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

In re:	:	
Silky Associates, L.L.C.	:	Appeal No. RCRA 21-02

APPELLEE RESPONSE BRIEF

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ISSUES ON APPEAL AND NATURE OF THE CASE

1. Whether Appellant has properly brought an Appeal.

2. Whether the Default Order should be upheld, and the Initial Decision affirmed.

3. Whether Appellant is liable under Count IV of the Administrative Complaint.

Respondent Silky Associates, L.L.C. filed a letter with Environmental Appeals Board seeking to set aside the Default Order, from the February 9, 2021 Initial Decision and Default Order issued by Regional Judicial Officer Joseph Lisa, United States Environmental Protection Agency, Region 3 framed as "Request Against Default Order to Cancel" on March 10, 2021. Subsequently, the United States Environmental Appeals Board elected to exercise *sua sponte* review pursuant to 40 C.F.R. § 22.30(b).

PROCEDURAL HISTORY AND STATEMENT OF FACTS

1. The United States Environmental Protection Agency, Region 3 (EPA or the Region) conducted a Compliance Evaluation Inspection (CEI) of Appellant's facility on July 18, 2016. Default Order and Initial Decision dated February 9, 2021, I.1. (Initial Decision).

2. Appellant's facility consists of five steel underground storage tanks (USTs), installed 36 - 48 years ago at a facility located In Sandston, Virginia. Initial Decision II. A.5. Appellant's USTs are regulated by EPA pursuant to Section 9001 of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6991, *et seq*. and the 1998 authorized Virginia management program regulations as set forth in the Virginia Administrative Code, *Underground Storage Tanks: Technical Standards and Corrective Action Requirements* (VA UST Regulations), 9 VAC §§ 25-580-10 *et seq*. Initial Decision ¶¶ II.5, II.13 -15.

3. EPA followed up the CEI with an information request letter (IRL) dated March 7, 2017 issued pursuant to Section 9001 of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6991, *et seq*. Appellant was required to respond to the IRL by March 30, 2017. Initial Decision II.A.16. ¶.

4. On March 31, 2017, Ms. Toffel telephoned Appellant's representative, Mr. Bagga. Mr. Bagga requested a two-week extension to respond to the IRL because he was experiencing lingering flu symptoms. Declaration of Melissa Toffel dated April 8, 2021 ¶5. (Toffel Declaration).

5. On April 18, 2017, and again on April 20, 2017, Ms. Toffel left telephone messages for Mr. Bagga asking if Mr. Bagga had sent Appellant's IRL response to EPA. Toffel Declaration ¶6.

6. On April 24, 2017, Appellant's IRL response was received by EPA. Toffel Declaration ¶7.

7. By letter dated May 17, 2017, EPA gave a notice to the Commonwealth of Virginia pursuant to Section 9006 of RCRA, 42 U.S.C. § 6991e(a)(2). Initial Decision II.7.

8. On August 10, 2017, EPA issued an Opportunity to Show Cause (Show Cause letter) letter to Appellant, inviting Appellant to discuss the potential allegations identified through EPA's investigation of Appellant's facility. The Show Cause letter required Appellant to respond by September 1, 2017. Exhibit 2.

9. On September 5, 2017, Ms. Toffel spoke by telephone with Mr. Bagga asking if he intended to respond to the Show Cause letter. Mr Bagga acknowledged receiving the Show Cause letter but stated he had already given EPA everything that was requested. Ms. Toffel ended the conversation stating she would follow up by telephone with Mr. Bagga on September 14, 2017. Toffel Declaration ¶8.

10. On September 14, 2017, Ms. Toffel spoke with Mr. Bagga by telephone. Mr. Bagga gave Ms. Toffel an update on the status of compliance measures for the facility UST equipment. Appellant remained in noncompliance. Toffel Declaration ¶9.

11. Appellant did not request to meet with EPA to discuss the allegations in the Show Cause letter, nor did Appellant submit a written response to EPA's Opportunity to Show Cause letter. Toffel Declaration ¶10.

12. On November 30, 2017, EPA issued a Notice of Intent to Prohibit Delivery (NIPD) letter to Appellant pursuant to Section 9012 of RCRA, 42 U.S.C. § 6991k. Appellant was required to respond by December 30, 2017. Initial Decision II.A.17.

13. On December 12, 2017, Mr. Bagga contacted Ms. Toffel and reported Appellant's progress towards compliance with the UST regulations. Appellant remained in noncompliance with the UST regulations. Toffel Declaration ¶12.

14. On December 15, 2017, Ms. Toffel sent a list to Mr. Bagga outlining the actions required by the UST regulations to come into compliance. Toffel Declaration ¶13. Exhibit 5.

15. On several occasions between March 2017 and April 2019, Ms. Toffel encouraged Mr. Bagga to retain counsel to represent Appellant in this matter. Toffel Declaration ¶11.

16. On January 3, 2018, Ms. Toffel telephoned Mr. Bagga to learn the status of the compliance documentation Mr. Bagga had previously promised to forward to EPA. Toffel Declaration ¶14.

17. On January 10, 2018, EPA received Appellant's documentation. The documentation showed Appellant remained in noncompliance with the UST regulations. Toffel Declaration ¶15.

18. On February 21, 2018, EPA issued an amended NIPD letter to Appellant pursuant to Section 9012 of RCRA, 42 U.S.C. § 6991k. The NIPD was amended because the information received from Appellant on January 10, 2018 documented compliance with some of the violations in the November 30, 2017 NIPD, and also documented the existence of a new violation not previously identified. Appellant was required to respond by March 25, 2018. Initial Decision II.A.17, Toffel Declaration ¶16.

19. On March 2, 2018, Mr Bagga spoke with Ms. Toffel and stated he would need an extension of time to complete the tasks necessary to come into compliance with the UST regulations. Because Appellant had been in noncompliance with the UST regulations for at least two years, an extension of time was not granted. Toffel Declaration ¶17.

20. On April 3, 2018, Appellant's USTs were "red tagged," prohibiting delivery of gasoline for sale. That same day, Mr. Bagga telephoned Ms. Toffel and asked if Appellant could receive delivery of gasoline. Ms. Toffel informed Mr Bagga that the delivery prohibition would not be lifted until Appellant returned to compliance with the UST regulations. Toffel Declaration ¶18.

21. On April 6, 2018, Mr. Bagga telephoned Ms. Toffel and again requested that Appellant be allowed to accept delivery of gasoline. Ms. Toffel informed Mr. Bagga that the delivery prohibition would not be lifted until Appellant returned to compliance with the UST regulations. Toffel Declaration ¶19.

22. On April 24, 2018, Appellant asked permission to remove a red tag from one of Appellant's USTs to perform a repair. EPA consented to this request on April 25, 2018. Toffel Declaration ¶20.

23. EPA filed an Administrative Complaint, Compliance Order and Notice and Opportunity to be Heard (Complaint) on July 24, 2018. Initial Decision I.A.1. Appellant remained in noncompliance with the UST Regulations. Toffel Declaration ¶23.

24. EPA filed Proof of Service of Administrative Complaint to Appellant on August 2, 2018. Initial Decision I.A.2. Accordingly, under the CROP, Appellant's Answer was due on September 3, 2018[1]. 40 C.F.R. § 22.15(a). Appellant remained in noncompliance with UST regulations, over two years after EPA's first enforcement contact. Toffel Declaration ¶23.

25. On August 2, 2018, EPA filed its Initial Prehearing Exchange.

[1] September 2, 2018 fell on a Sunday.

26. On August 9, 2018, Ms. Jenifer Abramson, attorney for EPA, spoke with Mr. Bagga, explaining the administrative complaint process, including the requirement that Appellant file an Answer to the Complaint within 30 days of receiving service. Initial Decision I.B.

27. On August 21, 2018, Appellant's representative, Mr. Bagga, sent to Ms. Toffel by mail and by telecopy a response to the Complaint. Initial Decision I.B.

28. On August 27, 2018, Mr. Bagga instructed EPA counsel to file the documents sent to Ms. Toffel as Silky Associates' Answer to the Complaint. Initial Decision I.B.

29. EPA counsel filed Mr. Bagga's letter with the EPA Regional Hearing Clerk on August 27, 2018. The case was then forwarded to the Office of Administrative Law Judges. Initial Decision I.B.

30. On August 31, 2018, Chief Administrative Law Judge Biro issued a Prehearing Order. *IMO Silky Associates, L.L.C*., Docket No. 03-2018-0131, Prehearing Order (August 31, 2018).

31. On September 7, 2018, Ms. Abramson, and Ms. Toffel, in telephone conference with Mr. Bagga, informed Mr Bagga of the calculated penalty. Mr. Bagga stated he would be unable to pay a substantial penalty. In response, Ms. Abramson requested that Mr. Bagga supply Appellant's financial information to substantiate Appellant's claim that it is unable to pay the proposed penalty. (ATP claim). Ms. Abramson reiterated the request by letter sent overnight mail the same day. In that letter, Ms. Abramson further reminded Mr. Bagga of Appellant's obligations under the Prehearing Order issued by Chief Administrative Law Judge Biro (CALJ Biro). Toffel Declaration ¶21, Exhibit 3.

32. On September 21, 2018, EPA received three years of Appellant's federal tax returns in support of Appellant's ATP claim. Initial Decision III.A.2.e.

33. On September 27, 2018 Ms. Abramson sent a letter to Appellant requesting additional financial information to substantiate Appellant's ATP claim and reminding Appellant that its Prehearing Exchange was due on November 2, 2018. Exhibit 4.

34. On October 12, 2018, Mr. Bagga informed EPA that the UST compliance measures at Appellant's facility had been completed. EPA authorized the removal of the last delivery restriction from Appellant's USTs, two and half years after EPA's first enforcement contact with Appellant. Toffel Declaration 22.

35. On October 22, 2018 Ms. Silky Bagga filed a letter dated October 16, 2018 requesting an extension of time to the deadlines in the Prehearing Order or that the deadlines be dropped altogether because Mr. Bagga was in India seeking medical care until November 11, 2018. *IMO Silky Associates, L.L.C*., Docket No. 03-2018-0131, Order on Remand, at 1 - 2, December 10, 2018.

36. On October 29, 2018, Appellant was ordered to file an Answer to the Administrative Complaint by November 16, 2018. *IMO Silky Associates, L.L.C.*, Docket No. 03-2018-0131, Order for Respondent to File an Answer, (October 29, 2018).

37. On October 30, 2018, EPA filed a response to Appellant's October16, 2018 letter consenting to Appellant's request for an extension of time but opposing dismissal of the complaint to the extent Appellant's October 16, 2018 letter was construed as a Motion to Dismiss. Furthermore, EPA requested an order compelling Appellant to produce supporting financial information and documentation previously requested by EPA by letter dated September 27, 2017 to the extent that Appellant's request for an extension was construed as a claim that is was unable to pay a penalty. Exhibit 6, *see also* IMO *Silky Associates, L.L.C*., Docket No. 03-2018-0131, Order on Remand, at 2, December 10, 2018.

38. On November 16, 2018, by letter dated November 14, 2018, Appellant requested an additional "3-4 weeks" to file an Answer. *IMO Silky Associates, L.L.C*., Docket No. 03-2018-0131, Order on Remand, at 2, December 10, 2018.

39. On November 23, 2018, EPA filed a Rebuttal Prehearing Exchange, as required by the Prehearing Order. *IMO Silky Associates, L.L.C*., Docket No. 03-2018-0131, Order on Remand, at 2, December 10, 2018.

40. On November 26, 2018, Ms. Abramson sent a draft Joint Motion for the appointment of Neutral to Mr. Bagga for his review and signature. Ms. Abramson further requested that Mr. Bagga return the motion with his signature in time to meet the November 30, 2018 filing deadline set forth in the Prehearing Order. Mr. Bagga returned the signed motion to Ms. Abramson on December 7, 2018. Exhibits 7 and 8.

41. On December 7, 2018, EPA filed a Motion seeking leave to file a Joint Motion for Appointment of a Neutral. Exhibit 8, *see also IMO Silky Associates, L.L.C*., Docket No. 03-2018-0131, Order on Remand, at 2, December 10, 2018.

42. On December 10, 2018, *twenty-six days or three and half weeks after Appellant's November 14, 2018 letter requesting a "3-4 week" extension*, Judge Biro remanded the matter back to the Region on grounds that Appellant had failed to file an answer. *IMO Silky Associates, L.L.C*., Docket No. 03-2018-0131, Order on Remand at 3, December 10, 2018.

43. On March 21, 2019, Ms. Abramson and Harry Steinmetz, an EPA financial analyst, contacted Mr. Bagga in attempt to resolve inconsistencies in the ATP financial information submitted by Appellant on December 27, 2018 Initial Decision at III.A.2.e., Exhibit 9.

44. On April 1, 2019, Ms. Abramson sent a letter to Appellant requesting additional financial information, setting a response due date of April 17, 2019. The basis for EPA's additional inquiry regarding Appellant's financial information was that Appellant's ATP

submissions to EPA were internally inconsistent, and Appellant had failed to disclose real estate assets that Mr Steinmetz had identified from the public record. Initial Decision at III.A.2.e., Exhibit 9.

45. As of July 23, 2020, and to the present date, Appellant has never submitted the requested financial information. Toffel Declaration ¶23.

46. Having exhausted the avenues of settlement with Appellant, EPA filed a Motion for Default on July 23, 2020. Service of the default motion on Appellant was made on July 28, 2020. Exhibit 10.

47. Appellant never filed an Answer. Initial Decision II.A.8.

48. Appellant never filed a response to the Motion for Default. Initial Decision at 2.

49. An Initial Decision and Default Order was issued by Regional Judicial Officer Joseph Lisa on February 9, 2021.

50. Appellant filed a letter with Environmental Appeals Board seeking to set aside the Default Order, framed as "Request Against Default Order to Cancel" on March 10, 2021.

51. On March 23, 2021, the Environmental Appeals Board (Board or EAB) issued an Order Electing to Exercise *Sua Sponte* Review and Establishing Briefing Schedule.

III. ARGUMENT

A. Appellant has not properly brought an Appeal

The Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (CROP) provide that the EAB may exclude from the record any pleading or document that does not comply with the regulatory requirements. 40 C.F.R. § 22.5(c)(5). Even if the EAB accepts Appellant's letter as a Notice of Appeal meeting the minimum requirements set forth at 40 C.F.R. § 22.30(a)(ii)[2], Appellant's submission falls far short of the requirements for an appeal to this Board.

[2] Appellant has also ignored the requirements of 40 C.F.R.§22.5(c). *see* 40 C.F.R. §22.30(a)(ii).

> [t]he notice of appeal shall summarize the order or ruling, or part thereof, appealed from. The appellant's brief shall contain tables of contents and authorities (with appropriate page references), a statement of the issues presented for review, a statement of the nature of the case and the facts relevant to the issues presented for review (with specific citation or other appropriate reference to the record (*e.g.,* by including the document name and page number)), argument on the issues presented, a short conclusion stating the precise relief sought, alternative findings of fact, and alternative conclusions regarding issues of law or discretion. If any appellant includes attachments to its notice of appeal or appellate brief, the notice of appeal or appellate brief shall contain a table that provides the title of each appended document and assigns a label identifying where it may be found in the record.

CROP 40 C.F.R.§ 22.30(a)(iii).

Appellant's submission does not support a decision by this Board to grant the relief Appellant has requested. Appellant's submission is devoid of any legal authority, contains uncertified statements not supported by the record, and has no proposed findings of fact or conclusions of law. Simply put, Appellant's argument is the same as it has been from when this matter was opened five years ago in 2016: Appellant wants to be excused from its conduct, but fails to demonstrate a justiciable reason why such excuse should be granted. *In re Jiffy Builders*, 8 E.A.D. 312, 320 (1999) (Parties who choose to proceed *pro se*, while held to a more lenient standard than parties represented by members of the bar, are not excused from compliance with the Consolidated Rules of Practice). For these reasons the Appeal should be dismissed, the Default Order upheld, and the Initial Decision affirmed.

B. The Default Order was Properly Entered.

1. Standard of Review

Because the Board has elected to review the February 9, 2021 Default Order and Initial Decision pursuant to 40 C.F.R. § 22.30(b) even though Appellant has not properly brought an appeal before this Board, it is necessary to explain why Appellant's appeal still fails. The

standard for setting aside a default order, known as the "totality of the circumstances" test, was summarized in *IMO Barry*, CWA-05-2010-008, 2011(December 21, 2000):

> Setting aside an entry of default "is essentially a form of equitable relief," and the undersigned must consider the "totality of the circumstances" when determining if there is good cause to do so. *Rybond, Inc., 6 E.A.D. 614, 624 (EAB 1996)* (quoting *Midwest Bank & Trust Co., Inc., 3 E.A.D. 696, 699 (CJO 1991))* (quotation marks omitted); *see JHNY, Inc., 12 E.A.D. at 384.* 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." *JHNY, Inc., 12 E.A.D. at 384.* The undersigned may also consider "whether the defaulting party would likely succeed on the substantive merits if a hearing were held." *JHNY, Inc., 12 E.A.D. at 384.* The 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." *Pyramid Chem. Co., 11 E.A.D. 657, 662 (EAB 2004).* This inquiry includes an examination of "whether the penalty assessed in the default order is a reasonable one." *JHNY, Inc., 12 E.A.D. at 384.*

Id. For the reasons set forth below, the totality of the circumstances in this matter demonstrate that the Default Order was properly entered, and the Initial Decision should be affirmed.

2. <u>Appellant failed to Answer to the Complaint</u>

Section 22.17(a) of the CROP states that:

> *Default.* A party may be found to be in default: after motion, *upon failure to file a timely answer to the complaint*; upon failure to comply with the information exchange requirements of 40 C.F.R. § 22.19(a) or an order of the Presiding Officer; or upon failure to appear at a conference or hearing.

40 C.F.R.§ 22.17(a) (*emphasis added*). It is not too often that a litigant is offered an opportunity to file an Answer without suffering any negative consequences five months after receiving service of the Complaint, but that is exactly what happened in this case. Nonetheless, Appellant squandered that opportunity and every opportunity extended to it by EPA to avoid the consequence from which it now appeals.

Recognizing Appellant's representative, Mr. Bagga, was proceeding *pro se*, EPA's representatives, Ms. Abramson and Ms. Toffel, endeavored to explain the enforcement process to Mr. Bagga before and after the Complaint was filed, encouraged Mr. Bagga to retain counsel, reminded Mr. Bagga both in writing and by telephone of upcoming deadlines, and gave Appellant the fullest measure that benefit of the doubt can afford by accepting, at Appellant's direction, Appellant's response to the Complaint as Appellant's Answer *and* filing it with the Regional Hearing Clerk. Finally, after EPA's Initial Prehearing and Rebuttal Exchanges, Appellant was ordered by CALJ Biro to file an Answer. Even after being ordered, Appellant did not file an answer. Nor did receipt of EPA's Default Motion compel Appellant to file an answer.

EPA's Motion for Leave to Move for the Appointment of a Neutral demonstrates the extent by which EPA extended its limited resources to assist a *pro se* litigant that was chronically out of compliance with the environmental laws and regulations. First, EPA contacted Appellant by telephone and overnight mail to obtain Appellant's consent to file a joint motion. EPA then worked to file a motion on consent before the filing deadline established in the Prehearing Order. Exhibit 7. Although Appellant expressed willingness to consent to a joint motion, inexplicably, Appellant did not return the draft motion to EPA in time to meet the November 30, 2018 filing deadline. Instead, Appellant returned the papers over a week later, on December 7. Exhibit 8. EPA's attempt to create another venue for Appellant to be heard prior to a hearing on the merits was thwarted by Appellant's habitual disregard for the rules whether they be procedural or substantive.

The requirements of the CROP may bend to accommodate *pro se* litigants, but it cannot not be allowed to bend so far that its process is no longer recognizable, and the integrity of the process the CROP is designed to uphold is compromised. As the Board has previously observed:

> Although the Board affords litigants unrepresented by counsel some latitude, all litigants, including pro se litigants, proceeding in an administrative enforcement action are subject to the CROP *citing IMO Jiffy Builders, 8 E.A.D. 312, 320*(1999) ("[P]arties who choose to proceed pro se, while held to a more lenient standard than parties represented by members of the bar, are not excused from compliance with the Consolidated Rules of Practice."); *and IMO Rybond 6 E.A.D. at 626* (stating that "regulatory rules of procedure at 40 C.F.R. [P]art 22 apply to all litigants, whether they appear pro se or are represented by counsel").

In re Rocking BS Ranch, at 10-11 CWA Appeal No. 09-04(April 21, 2010)(Final Decision and Order)10-11.

The record contains two occasions that obtained meaningful responses from Appellant: 1) when fuel deliveries to Appellant's facility were prohibited, and 2) when a Default Order was issued assessing a $189,00 penalty against Appellant. The remaining interactions between EPA and Appellant as recited in the procedural history, *ante*, consisted of EPA's attempts to compel Appellant's production of records to substantiate Appellant's ATP claim and obtain compliance with the UST regulations. Appellant has disregarded the process, taken advantage of the goodwill extended towards *pro se* litigants, ignored its responsibilities under the CROP and most significantly, demonstrated that it would comply with the UST regulations only when forced, and not because it is what the law requires. *In re Rocking BS Ranch*, at 11 CWA Appeal No. 09-04(April 21, 2010)(Final Decision and Order)(However, the Board cannot excuse the Ranch's abject failure to adhere to the requirements of the CROP by not providing a meaningful response to any of the pleadings filed prior to the Default Order). *E.g., Pyramid Chem*., 11 E.A.D. at 681 ("[Tlhe Board has made clear that it reserves its finite resources for those parties who are diligent enough to comply with EPA's procedural rules."). Where, as here, an Appellant has engaged in abuse of the process provided by the CROP to the detriment of the resources of EPA, OALJ and the Board, entry of default is appropriate. *In re Fulton Fuel Co*.

CWA Appeal No. 1003 at 5-6, Sep. 9, 2010. *See also In re Tri County Builders Supply*, CWA Appeal No. 03-04, at 7 (May 24, 2004)(Order Dismissing Appeal)(The filing requirements specified in 40 C.F.R. § 22.30 are not merely procedural niceties. Rather, they serve an important role in helping to bring repose and certainty to the administrative enforcement process.)

3. Appellant Has No Valid Excuse for Failing to Answer the Administrative Complaint

From the time Appellant received service of the Complaint until filing the Motion for Default, EPA repeatedly worked with Appellant to prevent Appellant's default. As recited above, a review of the record indicates the lengths to which EPA went to obtain Appellant's' compliance with the UST program and at the same time provide Appellant with an opportunity to be heard. *Id.*

Assuming for the purpose of argument that Appellant became aware that its response to the Complaint was deficient only after CALJ Biro ordered Appellant to file an Answer, there still is no valid excuse for Appellant's failure to then obey the Order and file an Answer. Looking at the sequence of events, when on October 29, 2018, CALJ Biro ordered Appellant to file an Answer by November 16, 2018, Appellant was put on unequivocal notice that its previous response to the Complaint was insufficient and that Appellant was in jeopardy of being found in default. CALJ Biro's October 29, 2018 Order spells out in detail the required content for an Answer under the CROP, and includes a warning, in all caps, advising that failure to file an answer may result in the entry of default judgement.

> *RESPONDENT IS CAUTIONED THAT FAILURE TO TIMELY COMPLY WITH THIS ORDER MAY RESULT IN THE ENTRY OF DEFAULT JUDGMENT AGAINST IT.*

Order for Respondent to File an Answer, *IMO Silky Associates, L.L.C.*, *Docket* at 2, No. 03-2018-0131. (October 29, 2018) (italics and caps in the original). On November 16, 2018, by letter dated November 14, 2018, Appellant asked for a "3-4 week" extension of time in which to file an Answer, which CALJ Biro *informally granted*, delaying the order remanding this matter to the Region for three and half weeks, i.e. the amount of additional time requested by Appellant.

Moreover, in addition to the detailed information contained in CALJ Biro's Order, Appellant had the benefit of EPA's complete pre-hearing exchange, which, combined with the detailed instructions contained the October 29, 2018 Order to File an Answer[3], were ample materials for Appellant to put together an Answer that met the requirements of the CROP . The Board has made clear that failure to meet the requirements of the CROP is grounds for default and Appellant's failure to file an Answer, taken together with Appellant's failure to file a prehearing exchange and file a response ot the motion for default are sufficient for the Board to sustain the Order for Default and confirm the Initial Decision. *In re Rybond*, *supra* at 626 (stating that "regulatory rules of procedure at 40 C.F.R. Part 22 apply to all litigants, whether they appear *pro se* or are represented by counsel"). Significantly, the Order on Remand did not nullify Appellant's obligation under the CROP to file an Answer. Appellant chose to ignore its obligations. *IMO Jiffy*, *supra at* 320 (The 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). For these reasons, the Default Order should be upheld, and the Initial Decision affirmed.

[3] The Order also included a refence to the Practice Manual, and Citizen's Guide to proceedings before the Office of Administrative Law Judges. *IMO Silky Associates, L.L.C.*, Docket No. 03-2018-0131, Order for Respondent to File an Answer, October 29, 2018.n.1.

4. Appellant Will Not Prevail at a Hearing on the on the Merits

Another element of the totality of the circumstances test is whether Appellant could potentially prevail at a hearing of this matter. *In re JHNY* 12 E.A.D. 373, 391(2005). Appellant will not prevail at a hearing. There is no question Appellant is liable for the allegations in the Complaint. Appellant has "failed to meet its burden of demonstrating a strong probability that it would prevail on the merits of its liability defense." *Id.* Appellant is obligated to explain to the Board how it complied with UST regulations from 2016 through 2018. It has not. As the Board noted in *Rybond*, the Board may consider whether the administrative action in question would have had a different outcome had there been a hearing." *Rybond, supra*, at 625. The burden falls on a respondent to demonstrate there is a more than the mere possibility of a defense, "but rather a 'strong probability' that litigating the defense will produce a favorable outcome." *In re Pyramid Chem. Co.,* 11 E.A.D. 657, 662 (EAB 2004); *Jiffy Builders*, *supra,* at 322.

The Complaint, the Motion on Default, and the Initial Decision document without contest Appellant's violations of the UST regulations. Appellant's statements in the Notice of Appeal are unsupported and fall far short of establishing a "strong probability of success" at hearing. *In re Four Strong Builders, Inc.* 12 E.A.D. 762, 771 (2006)(meager evidentiary support is not sufficient to establish a strong probability of success).

For these reasons, the Default Order should be upheld, and the Initial Decision confirmed.

5. Appellant failed to Substantiate an Inability to Pay Defense

The statutory factors for the assessment of a penalty under RCRA Subtitle I do not require the tribunal to consider a respondent's ability to pay a penalty or remain in business. *Cf*. Section 9006(d) and (e) of RCRA, 42 U.S.C. § 6991e(d) and (e) *with* Section 14(a)(4) of the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C § 136*l* (a)(4)(size of business,

ability to stay in business); Section 309(d)of the Clean Water Act, 42 U.S.C. § 1319(d)(economic impact on the violator); Section 16(a)(2)(B) of Toxic Substances Control Act, 15 U.S.C. § 2615(a)(2)(B)(ability of the violator to pay the penalty and effect on ability to continue in business). *See also* discussion, Initial Decision, III.A.2.e.

Appellant raises for the first time [4]on the record a claim that it is unable to pay the penalty assessed in the Default Judgement. *In re Silky*, RCRA Appeal 21-02, March 10, 2021. The burden to substantiate an inability to pay claim rests squarely on the Appellant. *In re Spitzer Great Lakes Ltd.*, 9 E.A.D. 302, 319-21 (EAB 2000); *In re Chempace Corp.*, 9 E.A.D. 119, 133 n.20 (EAB 2000); *In re Antkiewicz*, 8 E.A.D. 218, 239-40 (EAB 1999); *In re New Waterbury*, 5 E.A.D. 529, 541 (EAB 1994). Appellant has not met this burden. Appellant never substantiated its ATP claim despite EPA's efforts to elicit this information and the ATP documentation Appellant did supply to EPA was internally inconsistent and failed to disclose assets which were identified through an examination of the public record. Initial Decision III.A.2.e. *See e.g.* Exhibit 1 and Initial Decision III.A.2.e.

Where, as here, a respondent "does not raise an ability to pay claim in its answer to the complaint and does not produce any evidence to support such a claim during the case proceedings, a presiding officer may reasonably conclude that any objection to the penalty based on ability to pay has been waived and does not warrant a penalty reduction." *In re To Your Rescue! Services*, at 4 FIFRA Appeal 04-08 Final Order (September 1, 2006) citing *In re Spitzer Great Lakes Ltd.*, 9 E.A.D. 302, 319-21 (EAB 2000); *In re Chempace Corp.*, 9 E.A.D. 119, 133

[4] Out of an abundance of caution, EPA treated Appellant's October 16, 2018 request for an extension of time to file a Prehearing Exchange as a potential motion to dismiss and an inability to pay claim. IMO Silky Associates, L.L.C., Docket No. 03-2018-0131, Order on Remand, at 2, December 10, 2018. EPA's October 30, 2018 response while consenting to the extension of time, expressed EPA's opposition to the extent that Appellant's request for an extension of time was also a motion to dismiss and further sought an order requiring Appellant to produce records sustaining an inability to pay claim. Exhibit 6.

n.20 (EAB 2000); *In re Antkiewicz*, 8 E.A.D. 218, 239-40 (EAB 1999); *In re New Waterbury*, 5 E.A.D. 529, 541(1994).

Appellant's post- judgement claim is not supported and fails to demonstrate a basis for setting aside the Default Judgement. *JHNY supra* at 12 E.A.D. at 383 (a generalized claim of inability to pay does not absolve respondent from having to pay a penalty). For these reasons, the Default Order should be upheld, and the Initial Decision affirmed.

C. Appellant is Liable under Count IV of the Complaint

1. 9 Va. Admin. Code § 25-580-50(3)(a)(2)(c) is Not Approved

As recited in the Initial Decision, effective October 28, 1998, the Commonwealth of Virginia was granted final authorization[5] to administer a state UST management program in lieu of the Federal UST management program established under RCRA Subtitle I. The provisions of the Virginia UST management program, through the final authorization, became requirements of RCRA Subtitle I and are enforceable by EPA pursuant to Section 9006 of RCRA, 42 U.S.C. § 6991e. Virginia's authorized UST management program regulations are set forth in the VA UST Regulations, 9 Va. Admin. Code §§ 25-580-10 *et seq*. Initial Decision II.A.5. *See also* 63 Federal Register 51528 (September 28, 1998) and 40 C.F.R. § 282.96. The UST state program authorization regulations are at 40 C.F.R § 280 *et seq, See also In re General Motors Automotive-North America,* 14 E.A.D. 1, 7(2008)(describing state authorization under RCRA Subtitle C).

In its March 23, 2021 Order, the Board ordered EPA to explain:

> why [t]he type of equipment specified in 9 Va. Admin. Code § 25-580-50(3)(a)(2)(c) is not identified in the Region's Complaint, Motion for Default, or the Regional Judicial Officer's Default Order, and the copy of the regulations attached as Exhibit P to the Region's Complaint appears to be outdated because it does not include subsection [9 Va. Admin. Code § 25-580-50(3)(a)(2)](c).

[5] RCRA C uses the word "authorized", RCRA I uses the word "approved" *Cf.* Section 3006 of RCRA, 42 U.S.C. § 6926 with Section 9004 of RCRA, 42 U.S.C. §6991c.

In re Silky Associates, L.L.C., Order Electing to Exercise *Sua Sponte* Review and Establishing Briefing Schedule, at 5, RCRA Appeal 02-21(March 23, 2021). The answer to the Board's question is that the current version of the Virginia approved UST regulations was approved in 1998, and as the Board pointed out, 9 Va. Admin. Code § 25-580-50(3)(a)(2)(c) was adopted in 2004. *Id*. at 5, note 1.[6] Approved regulations are enforced by EPA in lieu of the federal program. Section 9004(d)(2) of RCRA, 42 U.S.C. § 6991c(d)(2). *See General Motors, supra*, at 87, *citing Pyramid, supra* at 669("noting that EPA authorization of a state RCRA program does not divest the Agency of authority to enforce any requirements of the that authorized state program *plus* any federal requirement that is not part of the authorized state program"(emphasis added in the original). UST regulations become approved only after EPA has followed the procedure outlined in Section 9004(d)(1) of RCRA, 42 U.S.C. § 6991c(d)(1), that is: notice, public comment, and a determination by EPA that the proposed state program (or amendments thereto) are consistent with Section 9004 requirements. State regulations that have not been subject to the Section 9004(d) of RCRA, 42 U.S.C. § 6991c(d) process are not approved and therefore cannot be enforced by EPA in lieu of the federal program. Moreover, EPA has incorporated by reference and codified Virginia's approved UST program in 40 C.F.R. § 282.96 on June 15, 2004. *See* 69 Federal Register 33312 (June 15, 2004). These codification regulations list in the Code of Federal Regulations the Virginia statutes and regulations that EPA has approved and can enforce. 9 Va. Admin. Code § 25-580-50(3)(a)(2)(c). does not appear in EPA's codification, and thus is not an EPA-enforceable regulation.[7]

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[6] The approved Virginia UST regulations are presently going through the re-approval process. The regulations were published for public comment on March 3, 2021. In the absence of significant public comment, the re-approved Virginia UST regulations will become effective on May 3, 2021. 86 Federal Register 12110 (March 2, 2021)

[7] *See also* 69 Federal Register 33312 (June 15, 2004) *(*EPA codifies its approval of a State program in 40 C.F.R. Part 282 and incorporates by reference therein the State's statutes and regulations that make up the approved

The Region's Complaint, Motion for Default, the Regional Judicial Officer's Default Order, and the copy of the regulations attached as Exhibit P to the Region's Complaint reflect that EPA enforced the approved Virginia UST regulations in this matter.

2. <u>Even if 9 Va. Admin code § 25-590-50(3)(a)(2)(c) was Approved, Appellant would be Liable.</u>

In order to prevent spilling and overfilling associated with product transfer to the UST system, owners and operators must use the spill and overfill prevention equipment and methods listed in 9 Va. Admin code § 25-590-50(3)(a)(2). Owners and operators of UST systems are required to use spill prevention equipment that will prevent release of product to the environment when the transfer hose is detached from the fill pipe (for example, a spill catchment basin); and overfill equipment under one of the three options listed in 9 Va. Admin. Code § 25-590-50(3)(a)(2) (a) – (c). In particular, 9 Va. Admin. code § 25-590-50(3)(a)(2)(c) recites:

> (c) Restrict the flow 30 minutes prior to overfilling, alert the operator with a high level alarm one minute before overfilling, or automatically shut off flow into the tank so that none of the fittings located on top of the tank are exposed to product due to overfilling.

Id. Appellant had no overflow alarm systems in place. As noted during the July 18, 2016 EPA CEI:

> According to information extracted from the VADEQ tank registration database, no overfill protection device has been reported for any of the five USTs. No drop tube shutoff device was observed in any of the USTs to prevent overfill. Also, according to the ATG system setup, there is no evidence of *<u>an external alarm setup and no visual/audible alarm</u>* was observed at the Facility. The EPA inspector could not determine whether the tanks are equipped with a ball float valve during field observations.

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program which is federally-enforceable in accordance with Sections 9005 and 9006 of Subtitle I of RCRA, 42 U.S.C.§ 6991d and 6991e, and other applicable statutory and regulatory provisions. Today's rulemaking codifies EPA's approval of Virginia's underground storage tank program. This codification reflects the State program in effect at the time EPA granted Virginia approval, in accordance with RCRA section 9004(a), 42 U.S.C. 6991c(a), for its underground storage tank program)

Exhibit 1, EPA CEI Report, at 4(internal references deleted)(emphasis added). Notably, Virginia did not record an overflow protection device in its tank registration records, and presumably such record would have included a device employed under 9 Va. Admin code § 25-590-50(3)(a)(2)(c). EPA's physical inspection of the facility also confirmed no external alarm was present. *Id*. As RJO Lisa noted:

> In response to EPA's March 7, 2017 information request letter and following EPA's November 30, 2017 and February 21, 2018 Notice of Intent to Prohibit Delivery letters, Respondent did not provide any overfill verification documentation for any of the UST systems at the Facility.

Initial Decision, II.A.53. Appellant failed to offer any evidence to contradict the conclusion in the EPA CEI that Appellant had any overflow protection devices in place because in fact, Appellant did not have any overflow protections in place for its UST systems until two and half years after the EPA CEI. Initial Decision, II.A.52, Toffel Declaration. ¶23.

Appellant is liable for Count IV of the Complaint. The Default Order should be upheld, and the Initial Decision affirmed.

CONCLUSION

Ample opportunity was afforded to Appellant to defend itself from the allegations contained in the Complaint. The Regional Judicial Officer's careful examination of the record and application of law to the facts in the record deserves the Board's deference. *JHNY*, *supra*, at 384 – 385 ("It has been the Board's longstanding practice to accord substantial deference to ALJs conducting proceedings under the CROP….").

It has respectfully submitted that based on foregoing, the Default Order be upheld, and the Initial Decision affirmed.

Respectfully submitted,

April 8, 2021

Joyce A. Howell
Signed per revised EAB Order on electronic filing in EAB Part 22 proceedings dated August 12, 2013.

Joyce A. Howell
Senior Assistant Regional Counsel,
USEPA Region 3 (MC 3RC40)
1650 Arch Street
Philadelphia, PA 19103
Phone: 215.814.2644
Email: howell.joyce@epa.gov

STATEMENT OF COMPLIANCE WITH WORD LIMITATION

In accordance with 40 C.F.R. § 124.19(d)(1)(iv), undersigned counsel certifies that the foregoing APPELLEE BRIEF contains 7,629 words, as counted by a word processing system, including headings, footnotes, quotations, and citations.

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

In re:	:	
Silky Associates, L.L.C.	:	Appeal No. RCRA 21-02

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appellee brief, Exhibits, and Declaration of Melissa Toffel were filed electronically with the EAB's electronic filing system and to Appellant via electronic mail on this eighth day of April, 2021.

Via electronic mail:
Lakhmir Bagga
Silky Associates, L.L.C.
200 E. Williamsburg Road
Sandston, VA 23150
luckymart200@gmail.com

April 8, 2021

/s/
Joyce A. Howell
Signed per revised EAB Order on electronic filing in EAB Part 22 proceedings dated August 12, 2013.

Joyce A. Howell
Senior Assistant Regional Counsel,
USEPA Region 3 (MC 3RC40)
1650 Arch Street
Philadelphia, PA 19103
Phone: 215.814.2644
Email: howell.joyce@epa.gov