



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

In re:
Silky Associates, LLC
Docket No. RCRA-03-2018-0131
RCRA (9006) Appeal No. 21-02

FINAL ORDER AND VACATUR OF ORDER ELECTING TO EXERCISE SUA SPONTE REVIEW

I. Introduction

The Regional Judicial Officer for the U.S. Environmental Protection Agency, Region 3 ("Region") issued a Default Order and Initial Decision (collectively, "Default Order") in this matter in February 2021. See In re Silky Associates, LLC, Dkt. No. RCRA-03-2018-0131 (RJO Feb. 9, 2021). The Regional Judicial Officer found Silky Associates, LLC ("Respondent") in default for failing to file an Answer to the Administrative Complaint filed by the Region, which alleged five violations of the Underground Storage Tank program of Subtitle I of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6991-6991m, and the federally authorized Underground Storage Tank regulations of the Commonwealth of Virginia, 9 Va. Admin. Code §§ 25-580-10 et seq. Id. at 1-2. Respondent was assessed a \$186,095 penalty. Id. at 2.

On March 10, 2021, Respondent (who is not represented by legal counsel) filed with the Environmental Appeals Board ("Board") a "Request Against [the] Default Order To Cancel." Request Against Default Order To Cancel (Mar. 10, 2021). Upon examination of the Default Order, the Board issued an order exercising sua sponte review on March 23, 2021. Order

Electing to Exercise Sua Sponte Review and Establishing Briefing Schedule (EAB Mar. 23, 2021) (“Sua Sponte Order”).

The parties submitted to the Board various documents with respect to Respondent’s appeal and the Board’s Sua Sponte Order. Appellee Resp. Br. (Apr. 8, 2021); Silky Associates Answer to Order Electing to Exercise Sua Sponte Review and Establishing Briefing Schedule (Apr. 18, 2021); Silky Associates Answer to Declaration of Melissa Toffel (Apr. 22, 2021). Among them is the Region’s motion for leave to file a reply and a proposed reply brief. Motion for Leave to File a Reply (Apr. 23, 2021). Respondent submitted a document in response and the Region represents that Respondent does not consent to the motion. Answer to Joyce A. Howell (Apr. 30, 2021); Status Report at 2 (Jun. 16, 2021). Because the Region’s reply brief clarifies the record and will assist the Board in resolving this matter, we grant the Region’s request to file a reply. *See In re ArcelorMittal Cleveland, Inc.*, NPDES Appeal No. 11-01 at 1-2 (EAB Dec. 9, 2011) (Order Granting in Part EPA’s Motion to File Surreply) (citing cases).

The Board then issued an order staying the proceedings for a finite period to provide the parties the opportunity to pursue amicable resolution of this matter. Order Staying Proceedings for 45 Days (EAB May 13, 2021). Following the Board’s Order, the Region submitted a status report stating that the parties could not agree on a settlement amount and that it terminated negotiations with Respondent. Status Report at 2-4. Respondent filed a document in response. Short Notes to Remember this Case (Jun. 23, 2021).¹

¹ As contemplated by our stay order, the parties met on three occasions to discuss settlement and in the course of settlement discussions, the Region received information from Respondent regarding its ability to pay the penalty. Status Report at 2-3.

As the background recounted above and the discussion below demonstrate, the Board takes seriously the issues raised by Respondent and the Board has examined the process leading to the Regional Judicial Officer's entry of the Default Order and the Default Order itself. Upon that review, the Board stayed these proceedings for a finite period to provide the parties an opportunity to amicably resolve this dispute. The Region and Respondent took advantage of that opportunity, but settlement discussions were ultimately unsuccessful. As such, this matter is no longer stayed and is now before the Board for disposition. Upon examination and consideration of the arguments raised on appeal and the record as a whole, we conclude that that Respondent's appeal lacks merit and we vacate our Sua Sponte Order.

II. Discussion

a. Respondent's Appeal

As a general matter, the Board endeavors to construe objections presented by pro se litigants liberally so as to fairly identify the substance of the arguments being raised. *See, e.g., In re To Your Rescue! Services*, FIFRA Appeal No. 04-08, at 3 (EAB Sept. 30, 2005) (Final Order); *In re Sutter Power Plant*, 8 E.A.D. 680, 687 (EAB 1999). Accordingly, we read Respondent's "Request Against [the] Default Order To Cancel" as an appeal of the Default Order to reduce or set aside the assessed penalty primarily based on (1) Respondent's cooperation with the Agency and (2) Respondent's ability to pay.

First, with respect to Respondent's argument that he should not be assessed a penalty because he cooperated with the EPA to eventually come into compliance, the applicable penalty policy specifies that "Because compliance with the regulation is expected from the regulated community, *no downward adjustment* may be made if the good faith efforts to comply primarily consist of coming into compliance. That is, there should be no 'reward' for doing now what

should have been done in the first place.” *U.S. EPA Penalty Guidance for Violations of UST Regulations*, OSWER Directive 9610.12, at 18 (Nov. 1990). Accordingly, we do not find merit in Respondent’s argument regarding his cooperation with the EPA to come into compliance. *See, e.g., In re Ram, Inc.*, 14 E.A.D. 357, 375-76 (EAB 2009).

Second, with respect to Respondent’s ability to pay claim, we conclude that Respondent’s arguments lack merit. In a RCRA Underground Storage Tank administrative enforcement action, the respondent has the burden of establishing inability to pay a penalty. *In re Carroll Oil Co.*, 10 E.A.D. 635, 661-63 (EAB 2002). In enforcement cases where a respondent does not raise an ability to pay argument in its answer to the complaint and does not produce any evidence to support such a claim during the proceedings, the Board has found that 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*, FIFRA Appeal No. 04-08 at 5; *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). Moreover, even if a respondent claims it may go bankrupt, a penalty may still be assessed because the respondent may be capable of paying the penalty after the bankruptcy reorganization process concludes. *See In re To Your Rescue! Services*, FIFRA Appeal No. 04-08 at 5; *New Waterbury*, 5 E.A.D. at 540 n.19; *see also In re Britton Constr. Co.*, 8 E.A.D. 261, 292 n.21 (EAB 1999). Here, Respondent did not sufficiently substantiate its ability to pay claim despite the Region’s repeated efforts to solicit information. *See* Default Order at 26-27; Appellee Resp. Br. at 10-12. The Region found that the limited information Respondent did provide was internally inconsistent and failed to disclose assets. Appellee Resp. Br. at 11-12. When the Region requested additional information to

resolve the inconsistencies, Respondent never submitted the requested financial information. *Id.* at 12. Thus, we conclude that Respondent's ability to pay argument lacks merit.

A party may be found to be in default upon failure to file a timely answer to a complaint. 40 C.F.R. § 22.17(a). A default by a respondent, as the case is here, constitutes an admission of all facts alleged in the complaint and a waiver of the respondent's right to contest such factual allegations in the pending proceeding. *Id.* Respondent's appeal does not seem to challenge the basis for the Regional Judicial Officer's finding of default—Respondent's failure to timely answer the complaint. Nonetheless, as part of the Board's order electing to exercise sua sponte review in this matter, the Board asked the parties to address whether it was properly determined that Respondent failed to file an answer and whether Respondent can be found in default based on the sequence of events that occurred.

b. The Board's Sua Sponte Order

In its Sua Sponte Order, the Board ordered the Region (in addition to responding to Respondent's appeal) to brief whether (1) the ALJ properly concluded that Respondent failed to file an Answer and whether Respondent can be found in default based on the sequence of events that occurred and (2) whether Respondent can be held liable on Count IV for failure to have overfill prevention equipment based on the applicable regulations and the facts as alleged in the Region's Complaint. Sua Sponte Order at 6-7. The Region timely filed its response addressing Respondent's appeal and the issues identified in the Board's Sua Sponte Order. Appellee Resp. Br. at 13-19, 21-24. Respondent was provided the opportunity to file a reply, and did so, although his reply did not address the two issues identified in the Board's Sua Sponte Order. *See* Silky Associates Answer to Order Electing to Exercise Sua Sponte Review and Establishing Briefing Schedule; Silky Associates Answer to Declaration of Melissa Toffel. In light of the

briefs and supporting documents submitted by the Region regarding the finding of default and Count IV, the Board vacates its order electing sua sponte review.

III. Conclusion

For the reasons set forth above, the Default Order is affirmed; Respondent is assessed a penalty of \$186,095. Payment of the full amount of the civil penalty shall be made within thirty (30) days of service of this final order. Payment by Respondent shall reference Respondent's name and address and the EPA Docket Number of this matter. Respondent may use any of the following means for purposes of paying the penalty:

- a. All payments made by check and sent by regular U.S. Postal Service Mail shall be addressed and mailed to:

United States Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000
Contact: Customer Service (513-487-2091)

- b. All payments made by check and sent by private commercial overnight delivery service shall be addressed and mailed to:

United States Environmental Protection Agency
Cincinnati Finance Center
Government Lockbox 979077
1005 Convention Plaza
Mail Station SL-MO-C2-GL
St. Louis, MO 63101
Contact: 314-418-1818

- c. All payments made by check in any currency drawn on banks with no USA branches shall be addressed for delivery to:

United States Environmental Protection Agency
Cincinnati Finance Center

MS-NWD
26 W. M.L. King Drive
Cincinnati, OH 45268-0001

d. All payments made by electronic wire transfer shall be directed to:

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”

e. All electronic payments made through the Automated Clearinghouse (ACH), also known as Remittance Express (REX), shall be directed to:

U.S. Treasury REX/Cashlink ACH Receiver
ABA = 051036706
Account No.: 310006, Environmental Protection Agency
CTX Format Transaction Code 22 – Checking
Physical location of U.S. Treasury facility:
5700 Rivertech Court
Riverdale, MD 20737
Contact: 866-234-5681

f. On-Line Payment Option: WWW.PAY.GOV/paygov/

Enter “sfo 1.1” in the search field. Open and complete the form.

g. Additional payment guidance is available at:

<https://www2.epa.gov/financial/makepayment>

At the same time that payment is made, Respondent shall email copies of any corresponding check, or written notification confirming any electronic fund transfer or online payment, as applicable to:

Regional Hearing Clerk
U.S. Environmental Protection Agency

Region III (Mail Code 3RC00)
1650 Arch Street
Philadelphia, PA 19103-2029
R3_Hearing_Clerk@epa.gov

And


Jennifer M. Abramson
Senior Assistant Regional Counsel
U.S. Environmental Protection Agency
Region III (Mail Code 3RC50)
1650 Arch Street
Philadelphia, PA 19103-2029
Abramson.jennifer@epa.gov

If Silky Associates, LLC, fails to pay the penalty within the prescribed statutory period after entry of this decision, interest on the penalty may be assessed. *See* 31 U.S.C. § 3717; 40 C.F.R. § 13.11.

So ordered.²

ENVIRONMENTAL APPEALS BOARD

Dated: Jul 06, 2021

By: 

Aaron P. Avila
Environmental Appeals Judge

² The three-member panel deciding this matter consists of Environmental Appeals Judges Aaron P. Avila, Mary Kay Lynch, and Kathie A. Stein.

CERTIFICATE OF SERVICE

I certify that copies of the foregoing *Final Order and Vacatur of Order Electing to Exercise Sua Sponte Review* in the matter of Silky Associates, LLC, RCRA (9006) Appeal No. 21-02, were sent to the following persons in the manner indicated.

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Dated: Jul 06, 2021

Emilio Cortes

Emilio Cortes
Clerk of the Board