UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR
Decision Published At Website - http://www.epa.gov/aljhomep/orders.htm

IN THE MATTER OF	)	
	)	
B & L PLATING, INC.,	)	**DOCKET NO. CAA 5-2000-012**
	)	
RESPONDENT	)	

DEFAULT ORDER AND INITIAL DECISION

Section 113(d) of the Clean Air Act, 42 U.S.C. § 7413(d): Pursuant to Section 22.17(a) of the Rules of Practice, 40 C.F.R. § 22.17(a), Respondent, B & L Plating, Inc., is found to be in default because of its failure to comply with the Administrative Law Judge's Prehearing Order without good cause, and such default by Respondent constitutes an admission of all facts alleged in the Complaint and a waiver of Respondent's right to contest such factual allegations. Respondent violated Section 112 of the Clean Air Act, as amended, 42 U.S.C. § 7412, and the regulations of the National Emission Standards for Hazardous Air Pollutants for Hard and Decorative Chromium Electroplating and Chromium Anodizing Tanks, 40 C.F.R. Part 63, Subpart N. The $42,600 civil administrative penalty proposed in the Complaint and in the Motion for Default is assessed against Respondent.

Issued: April 5, 2002

Barbara A. Gunning
Administrative Law Judge

Appearances:

For Respondent: Kathleen Allender, Esq.
Kathleen Allender, P.C.
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Belleville, MI 48111

For Complainant: Mark Geall, Esq.
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INTRODUCTION

This civil administrative penalty proceeding arises under Section 113(d) of the Clean Air Act, 42 U.S.C. § 7413(d). This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (the "Rules of Practice"), 40 C.F.R. §§ 22.1-22.32 (2000).

The United States Environmental Protection Agency ("Complainant" or the "EPA") initiated this proceeding by filing a Complaint against B & L Plating, Inc., Respondent ("Respondent"). The Complaint charges Respondent with violating Section 112 of the Clean Air Act, as amended, 42 U.S.C. § 7412, and the regulations of the National Emission Standards for Hazardous Air Pollutants ("NESHAPs") for Hard and Decorative Chromium Electroplating and Chromium Anodizing Tanks, 40 C.F.R. Part 63, Subpart N ("Chrome Plating NESHAP"). Complainant seeks the imposition of a civil administrative penalty in the amount of $42,600 against Respondent.

Complainant has filed a Motion for Default. For the reasons discussed below, Complainant's Motion for Default will be granted. Respondent is found to be in default pursuant to Section 22.17(a) of the Rules of Practice, 40 C.F.R. § 22.17(a), and is assessed the proposed penalty of $42,600.

FINDINGS OF FACT

1. The EPA initiated this matter against Respondent by filing a Complaint and Notice of Opportunity for Hearing ("Complaint") pursuant to Section 113(d) of the Clean Air Act, 42 U.S.C. § 7413(d). In the Complaint, the EPA charges that Respondent violated Section 112(b) of the Clean Air Act, 42 U.S.C. § 7412(b), for failing to comply with the regulations codified at 40 C.F.R. Part 63, Subpart N. Specifically, Complainant charges that Respondent, the owner or operator of an affected source that is located at an area source site, violated 40 C.F.R. §§ 63.343(c)(5), 63.342(f)(3)(i), and 63.347(h)(1). The EPA proposes a civil administrative penalty of $42,600 for these alleged violations.

2. The Complaint was filed with the Regional Hearing Clerk on July 26, 2000, and copies were sent to Respondent and

Respondent's counsel by certified mail, return receipt requested.[1/] The Complaint advised Respondent that the Rules of Practice, 40 C.F.R. Part 22, govern this proceeding, and a copy of 40 C.F.R. Part 22 was sent to Respondent along with the Complaint.

3. Prior to the filing of the Complaint in this matter, Complainant sent a pre-filing notice letter to Respondent, dated May 23, 2000, extending Respondent the opportunity to advise the EPA of any financial factors that could bear on Respondent's ability to pay a civil penalty. Complainant also requested that Respondent submit financial statements, including balance sheets and income statements spanning the prior three years, if Respondent believed that there were financial factors which would bear on its ability to pay a civil penalty.

4. Respondent, through counsel, filed an Answer to the Complaint with the Regional Hearing Clerk on March 20, 2001. In its Answer, Respondent requested a hearing and denied that it violated the Clean Air Act in the manner alleged in the Complaint. Although Respondent objected to the proposed penalty, and alluded to potential mitigating factors, Respondent did not indicate an inability to pay the proposed penalty as one such reason to mitigate the proposed penalty. Respondent's specific answer corresponding to Complainant's allegations of economic impact and ability to pay was unresponsive.[2/]

5. On March 22, 2001, the case was forwarded to the Chief Administrative Law Judge who then advised the parties of the availability of participating in the process of Alternative Dispute Resolution ("ADR") to facilitate settlement. Complainant agreed to participate in ADR but Respondent did not respond to the offer which was deemed a declination of its participation in ADR.

6. On April 18, 2001, the undersigned entered a Prehearing Order setting forth a schedule for the parties to submit their

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[1/] Hereinafter, all references to the service of documents on Respondent subsequent to the Complaint refers to service on its attorney of record.

[2/] In the Complaint, Complainant alleges that "[t]he proposed penalty of $42,600.00 reflects a presumption of Respondent's ability to pay the penalty and to continue in business based on the size of its business and the economic impact of the proposed penalty on its business." Complaint at ¶ 43. In its Answer, Respondent responded that "[w]e have no knowledge of the truth of this matter." Answer at ¶ 43.

prehearing exchange information. Complainant was directed to file its prehearing exchange by June 28, 2001, and Respondent was directed to file its prehearing exchange by July 28, 2001.[3/] The parties were advised that failure to comply with the Order could result in the entry of a default judgment against the defaulting party. Respondent was specifically advised to submit a statement explaining why the proposed penalty should be reduced or eliminated. Respondent was also directed to furnish financial statements, tax returns, or other supporting documentation if Respondent intended to take the position that it would be unable to pay the proposed penalty or that the penalty would have an adverse effect on its ability to continue to do business. The April 18, 2001, Prehearing Order was sent to Respondent by certified mail and the signed return receipt is in the case file.

7. On June 27, 2001, Complainant filed its prehearing exchange as directed. Complainant's prehearing exchange was accompanied by several exhibits which included, *inter alia*, the Clean Air Act Stationary Source Civil Penalty Policy and Complainant's "Explanation of Proposed Civil Penalty Calculation", a detailed narrative documenting Complainant's computation of the proposed penalty based upon the statutory penalty factors of Section 113(e)(1) of the Clean Air Act. Complainant's prehearing exchange was sent to Respondent by certified mail and Complainant has submitted a photocopy of the signed return receipt. Respondent has not filed its prehearing exchange.

8. On August 13, 2001, Complainant filed its rebuttal prehearing exchange, noting that Respondent had failed to file its prehearing exchange as directed. Complainant also stated that it would file a motion for accelerated decision within two weeks.

9. Complainant filed a Motion for Default Judgment on October 30, 2001.[4/] A response to the Motion has not been received from Respondent.

[3/] The April 18, 2001, Prehearing Order directed Respondent to file a statement of election to only conduct cross-examination of Complainant's witnesses as its manner of defense if it chose to forgo the presentation of direct and/or rebuttal evidence.

[4/] The Motion for Default Judgment was not received by the Office of Administrative Law Judges until December 11, 2001, due to mail delays on account of anthrax contamination in Washington, D.C.

10. Respondent is B & L Plating, Inc., a “person” within the meaning of Section 302(e) of the Clean Air Act, 42 U.S.C. § 7602(e).

11. Respondent is the “owner or operator” of a decorative chromium electroplating facility located at 21353 Edom, Warren, Michigan (“the B&L facility”).

12. As defined by 40 C.F.R. § 63.341, decorative chromium electroplating means the process by which a thin layer of chromium (typically 0.003 to 2.5 microns) is electrodeposited on a base metal, plastic, or undercoating to provide a bright surface with wear and tarnish resistance.

13. The B&L facility is a major or area source at which chromium electroplating is performed, and is therefore a “facility” within the meaning of 40 C.F.R. § 63.341.

14. The B&L facility, performing decorative chromium electroplating using a chromium electroplating tank, is an “affected source” within the meaning of 40 C.F.R. §§ 63.2 and 63.340.

15. The B&L facility is subject to the Chrome Plating NESHAP codified at 40 C.F.R. Part 63, Subpart N, 40 C.F.R. §§ 63.340-63.347.

16. The B&L facility uses a chromic acid bath and is therefore subject to the standards codified at 40 C.F.R. § 63.342(d). As such, Respondent is subject to the work practice standards codified at 40 C.F.R. § 63.342(f).

17. Pursuant to 40 C.F.R. § 63.343(c)(5), the owner or operator of an affected source shall establish as the site-specific operating parameter the surface tension of the electroplating bath using Method 306B, Appendix A of Part 63, setting the maximum value that corresponds to compliance with the applicable emission limitation.

18. Pursuant to 40 C.F.R. § 63.342(f)(3)(i), the owner or operator of an affected source subject to the work practice standards of 40 C.F.R. § 63.342(f), shall prepare an operation and maintenance plan to be implemented no later than the compliance date of January 25, 1996.

19. Pursuant to 40 C.F.R. § 63.347(h)(1), the owner or operator of an affected source that is located at an area source site shall prepare a summary report to document the ongoing

compliance status of the affected source. Such report must be completed annually, retained on site, and made available to the Administrator upon request.

20. On January 8, 1999, the Michigan Department of Environmental Quality (MDEQ) inspected the B&L facility.

21. During the January 8, 1999 inspection, MDEQ observed that Respondent had failed to establish as the site-specific operating parameter the surface tension of the bath using Method 306B, Appendix A of Part 63, as required by 40 C.F.R. § 63.343(c)(5).

22. During the January 8, 1999 inspection, Respondent was unable to produce an operation and maintenance plan as required by 40 C.F.R. § 63.342(f)(3)(i).

23. During the January 8, 1999 inspection, Respondent was unable to produce an ongoing compliance status report as required by 40 C.F.R. § 63.347(h)(1) for an affected source located at an area source site.

24. Respondent, as well as other persons, may be deterred from future violations of the Clean Air Act and the NESHAPs by the assessment of a penalty in this case.

25. Complainant's proposed civil administrative penalty was determined in accordance with the penalty factors listed in Section 113(e)(1) of the Clean Air Act and upon consideration of the Clean Air Act Stationary Source Civil Penalty Policy, dated October 25, 1991 ("Clean Air Act Penalty Policy"). Complainant considered each statutory penalty factor identified in Section 113(e)(1) of the Clean Air Act, and its proposed penalty is supported by its analysis of those factors.

26. Under the applicable Clean Air Act Penalty Policy, the EPA determined that the preliminary deterrence amount, comprised of the economic benefit and gravity components, was $142,000. The EPA found that Respondent had not received an economic benefit from its noncompliance. The gravity component of $142,000 was based on the length of each violation, which ranged from 31 to 46 months, the seriousness of the violations as measured by the importance of each requirement to the regulatory scheme, and the size of Respondent's business. Noting the litigation risks associated with seeking a penalty that represents a significant percentage of Respondent's net worth for violations that did not result in hazardous releases to the environment and Respondent's cooperation, the EPA reduced the $142,000 preliminary deterrence amount seventy percent, resulting in a proposed penalty of $42,600 to reflect

other factors as justice may require under Section 113(e)(1) of the Clean Air Act.

DISCUSSION

Liability on Default

The issues before me are whether a default order should be entered against Respondent and whether the proposed penalty of $42,600 should be assessed against Respondent. This proceeding arises under the authority of Section 113(d) of the Clean Air Act, 42 U.S.C. § 7413(d). The federal regulations governing such proceedings are found at the Rules of Practice, 40 C.F.R. Part 22. Section 22.17(a) of the Rules of Practice concerning default states, in pertinent part:

> 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 § 22.19(a) or an order of the Presiding Officer [5/]; or upon failure to appear at a conference or hearing. Default by respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations.

40 C.F.R. § 22.17(a).

Section 22.17(c) of the Rules of Practice concerning default orders states, in pertinent part:

> When the Presiding Officer finds that default has occurred, he shall issue a default order against the defaulting party as to any or all parts of the proceeding unless the record shows good cause why a default order should not be issued. If the order resolves all outstanding issues and claims in the proceeding, it shall constitute the initial decision under these Consolidated Rules of Practice. The relief proposed in the complaint or in the motion for default shall be ordered unless the requested relief is clearly

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5/ The term "Presiding Officer" refers to the Administrative Law Judge designated by the Chief Administrative Law Judge to serve as the Presiding Officer. 40 C.F.R. § 22.3(a).

> inconsistent with the record of the proceeding or the Act. For good cause shown, the Presiding Officer may set aside a default order.

40 C.F.R. § 22.17(c).

A party's failure to comply with an order of the Administrative Law Judge may subject the defaulting party to a default order under Section 22.17(a) of the Rules of Practice. Although the Administrative Law Judge is accorded some discretion in making the default determination under Section 22.17 of the Rules of Practice, such discretion is usually reserved for minor violative conduct or when the record shows "good cause" why a default order should not be issued.[6/]

The file in this proceeding reflects that this matter was initiated by the filing of a Complaint against Respondent on July 26, 2000. Respondent's Answer to the Complaint, filed on March 20, 2001, was delinquent by nearly eight months. This, alone, could have constituted grounds for default.[7/] *See* 40 C.F.R. § 22.17(a). However, the EPA did not object to, and was the likely impetus for, Respondent's untimely Answer.

The parties were directed to file their prehearing exchange information by the Administrative Law Judge's Prehearing Order entered on April 18, 2001. The Prehearing Order advised both parties that failure to comply with the Prehearing Order could result in the entry of a default judgment against the defaulting

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[6/] The language of Section 22.17(a) of the Rules of Practice concerning the entry of a default order is discretionary in nature, providing that "a party may be found in default . . . upon failure to comply with an order of the Presiding Officer." The application of the regulation should be made as a general rule in order to effectuate its intent. Thus, when the facts support a finding that there has been a failure to comply with an Administrative Law Judge's order without good cause, a default order generally should follow. Discretion may be exercised in instances of minor nonperformance, and lesser sanctions as appropriate, are available to the Administrative Law Judge for violative conduct that does not reach the level of default. It is also noted that the entry of a default order avoids indefinitely prolonged litigation.

[7/] Information in the case file indicates that in February 2001, Complainant communicated its intent to file a motion for default judgment if Respondent did not submit an Answer to the Complaint. *See* Letter from Geall to Allender of 2/13/01.

party. The EPA timely filed its prehearing exchange but no prehearing exchange information was filed by Respondent. On August 13, 2001, the EPA filed a rebuttal prehearing exchange [8/] in which the EPA informed Respondent of its intent to move for an accelerated decision. Still, Respondent failed to submit its prehearing exchange.[9/] On October 30, 2001, the EPA filed the instant Motion for Default Judgment, requesting that a default order be issued against the Respondent for failing to comply with the Prehearing Order. The Motion for Default Judgment, as with the Complaint and other submissions Complainant filed in this proceeding, was sent to Respondent by certified mail, return receipt requested. Respondent has not filed a response to Complainant's Motion for Default Judgment.

A party's failure to comply with an order of the Administrative Law Judge subjects the defaulting party to a default order under Section 22.17(a) of the Rules of Practice, unless the record shows good cause why a default order should not be issued. Here, Respondent failed to comply with the Prehearing Order. Further, Respondent has not responded to the Motion for Default. A party's failure to respond to a motion within the designated period waives any objection to the granting of the motion under Section 22.16(b) of the Rules of Practice, 40 C.F.R. § 22.16(b). As such, Respondent is found to be in default, and the record does not show good cause why a default order should not be issued.

As cited above, Section 22.17(a) of the Rules of Practice further provides that "[d]efault by respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations." 40 C.F.R. § 22.17(a). This regulatory provision, couched in mandatory language, requires, upon Respondent's default, that I accept as true all facts alleged in the Complaint. Thus, in the instant proceeding, I must accept as true all facts alleged in the instant Complaint. *Id*.

The facts alleged in the instant Complaint establish, by a preponderance of the evidence, Respondent's three violations of 40

[8/] The Prehearing Order directed Complainant to file its rebuttal prehearing exchange on or before August 11, 2001.

[9/] Complainant provided proof that both its prehearing exchange and rebuttal prehearing exchange were received at the law office of Kathleen Allender, P.C., counsel of record for Respondent. *See* Complainant's Motion for Default Judgment Exs. 1-2.

C.F.R. Part 63, Subpart N, as charged in the Complaint. Specifically, the alleged facts, deemed to be admitted, establish that Respondent failed to establish as the site-specific operating parameter the surface tension of the bath using Method 306B, Appendix A of Part 63, failed to prepare an operation and maintenance plan, and failed to prepare an ongoing compliance status report. 40 C.F.R. §§ 63.343(c)(5), 63.342(f)(3)(i), and 63.347(h)(1).

Penalty on Default

The EPA proposes that Respondent be assessed a civil administrative penalty in the amount of $42,600 for its three violations of the Chrome Plating NESHAP. Section 22.24(a) of the Rules of Practice places the burdens of presentation and persuasion on Complainant to prove that "the relief sought is appropriate." 40 C.F.R. § 22.24(a). Each matter of controversy is adjudicated under the preponderance of the evidence standard. 40 C.F.R. § 22.24(b). The Rules of Practice also direct that where a party is found liable in default, as is the case here, "[t]he relief proposed in the complaint or the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act."[10/] 40 C.F.R. § 22.17(c).

As such, Complainant's burden of proof as to the requested relief is less demanding in a default case than in a contested case. *See* 63 Fed. Reg. 9464, 9470 (Feb. 25, 1998)(Proposed Rule). This does not mean, however, that Complainant is released from the requirement to make a *prima facie* case in regard to the appropriateness of the proposed penalty. *See id*. at 9470. In other words, a finding of default as to liability may reduce what the EPA needs to show to support the proposed penalty but such finding does not disturb the EPA's underlying burdens of presentation and persuasion to establish that the relief sought is appropriate.

The appropriateness of the recommended penalty in this proceeding brought under the Clean Air Act must be examined in light of the statutory penalty factors set forth at Section

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[10/] For purposes of discussion in this Default Order and Initial Decision, the phrase "record of the proceeding" refers to the pleadings, as well as other submitted material, including Complainant's prehearing exchange.

113(e)(1) of the Clean Air Act, 42 U.S.C. § 113(e)(1). [11/] Section 113(e) of the Clean Air Act sets forth the factors that the EPA and the Administrative Law Judge must consider in determining the amount of any penalty for violations of Section 112 of the Clean Air Act. Section 113(e)(1) of the Clean Air Act, in pertinent part, provides:

> In determining the amount of any penalty to be assessed under this section . . . , the Administrator or the court, as appropriate, shall take into consideration (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 and 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.

42 U.S.C. § 7413(e)(1).

The Environmental Appeals Board ("EAB") has addressed the EPA's burden of proof with regard to establishing the appropriateness of a proposed penalty under the Toxic Substances Control Act ("TSCA"). *See In re New Waterbury, Ltd. ("New Waterbury"),* TSCA Appeal No. 93-2, 5 E.A.D. 529, 536-43 (EAB, Oct. 20, 1994). Before turning to the EAB's analysis in *New Waterbury*, it is important to note the differences between TSCA and the Clean Air Act statutory penalty factors as well as the procedural posture of the *New Waterbury* litigation as opposed to the instant proceeding.

[11/] Section 113(d) of the Clean Air Act authorizes the imposition of a civil penalty in the amount of up to $25,000 per day for each violation, up to a total of $200,000. The Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996, requires the EPA to periodically adjust penalties to account for inflation. The EPA has issued a Civil Monetary Penalty Inflation Adjustment Rule which declares that the maximum civil penalty for violations of the Clean Air Act that occurred on or after January 31, 1997, and assessed under Section 113(d)(1), is $27,500 per violation and that the total penalty cannot exceed $220,000. *See* 40 C.F.R. Part 19; 61 Fed. Reg. 69360 (Dec. 31, 1996).

Under TSCA, the EPA must consider, among other statutory penalty factors, a Respondent's "ability to pay" the penalty. Whereas, under the Clean Air Act, the EPA must consider the "economic impact of the penalty on the [Respondent's] business." Although the two statutes employ different terminology, "ability to pay" and "economic impact" are treated as interchangeable terms. *See United States v. Dell'Aquilla*, 150 F.3d 329, 338 (3rd Cir. 1998); *United States v. Vista Paint Corp.*, No. EDCV 94-0127 RT, 1996 U.S. Dist. LEXIS 22129, *31 (C.D. Cal. Apr. 16, 1996); *In re Mr. C.E. McClurkin d/b/a J-C Oil Company*, Docket No. VI-UIC-98-0001 (RJO, Feb. 10, 2000). Additionally, unlike the procedural posture of the instant matter, the EAB discussed the EPA's *prima facie* case as to the appropriateness of a proposed civil penalty in the context of a penalty hearing. Whereas, in the instant matter, Respondent has not challenged the appropriateness of the proposed penalty and has defaulted prior to the penalty hearing.

In *New Waterbury*, the EAB noted that the term "burden of proof" encompasses both the burden of production and the burden of persuasion. *See New Waterbury*, *supra*, at 536 n.16; *40 C.F.R. § 22.24(a)* The burden of production, the "duty of going forward with the introduction of evidence," can shift during the course of litigation. *Id*. *(quoting* 4 Stein, et al., *Administrative Law* 24-9 (1994). Thus, once the EPA produces evidence to establish the appropriateness of the proposed penalty, the burden of production shifts to the Respondent to introduce rebuttal evidence. Yet, the burden of persuasion "comes into play only 'if the parties have sustained their burdens of producing evidence and only when all of the evidence has been introduced.'" *New Waterbury*, *supra*, at 536 n.16 (quoting 2 McCormick on Evidence at 426 (Strong, ed. 1992)).

In *New Waterbury* the EAB found that in order for the EPA "to make a prima facie case on the appropriateness of its recommended penalty, the Region must come forward with evidence to show that it, in fact, considered each factor identified in Section 16 [TSCA's statutory penalty factors] and that its recommended penalty is supported by its analysis of those factors." *New Waterbury*, *supra*, at 538. Recognizing that the level of consideration of the penalty factors varies from case to case, the EAB found that at least every factor must be "touched upon" and the penalty must be supported by the analysis. *Id*. In this regard, the EAB noted that "this type of analysis is routinely performed in enforcement cases and is required under the Agency's general penalty policy and the program-specific penalty guidelines." *New Waterbury, supra*, at 538 n.18.

Applying the Board's analysis in *New Waterbury* to the instant matter, I find that the EPA minimally has met its burden of

establishing its *prima facie* case as to the appropriateness of the recommended penalty in the context of this default proceeding. In this regard, I note that the EPA submitted an "Explanation of Proposed Civil Penalty Calculation" as part of its prehearing exchange which memorializes its analysis of the statutory penalty factors. *See* Complainant's Prehearing Exchange Exs. 1, 4. This penalty calculation explanation shows that the EPA touched upon each penalty factor identified in Section 113(e)(1) of the Clean Air Act, including the "economic impact of the penalty on the business," in assessing the penalty.

According to its analysis supporting the proposed penalty, the EPA calculated a preliminary deterrence amount of $142,000 based on the length of each violation, which ranged from 31 to 46 months, the seriousness of the violations as measured by the importance of each requirement to the regulatory scheme,[12/] and the size of Respondent's business.[13/] The EPA found that Respondent had not received an economic benefit from its noncompliance. Noting the litigation risks associated with seeking a penalty that represents a significant percentage of Respondent's net worth for violations that did not result in hazardous releases to the environment and Respondent's cooperation, the EPA reduced the $142,000 preliminary deterrence amount seventy percent, resulting in the recommended penalty of $42,600. See Complainant's Prehearing Exchange Ex. 4 at 3.

I observe that the Explanation of Proposed Civil Penalty Calculation submitted by the EPA suggests that payment of the proposed penalty could have an adverse economic impact on Respondent's business. Specifically, in the EPA's penalty calculation under the section regarding "size of the violator," the

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[12/] Although Complainant's prehearing exchange indicates a possible mistake in the calculation of the proposed penalty to Respondent's advantage, *see* Complainant's Prehearing Exchange Ex. 4 at 2 ("Importance to Regulatory Scheme"), the amount of the penalty will not be increased. Under Section 22.27(b) of the Rules of Practice, 40 C.F.R. § 22.27(b), when a Respondent is found to be in default, the Administrative Law Judge "shall not assess a penalty greater than that proposed by complainant in the complaint, the prehearing information exchange, or the motion for default, whichever is less."

[13/] In determining this component of the proposed penalty, the EPA relied upon a July 28, 1999, Dun & Bradstreet report. The EPA did not submit the Dun & Bradstreet report in its prehearing exchange.

EPA, using a Dun & Bradstreet report, stated that as of July 28, 1999, Respondent's net worth was $7,421. However, the proposed penalty, already reduced by seventy percent, seeks $42,600, an amount that is more than five times greater than Respondent's net worth. Net worth is not determinative of a party's ability to pay,[14/] but it may provide some indication of the potential adverse economic impact of the proposed penalty on Respondent's business. Although Respondent's net worth may be significantly less than the requested relief, this is not dispositive, for the issue "is not whether the respondent can, in fact, pay a penalty, but whether a penalty is *appropriate*." *See New Waterbury*, *supra*, at 539 (emphasis in original).

In this connection, it is emphasized that Complainant has no specific burden of proof as to any individual penalty factor, including ability to pay. Rather, its burden of proof "goes to the appropriateness of the penalty taking *all* factors into account." Id. at 538 (emphasis in original). Also, "inability to pay" is not an affirmative defense, which if proven, defeats the assessment of a penalty.[15/] *See New Waterbury, supra,* at 540. Rather, as is the case here, the economic impact of the proposed penalty on the Respondent's business is one of several statutory penalty factors that Complainant must take into consideration in establishing the appropriateness of the proposed penalty. *Id*. Thus, inability to pay more appropriately serves as a "potential mitigating consideration in assessing a penalty." *Id*. at 541.

Inasmuch as the EPA touched upon each statutory penalty factor and its analysis of those factors supports the proposed penalty and in light of Respondent's default without filing its prehearing exchange, I find that the EPA minimally has met its burden of proof in establishing its *prima facie* case as to the appropriateness of

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[14/] *See LVI, Environmental Services, Inc.*, Docket No. CAA-09-97-10 (ALJ, June 28, 2000), aff'd, CAA Appeal No. 99-4, 10 E.A.D.___(EAB, July 26, 2001)(assessing a $9,160 civil administrative penalty against Respondent despite evidence that Respondent had a negative net worth). *See also New Waterbury*, *supra*, at 546-50, in which the EAB, applying the EPA's ability to pay guideline, assessed a $24,000 penalty against Respondent even though Respondent had a negative net worth.

[15/] At the time a complaint is filed, a "respondent's ability to pay may be presumed until it is put at issue by a respondent." *New Waterbury, supra,* at 541. The mere allegation of an inability to pay in an Answer is not sufficient to put ability to pay in issue. *See New Waterbury*, *supra*, at 542.

the proposed penalty. However, had this proceeding progressed to the penalty hearing, the EPA, as part of its *prima facie* case, would need to present "some evidence regarding the respondent's *general* financial status from which it can be *inferred* that the respondent's ability to pay should not affect the penalty amount." *Id*. at 541, *citing Helena Chemical Co.,* FIFRA Appeal No. 87-3 (CJO, Nov. 16, 1989) (emphasis in original).

Complainant's *prima facie* case with respect to the appropriateness of the proposed penalty has not been rebutted by Respondent. In particular, Respondent has offered no proof, objection, or allegation concerning any adverse economic impact of the penalty on its business nor has Respondent argued that the penalty should be mitigated based on inability to pay. During the course of this proceeding, Respondent has been repeatedly advised that its inability to pay a civil penalty could serve as a reason to mitigate the penalty. Before the Complaint was issued, the EPA extended Respondent the opportunity to advise the EPA of any financial factors that could bear on Respondent's ability to pay a civil penalty. *See* Complainant's Prehearing Exchange Ex. 3 ("Pre-filing Notice Letter" from Czerniak to Respondent of May 23, 2000). Again, in the Complaint, the EPA indicated that the proposed penalty could be "adjusted" if Respondent demonstrated an inability to pay. *See* Complaint ¶¶ 43-44. Moreover, my Prehearing Order directed Respondent to submit a statement explaining why the proposed penalty should be reduced or eliminated, with specific recognition that Respondent could take the position of either an inability to pay the proposed penalty or an adverse effect on its ability to continue to do business. *See* Prehearing Order at 3 ¶ 3. This outreach notwithstanding, Respondent failed to raise either its inability to pay the proposed penalty or the potential adverse economic impact of the penalty on its business.

Finally, I note that the Rules of Practice require a Respondent to indicate whether it will raise the issue of ability to pay, and if so, to submit evidence to support its claim as part of the prehearing exchange. *See* 40 C.F.R. §§ 22.15(a)-(b), 22.19(a)(3)-(4). "[W]here a respondent does not raise its ability to pay as an issue in its answer, or fails to produce any evidence to support an ability to pay claim after being apprised of that obligation during the pre-hearing process, the [EPA] may properly argue and the [Administrative Law Judge] may properly conclude that any objection to the penalty based upon ability to pay has been waived." *New Waterbury*, *supra*, at 542. Moreover, pursuant to Section 22.16(b) of the Rules of Practice, by virtue of Respondent's failure to respond to this Motion for Default Judgment, Respondent is deemed to have waived any objection to the granting of the requested relief. 40 C.F.R. § 22.16(b).

In conclusion, I find that the EPA has minimally presented a *prima facie* case with respect to the appropriateness of the proposed penalty within the context of this default proceeding and that Respondent has not rebutted the EPA's *prima facie* case. Further, the proposed penalty is not clearly inconsistent with the record of proceeding or the Clean Air Act. 42 U.S.C. § 7413(e)(1); 40 C.F.R. §§ 22.17(c), 22.24(a). Accordingly, the proposed civil administrative penalty of $42,600 is assessed against Respondent.

CONCLUSIONS OF LAW

1. Respondent is found to be in default because it failed to comply with the Administrative Law Judge's April 18, 2001, Prehearing Order and the record does not show good cause why a default order should not be issued. 40 C.F.R. § 22.17(a).

2. The default by Respondent constitutes, for purposes of the above-cited matter only, an admission of all facts alleged in the Complaint and a waiver of its right to contest such factual allegations. 40 C.F.R. § 22.17(a).

3. Respondent's failure to establish as the site-specific operating parameter the surface tension of the bath using Method 306B, Appendix A of part 63, prepare an operation and maintenance plan, and prepare an ongoing compliance status report, constitute three violations of Section 112 of the Clean Air Act and the Chrome Plating NESHAP, thereby subjecting Respondent to the assessment of a civil penalty pursuant to Section 113(d) of the Clean Air Act. 42 U.S.C. § 7412; 40 C.F.R. Part 63, Subpart N, §§ 63.343(c)(5), 63.342(f)(3)(i), 63.347(h)(1).

4. The EPA has made a *prima facie* showing that the proposed civil administrative penalty of $42,600 is appropriate and Respondent has not rebutted this *prima facie* showing. The proposed penalty is not clearly inconsistent with the record of proceeding or the Clean Air Act. 42 U.S.C. § 7413(e)(1); 40 C.F.R. §§ 22.17(c), 22.24(a).

ORDER

1. Respondent is found to be in default and, accordingly, is found to have violated Section 112 of the Clean Air Act and the Chrome Plating NESHAP as charged in the Complaint.

2. Respondent, B&L Plating, Inc., is assessed a civil administrative penalty of $42,600.

3. Payment of the full amount of this civil penalty shall be made within thirty (30) days of the service date of the final order by submitting a cashier's check or certified check in the amount of $42,600, payable to the "Treasurer, United States of America," and mailed to:

The First National Bank of Chicago
EPA Region 5
(Regional Hearing Clerk)
P.O. Box 70753
Chicago, IL 60673

4. A transmittal letter identifying the subject case and EPA docket number (CAA-5-2000-012), as well as Respondent's name and address, must accompany the check.

5. If Respondent fails to pay the penalty within the prescribed statutory period after the entry of the Order, interest on the civil penalty may be assessed. 31 U.S.C. § 3717; 40 C.F.R. § 13.11.

This Default Order constitutes an Initial Decision as provided in Section 22.17(c) of the Rules of Practice, 40 C.F.R. § 22.17(c). Pursuant to Sections 22.27(c) and 22.30 of the Rules of Practice, 40 C.F.R. §§ 22.27(c) and 22.30, this Initial Decision shall become the Final Order of the Agency, unless an appeal is filed with the Environmental Appeals Board within thirty (30) days after the service of this Order, or the Environmental Appeals Board elects, *sua sponte*, to review this decision.

_____
Barbara A. Gunning
Administrative Law Judge

Dated: April 5, 2002
Washington, DC

In the Matter of B & L Plating,Inc.. Respondent
Docket No. CAA-5-2000-012

CERTIFICATE OF SERVICE

I certify that the foregoing **Default Order and Initial Decision**, dated April 5, 2002 was sent this day in the following manner to the addressees listed below.

_____
Maria Whiting-Beale
Legal Staff Assistant

Dated: April 5, 2002

Original and one Copy by Pouch Mail to:

Sonja Brooks-Woodard
Regional Hearing Clerk
U.S. EPA
77 West Jackson Boulevard, E-19J
Chicago, IL 60604-3590

Copy by Pouch Mail to:

Mark Geall, Esquire
Assistant Regional Counsel
U.S. EPA
77 West Jackson Boulevard, C-14J
Chicago, IL 60604-3590

Copy by Certified Mail Return Receipt to:

Kathleen Allender, Esquire
Kathleen Allender, P.C.
207 South Street
Belleville, MI 48111