

BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III

1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

2008 SEP 30 AM 11:45

REGIO. III PHILA. OFFICE
EPA REGION III PHILA, PA

In the Matter of:)
)
Ebersole Associates, Inc.,)
)
and)
)
L & N Zimmerman Excavating, Inc.,)
)
Respondents.) U.S. EPA Docket No.: CAA-3-2007-0329
)
)

ORDER TO SUPPLEMENT RECORD

Pursuant to Rule 22.17(b) of the Consolidated Rules of Practice, 40 C.F.R. §22.17(b), Complainant has filed a Motion for Default Order against Respondent, Ebersole Associates, Inc. (Ebersole), in this proceeding. The Motion has no accompanying affidavits, exhibits or attachments. The Complainant seeks a penalty of \$16,312.17, based on alleged violations of a rule establishing a national emission standard for asbestos promulgated under Section 112 of the Clean Air Act (CAA), 42 U.S.C. §7412. The Motion for a Default Order seeks assessment of the penalty proposed in the Complaint filed on September 28, 2007.

In arriving at a penalty amount, Complainant is to consider the statutory factors set forth in Section 113(e) of the CAA, 42 U.S.C. §7413(e). The statutory factors include, in addition to such other factors as justice may require, "the size of the business, the economic impact of the

penalty on the business, the violator's full compliance history, the good faith efforts to comply, the duration of the violation as established by any credible evidence (including evidence other than the applicable test method), payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation." Complainant must, through affidavit and/or other documentation, make a prima facie case in support of its request for the assessment of a civil administrative penalty (including compliance with 40 C.F.R. §§22.5, 22.7, and 22.16). There must be evidence and analysis sufficient for the decision maker to conclude that the statutory factors have been addressed and the penalty is in conformity with the statute and any applicable penalty policies.

Katzon Bros. v. U.S. EPA, 839 F. 2d 1396 (10th Cir. 1988), states the generally held judicial view that the law favors resolution of cases on the merits; default judgments are not favored. Katzon Bros. reversed the penalty assessment in an EPA Part 22 default proceeding, where the court felt that the Regional Administrator had rubber stamped the assessment of a proposed penalty. See also In the Matter of Roderick L. Dudley et al., FIFRA Docket No. 6-029-C (Decision and Order Denying Motion for Default, George Malone, III, Regional Judicial Officer, Region 6, November 18, 1998); In the Matter of G. Lynn Golden, Docket No. CWA- III-209 (Order on Supplemental Motion for Default Order, Benjamin Kalkstein, Regional Judicial Officer, Region 3, November 16, 1998).

In its Motion for a Default Order, Complainant does not address the statutory factors considered in development of the penalty amount, or file any supporting affidavits or other documentation concerning service of the Complaint, Respondent's receipt of the Complaint or Respondent's failure to file an Answer. Therefore, Complainant is **ORDERED** to supplement the record, within thirty (30) days from service of this Order, with prima facie evidence and

analysis sufficient to allow the Presiding Officer to conclude that a default judgment is appropriate and that the statutory penalty factors were considered in assessing an appropriate civil penalty.

Date: September 30, 2008

Renée Sarajian

Renée Sarajian
Regional Judicial Officer/Presiding Officer

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this date I served a true and correct copy of the Order to Supplement Record, in U.S. EPA Docket No.: CAA-3-2007-0329, to the following:

Via Hand Delivery:

James Baker (3RC10)
Assistant Regional Counsel
U.S. EPA, Region III
1650 Arch Street
Philadelphia, PA 19103

Via Certified Mail

Return Receipt Requested:

Randall I. Ebersole
President
Ebersole Associates, Inc.
1900 Cumberland Street
Lebanon, Pennsylvania 17042

Date: 9/30/2008

Catherine McCool

Catherine McCool (3RC42)
Lead Paralegal Specialist
U.S. EPA, Region III