

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

In the Matter of:

Hagerstown Aircraft Services, Inc.

RESPONDENT

Hagerstown Aircraft Services, Inc.
14235 Oak Springs Road
Hagerstown, MD 21742

FACILITY

Docket No. RCRA-03-2011-0112

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**COMPLAINANT'S RESPONSE TO THE PRESIDING OFFICER'S
MARCH 13, 2014 ORDER TO SHOW CAUSE**

This brief is submitted in response to the Presiding Officer's March 14, 2014 Order to Show Cause why the Presiding Officer should not deny Respondent's Motion to Set Aside the Default Order and Temporarily Stay Proceedings.

PROCEDURAL HISTORY

1. This matter was commenced three years ago by the filing of an Administrative Complaint ("Complaint") pursuant to on Section 3008(a) and (g) of the Resource Conservation and Recovery Act ("RCRA"), as amended, 42 U.S.C. § 6928(a)(1) and (g) ("RCRA"), 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. Respondent 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.
3. Respondent failed to file an Answer or otherwise respond to the Complaint, and accordingly, Complainant filed a Motion for Default Order on June 23, 2011. Respondent 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 Respondent 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. Respondent has not made any submissions to EPA in response to the Initial Decision and Default Order.
5. The Default Order further requires Respondent to pay a penalty in the amount of \$64,000 30 days after the Default Order becomes final.
6. Respondent 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 Default Order to the Presiding Officer.

8. Complainant filed a Reply to Respondent's Motion to Set Aside the Default Order and Temporarily Stay Proceedings on August 15, 2013 with the Regional Hearing Clerk.
9. Respondent 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 Respondent's Motion to Set Aside the Default Order and Temporarily Stay Proceedings.
11. Respondent submitted a response to the Order to Show Cause by pleading dated March 20, 2014.
12. Complainant now respectfully submits its response to the Presiding Officer's March 14, 2014 Order to Show Cause.

STANDARD OF REVIEW

The Consolidated Rules provide that the Presiding Officer may set aside a Default Order "for good cause shown." Consolidated Rules, 40 C.F.R. § 22.17(c). The good cause standard of the rule is considered a form of equitable relief, requiring the Court to consider the totality of the circumstances. IMO JHNY, Inc., 12 E.A.D. 372 , 2005 EPA App. Lexis 22, (September 30, 2005); IMO Midwest BNK & Trust Co., Inc et al, 3 E.A.D. 696, 1991 EPA APP. Lexis 29 (Oct. 23, 1991); IMO Lawrence County Agricultural Society, 200 EPA ALJ Lexis (November 22, 2000).

In JHNY, the Board first examined the procedural omission that prompted the default order, examining whether such procedure was violated, and whether the procedural 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 at 12 E.A.D.372; 2005 EPA App. Lexis 13. The Board then considered whether the defaulting party would likely succeed on the substantive

merits if a hearing were held. Id. The Board further noted: “it is the respondent’s burden in this context to demonstrate there is more than a mere possibility of defense, but rather a “strong probability” that litigating the defense will produce a favorable outcome. Id. (quoting IMO Pyramid Chemical Co., 11 E.A. D. 657, 662 (Sept. 16, 2004)).

It is respectfully submitted that the totality of the circumstances here do not show good cause to set aside the Default Order.

ARGUMENT

1. There is no valid excuse for Respondent’s failure to Answer the Complaint.

The Complaint in this matter was served on Respondent on March 11, 2011 after the completion of an EPA investigation of Hagerstown Aircraft Services, Inc. (“Hagerstown Aircraft”) for violations of RCRA. An Answer to the Complaint was due thirty days after service of the Complaint, on April 24, 2011. 40 C.F.R. § 22.15(a). No Answer to the Complaint or other responsive pleading was ever filed by Hagerstown Aircraft.

Respondent’s response to the Order to Show Cause concedes these facts.¹ The Consolidated Rules are clear that failure to file an Answer will place a party in jeopardy of Default. 40 C.F.R. § 22.17(a). Likewise, the Consolidated Rules provide that failure to admit, deny, or explain any material factual allegation contained in the complaint constitutes an admission of such allegations. 40 C.F.R. § 22.15(d). Two years elapsed without Respondent’s engagement in the administrative process. As noted by the Board:

My interest in the just determination of cases before the U.S. Environmental Protection Agency requires the fair and expeditious application of the Consolidated Rules of Practice. The Rules provide for the entry of a default order to avoid indefinitely prolonged litigation and a consequent subversion of the orderly process of this administrative system.

¹ “Respondent appreciates and acknowledges there are no known facts to counter Complainant’s allegations made in the Administrative Complaint or Motion for Default Order.”

IMO Turner, 2 E.A.D. 96 (1985). In the context of JHNY test, procedural omission that prompted the default order did in fact occur, is a proper ground for a default order, and whether there is no valid excuse or justification for not complying with the procedural requirement. It is respectfully submitted that the first step of the JHNY test is satisfied and there is no good cause to set aside of the Default Order.

2. Respondent will not likely prevail on the merits.

Respondent has admitted in its initial moving papers that it was out of compliance with RCRA. Respondent's Initial Motion p. 2. Moreover, as recited in Exhibit A to Respondent's Initial Motion, many of the violations observed by a representative of MDE on May 3, 2013 were the same violations observed by EPA and MDE three years earlier. (Respondent's Initial Motion, Exhibit A, p. 4). In fact, these violations were not resolved to the satisfaction of the Maryland Department of the Environment until September 18, 2013. Respondent's Supplemental Filing. Given the evidence supplied by Respondent, it appears there is no dispute as Respondent's liability for the allegations contained in Count I of the Complaint.

It is also uncontroverted that Hagerstown Aircraft did not respond to the IRL. In the absence of any contrary evidence, there are no material facts in controversy regarding Count II of the Complaint. Respondent's Response to Order to Show Cause at 3. It is respectfully submitted that the second step of the JHNY test is satisfied in that Respondent will not prevail on the merits and there is no good cause to set aside of the Default Order.

(emphasis added). Consolidated Rules 40 C.F.R. § 22.18(b)(1); see also, Respondent's Response to Order to Show Cause at 3 – 4.

Hagerstown Aircraft's return to compliance in September 2013, (three and half years after EPA's inspection of the Hagerstown Aircraft facility), meets the basic requirement of the law. Compliance is not a basis for nor should it be rewarded by setting aside of the Default Order.

On a similar note, Hagerstown Aircraft also claimed in its Initial Motion that the Default Order should be set aside because no harm or potential harm was caused by the violations. However EPA recently began a site investigation of the Hagerstown Aircraft facility. (Attachment A).

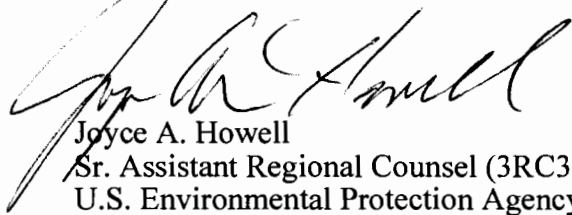
Last, Hagerstown Aircraft also mentions, that it should be allowed to enter into settlement negotiations to include "formal consideration of the facts such as Respondent's ability to pay the penalties in the Default Order." Hagerstown Aircraft has never entered evidence or argument contesting the Determination of Civil Penalty Amount contained in the Initial Decision and Default Order.

In sum, Respondent's arguments completely miss the mark, and suggest no factors which fit into the totality of circumstances test as set forth by the decisions of the Board. See e.g., IMO JHNY, Inc., 12 E.A.D. 372 , 2005 EPA App. Lexis 22, (September 30, 2005); IMO Midwest BNK & Trust Co., Inc et al, 3 E.A.D. 696, 1991 EPA APP. Lexis 29 (Oct. 23, 1991)

Therefore, for the reasons set forth above, it is respectfully requested that Respondent's Motion to Set Aside Default Order and to Temporarily Stay Proceedings be denied.

Respectfully submitted,

Dated: *March 25, 2014*



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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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CERTIFICATE OF SERVICE

I hereby certify that on the date set forth below, I caused to be hand-delivered to Ms. Lydia Guy, Regional Hearing Clerk (3RC00), U.S. EPA Region III, 1650 Arch Street, 5th Floor, Philadelphia, PA 19103-2029, the original and one copy of the foregoing Complainant's Response to the Order to Show Cause. I further certify that on the date set forth below, I caused true and correct copies of the same to be served upon each of the following persons at the following addresses and in the manner identified below:

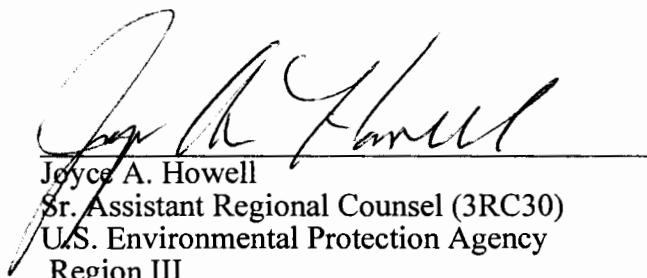
By Hand:

Hon. Renée Sarajian
Regional Judicial Officer
USEPA Region III
1650 Arch Street
Philadelphia, PA 19103

Via UPS Next Day Delivery, to:

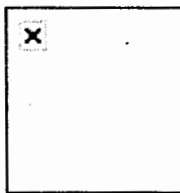
M. Trent Zivkovich, Esq.
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Date: March 25, 2014


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**ATTACHMENT A
EPA RESPONSE TO
ORDER TO SHOW CAUSE**

U.S. ENVIRONMENTAL PROTECTION AGENCY
 POLLUTION/SITUATION REPORT
 Hagerstown Aircraft Services - Removal Polrep



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
 Region III

Subject: POLREP #2
 Hagerstown Aircraft Services
 A3XE
 Hagerstown, MD
 Latitude: 39.7073300 Longitude: -77.7208360

To:
From: Don Mclaughlin, On-Scene Coordinator
Date: 1/21/2014
Reporting Period:

1. Introduction

1.1 Background

Site Number:	A3XE	Contract Number:	
D.O. Number:		Action Memo Date:	
Response Authority:	CERCLA	Response Type:	Time-Critical
Response Lead:	EPA	Incident Category:	Removal Assessment
NPL Status:	Non NPL	Operable Unit:	
Mobilization Date:		Start Date:	
Demob Date:		Completion Date:	
CERCLIS ID:		RCRIS ID:	
ERNS No.:		State Notification:	
FPN#:		Reimbursable Account #:	

1.1.1 Incident Category

Site Assessment

1.1.2 Site Description

This is an active Facility specializing in servicing private aircraft-painting/stripping, repainting, engine services, and miscellaneous aircraft services

1.1.2.1 Location

The Facility is located at the Hagerstown Airport, in Hagerstown MD

1.1.2.2 Description of Threat

Site Assessment will be initiated during the week of January 27, 2014....surface/subsurface soil samples will be collected across the Facility, and groundwater monitoring wells will be installed to assess potential contaminants at the Facility

1.1.3 Preliminary Removal Assessment/Removal Site Inspection Results

Site Assessment data results will be included following sampling activities at the Facility

2. Current Activities

2.1 Operations Section

2.1.1 Narrative

This is an active Facility which services private aircraft

2.1.2 Response Actions to Date

RCRA investigations

2.1.3 Enforcement Activities, Identity of Potentially Responsible Parties (PRPs)

PRP has been identified as the owner of the Facility

2.1.4 Progress Metrics

<i>Waste Stream</i>	<i>Medium</i>	<i>Quantity</i>	<i>Manifest #</i>	<i>Treatment</i>	<i>Disposal</i>

2.2 Planning Section

2.2.1 Anticipated Activities

Field sampling activities will be initiated during the week of January 27, 2014

2.2.1.1 Planned Response Activities

Unknown at this point

2.2.1.2 Next Steps

Initiate Site Assessment activities to include surface/subsurface soil sampling, and groundwater monitoring well installation

2.2.2 Issues

None to report

2.3 Logistics Section

Because the Facility and the Hagerstown Airport are both actively operating, both the Facility and the Hagerstown Airport will be updated as activities progress

2.4 Finance Section

2.4.1 Narrative

CERCLA funding is anticipated to perform the Site Assessment

2.5 Other Command Staff

No information available at this time.

3. Participating Entities

No information available at this time.

4. Personnel On Site

EPA, START Personnel, and additional contractors anticipated at this time

5. Definition of Terms

No information available at this time.

6. Additional sources of information

No information available at this time.

7. Situational Reference Materials

No information available at this time.