonstrate it meets the totality of circumstances test set forth in *In re Willie P. Burrell*, because it cannot show an acceptable excuse for failing to file a timely answer. In addition, there is no evidence to show Appellant is likely to succeed on the merits. Finally, Appellant has not demonstrated an inability to pay the assessed penalty.

Appellee therefore respectfully requests that the Regional Judicial Officer's Order for Default and the Order denying Respondent's Motion to Set Aside Default Order and Temporarily Stay Proceedings be affirmed.

Dated Sept 9, 2014

Respectfully submitted,


Joyce A. Howell
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Philadelphia PA 19103
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215-814-2644

In re:

Hagerstown Aircraft Services, Inc.

Docket No. RCRA-03-2011-0112

RCRA (3008) Appeal No. 14-01

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Supplemental Brief of Appellee, the United States Environmental Protection Agency in the matter Hagerstown Aircraft Services, Inc, RCRA (3008) Appeal No. 14-01, were sent to the following persons in the manner indicated:

By Overnight Night Mail:

Clerk of the Board
U.S. Environmental Protection Agency
Environmental Appeals Board
1201 Constitution Avenue NW
U.S.EPA East Building, Room 3334
Washington, DC 20004
(Original and one copy)

Andrew F. Wilkinson, Esq.
13424 Pennsylvania Avenue, Suite 302
Hagerstown, MD 21742

By Hand:

Lydia Guy
Regional Hearing Clerk (3RC00)
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1650 Arch Street
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Heather Gray
Regional Judicial Officer (3RC00)
USEPA, Region 3
1650 Arch Street
Philadelphia PA 19103

Dated: Sept. 9, 2014


Joyce A. Howell
Senior Assistant Regional Counsel