UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of:	)	
JOSEPH OH	)	Docket No. RCRA-10-2011-0164
and	)	
HOLLY INVESTMENT, LLC,	)	
Respondents.	)	

COMPLAINANT'S RESPONSE OPPOSING RESPONDENTS' MOTION TO REOPEN CASE AND SET ASIDE DEFAULT ORDER

Introduction

Complainant U.S. Environmental Protection Agency Region 10 ("Complainant" or "EPA") files this motion pursuant to Section 22.16(b) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties ("the Consolidated Rules of Practice"), 40 C.F.R. § 22.16(b). Complainant opposes Respondents' motion because Respondents have failed to show good cause for setting aside the default order and reopening the

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case. The legal grounds and factual basis for Complainant's opposition to Respondents' motion is set forth below.

Procedural and Factual Background

On September 28, 2011, EPA filed an administrative complaint ("Complaint") against Respondents alleging violations of Section 9003 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6991b, and the underground storage tank ("UST") regulations at 40 C.F.R. Part 280. On October 27, 2011, Joseph Oh filed an Answer generally denying all of the allegations in the Complaint. On December 7, 2011, the administrative law judge ("ALJ") ordered the parties to submit prehearing exchanges. Complainant timely submitted its prehearing exchange. Respondents missed their prehearing exchange deadline of February 17, 2012, but submitted a prehearing exchange on February 28, 2012, which failed to include any basis for the denials in their Answer with supporting documentation or copy of documents supporting any claim of inability to pay the proposed penalty or other claim that the penalty should be reduced. On June 29, 2012, Complainant filed and served a Motion to Compel Discovery or in the Alternative, a Motion in Limine. After Respondents chose not to respond to the motion, on July 16, 2012, the ALJ granted the part of Complainant's motion requesting discovery, and ordered Respondents to file and serve the information requested in the Prehearing Order by July 23, 2012. Respondents have never filed or served the requested information, nor

have they provided any response to the July 16th order. Further, Respondents did not move to supplement their initial prehearing exchange with any of the requested information by the July 30, 2012 deadline for supplementing prehearing exchange. On July 24, 2012, the ALJ issued a Notice of Hearing Location and Order Scheduling Prehearing Conference ordering the parties to participate in the prehearing conference on August 2nd to discuss, among other things, matters which may expedite the disposition of the proceeding. In that order, the ALJ specifically advised Respondents that failure to call in to the conference may result in a default decision being entered against them. Despite this warning and previous warnings, Respondents again failed to comply with the order and did not appear at the Prehearing Conference. On August 3, 2012, Complainant filed a Motion for Default or in the Alternative, Motion in Limine renewing its motion for the ALJ to draw an adverse inference from Respondents' failures to provide the information required by the previous orders. Later that day, the ALJ issued a Default Order and Initial Decision. Respondents then submitted a document dated August 17, 2012 entitled "Reopen Case and Set Aside Default Order of August 3, 2012, stating that they would later submit additional information and present good cause to reopen case. By order dated August 21, 2012, the ALJ denied Respondents' motion because Respondents August 17, 2012 document did not provide the factual grounds to support the request and therefore, did not satisfy the criteria for a motion set forth 40 C.F.R. § 22.16(a) or 22.28(a). In the order, the ALJ stated that

Respondents may renew their request by filing a motion in accordance with the Rules, to set aside the Default Order and Initial Decision before it becomes final on September 17, 2012.

On September 17, 2012, Respondents had a courier hand-deliver to EPA Region 10 offices a document dated September 16, 2012, and entitled Reopen Case and Set Aside Default Order of August 3, 2012. This document and attachments were stamped as filed with the Regional Hearing Clerk on September 17, 2012. The Certificate of Service filed with the document indicated that a true and correct copy of each document was served by mail and electronic mail to Counsel for Complainant, the Regional Hearing Clerk and the ALJ on September 17, 2012. Counsel for Complainant has never received a hard copy of the document through the mail or otherwise, but on September 17th was sent an electronic copy of the documents minus the Certificate of Service. For the reasons described below, Complainant requests that the ALJ deny Respondents' motion to reopen the case and set aside the default order.

Argument

I. **Respondents have failed to show good cause for ignoring the ALJ's orders despite warnings from the ALJ.**

Respondents base their motion on Federal Rule of Civil Procedure ("Fed. R. Civ. P.") 60(b) which states, in pertinent part:

> (b) Grounds for Relief From A Final Judgment, Order, Or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding, for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect …

Fed. R. Civ. P. 60(b)(1).

The Federal Rules of Civil Procedure are not directly applicable to administrative proceedings, but the Environmental Appeals Board ("EAB") and ALJs have consulted the Federal rules from time to time to aid in the interpretation and application of the Part 22 rules. See, e.g., *In re Carroll Oil Company*, 10 E.A.D. 635, 649 (EAB 2002); *In re Lazarus, Inc.*, 7 E.A.D. 318, 330 (EAB) 1997; *In re Asbestos Specialists*, 4 E.A.D., 819, 827 n.20 (EAB 1993). In support of their position that Respondents should be excused from complying with the ALJ's orders due to excusable neglect," Respondents cite to *Pioneer Investment Servs. Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380, 395 (1993), a decision in which the Court confronted the issue of whether an attorney's inadvertent failure to file a timely proof of claim in a bankruptcy proceeding constitutes excusable neglect under Bankruptcy Rule 9006. In determining the type of neglect that would be excusable, the Court made an equitable inquiry taking into account all relevant circumstances surrounding the party's omission and affirmed the lower court's judgment that the attorney's omission was excusable neglect. But when comparing the one time failure to timely file a proof of claim in *Pioneer Investment Servs Co.* to Respondents repeated failures to comply with the ALJ's orders even after warnings that such failures may result in a default order, the circumstances in the current case should be readily

distinguished from those in *Pioneer Investment Servs. Co.* and Respondents' neglect would not qualify as excusable. Respondents failed to comply with the information exchange requirements of 40 C.F.R. § 22.19(a), the prehearing orders issued on December 11, 2011 and July 16, 2012, and failed to appear at the August 2nd prehearing conference as required in the ALJ's order issued July 24, 2012. These orders were issued in plenty of time to provide Respondents with the opportunity to seek help if Respondents needed them to be translated, but Respondents still failed to comply with the orders. Respondents have also failed to meet the very criteria that they list on p. 5 of their motion because they have presented no evidence to support their claim of excusable neglect (only summary statements) and they have failed to act with due diligence to cure the neglect in that they have yet to provide any of the missing information requested in the prehearing and the discovery orders. Respondents' continued disregard of the ALJ's orders and the Consolidated Rules of Practice justify the entry of a default order against them.

Furthermore, statements made by Mr. Oh in his affidavit concerning the date by which he was aware of the failed reports are not consistent with the facts of this case. As indicated by Katherine Griffith's declaration filed as Attachment 1 to this motion, EPA has sent letters and talked to Mr. Oh about the violations observed at the facility as early as November 2009. See Griffith Declaration at 6, Complainant's Exhibit in the prehearing exchanges ("CX") 14, and 16. See also Attachment 2 to this motion containing a letter mailed to Mr. Oh on April 8, 2011, describing the violations. Mr. Oh's assertions that his problems were caused by Helen and Chan

Ho also do not take into account that the violations were first documented during the September 14, 2009 inspection when Mr. Oh's employee, John Kim, was managing the facility. See CX 13, 14, and 15. While Mr. Oh found time to "actively monitor [his] bankruptcy," he apparently *found* little if any time to monitor UST compliance at Totem Grocery. As the owner of the USTs he is liable for the violations at the facility.

Moreover, Mr. Oh's pro se status should not excuse failure to comply with the ALJ's orders. The EAB in *In re: Rybond, Inc.*, 6 E.A.D. 614, 626 (EAB 1996) upheld a default order against a pro se respondent for failure to comply with an ALJ's order, noting that, although federal courts and the Agency have adopted the approach that more lenient standards of competence apply to pro se litigants, a litigant who elects to represent himself has the responsibility for complying with the procedural rules and may suffer adverse consequences in the event of noncompliance.

II. Respondents have yet to provide any documentation whatsoever to support their claim of inability to pay the $48,078 penalty assessed in the Default Order.

Respondents appear to argue that the fact Mr. Oh has filed a bankruptcy petition is pro se evidence of an inability to pay the proposed penalty. But that is not the case. Inability to pay is an affirmative defense that Respondents have the burden of proof. *See* Carroll Oil, supra at 662. It is not one of the statutory penalty factors in Section 9006(c) of RCRA (seriousness of the violation and good faith efforts to comply). To the extent it is considered for settlement purposes

as part of the UST Penalty Policy or as an indication of good faith, Respondents have not provided documents to support their claim and have therefore failed to meet their burden. It is unclear if they will ever provide the financial documents the ALJ ordered them to provide.

III. If the ALJ elects to reopen the case and set aside the default order, Complainant requests the ALJ should find Respondents liable for the violations alleged and limit the issues in the case Respondents' claim of inability to pay the $48,078 penalty assessed in the Default Order.

Respondents have stated in their motion that they do not contest the liability determination made in the ALJ's default order. See Respondents Motion at 14, 19, 20. Therefore, the ALJ should limit any issues addressed in a reopened case to Respondents' inability to pay the proposed penalty.

Conclusion

For the foregoing reasons, Complainant respectfully requests the ALJ deny Respondents' motion to reopen the case and set aside the default order. In the alternative, Complainant respectfully requests that the ALJ find Respondents liable for the violations alleged in the Complaint and subject to the proposed Compliance Order. Complainant further requests that the ALJ limit the issues remaining in any reopened case to Respondents' inability to pay the $48,078 penalty and any necessary revisions of the Compliance Order to reflect Respondents current compliance status.

Respectfully submitted this 9th day of October, 2012.

Deborah E. Hilsman
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region 10

CERTIFICATE OF SERVICE

In the Matter of Joseph Oh and Holly Investment, LLC, No. RCRA-10-2011-0164, I hereby certify that a copy of COMPLAINANT'S RESPONSE OPPOSING RESPONDENT'S MOTION TO REOPEN CASE AND SET ASIDE DEFAULT ORDER was sent to the following persons in the manner specified on the date below:

Original and one true and correct copy of the document, by hand delivery:

Candace H. Smith, Regional Hearing Clerk
U.S. Environmental Protection Agency
Region 10, Suite 900
Office of Regional Counsel
1200 Sixth Avenue, Mail Stop ORC-158
Seattle, Washington 98101

A true and correct copy of the document, by Email and Pouch mail to:

The Honorable M. Lisa Buschmann, Administrative Law Judge
Office of Administrative Law Judges
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1200 Pennsylvania Avenue, N.W., Mail Code 1900L
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DATED: Oct. 9, 2012

Deborah E. Hilsman
Signature
Print Name: Deborah E. Hilsman
Title: Assistant Regional Counsel