UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
Joseph Oh	)	
	)	
and	)	**Docket No. RCRA-10-2011-0164**
	)	
Holly Investment, LLC,	)	
	)	**Dated: November 13, 2012**
Respondents.	)	

ORDER ON RESPONDENTS' MOTION TO REOPEN CASE AND SET ASIDE DEFAULT ORDER OF AUGUST 3, 2012

Respondents Joseph Oh and Holly Investment, LLC (collectively "Respondents") move to set aside the Default Order and Initial Decision issued on August 3, 2012. As discussed below, Respondents have failed to show that there is good cause to set aside the entry of default, and their motion is therefore denied.

I. Background

This proceeding arises under Section 9003 of the Solid Waste Disposal Act as amended by the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6991b, and the release detection, prevention, and correction regulations codified at 40 C.F.R. Part 280, and is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Rules of Practice" or "Rules"), 40 C.F.R. §§ 22.1 through 22.32.

The Director of the Office of Compliance and Enforcement for the United States Environmental Protection Agency Region 10, (variously "Complainant," the "Region," or "EPA") initiated this proceeding on September 28, 2011, by filing a Complaint, Compliance Order, and Notice of Opportunity for Hearing ("Complaint") against Respondents. The Complaint alleges that Respondents own and/or operate a facility, Totem Grocery & Gas, at which underground storage tanks ("USTs") containing petroleum are installed. The Complaint charges Respondents in five counts with violations of RCRA Section 9003, 42 U.S.C. § 6991b and the implementing regulations, for failure to have valid automatic tank gauge ("ATG") leak tests conducted on two steel USTs containing petroleum, failure to have annual automatic line leak detector ("ALLD") and line tightness testing on two underground fuel lines connected the

USTs, failure to install corrosion protection on metal flex connectors connected to the UST systems, and failure to test the corrosion protection installed on other portions of the UST systems. The Complaint proposed a total penalty of $48,079. Respondents were served with the Complaint on October 3, 2011.

Respondent Joseph Oh, appearing pro se individually and on behalf of Respondent Holly Investment, LLC, filed an Answer to the Complaint, denying the allegations for lack of knowledge and requesting a hearing. On December 7, 2011, a Prehearing Order was issued directing the parties to file prehearing exchanges of information. Complainant timely filed its Prehearing Exchange, but Respondents filed their Prehearing Exchange on March 1, 2012, twelve days after it was due to be filed. Respondents' Prehearing Exchange failed to comply with several requirements of the Prehearing Order. The undersigned issued an order scheduling a hearing and directing Mr. Oh to file a statement as to where he wished the hearing to be held, but he did not file any response to the order. Thereafter, the hearing in this matter was scheduled, and later rescheduled to begin on August 14, 2012 in Seattle, Washington.

On July 3, 2012, Complainant filed a motion to compel discovery, requesting an order compelling Respondents to file written responses to the Prehearing Order's requirements. Respondents did not file any response to the motion, and by order dated July 16, 2012, the motion was granted. Despite a warning in the order that failure to submit the requested information may result in sanctions, Respondents did not submit any information in response to the order.

Approximately one month prior to the date the hearing was scheduled to commence, the undersigned's staff attorney invited the parties by email to participate in an informal prehearing teleconference to review the procedures for the hearing. Mr. Oh did not respond to the emails. In various filings, Complainant's counsel reported ongoing difficulty in contacting Mr. Oh. On July 24, 2012, the undersigned issued a Notice of Hearing Location and Order Scheduling Prehearing Conference, ordering the parties to appear telephonically for a prehearing conference on August 2, 2012. The Order included a clear warning that under the Rules, failure to appear at a conference may result in a decision by default, and directing each of the parties to notify the undersigned immediately if it cannot attend the conference. On August 2, 2012, Respondents failed to appear for the prehearing conference telephonically as ordered, despite the undersigned's staff attorney's voicemail messages for Mr. Oh and several attempts to contact him by telephone.

Subsequently, Complainant filed a motion for default order, requesting that Respondents be held liable for the violations alleged in the Complaint and that the penalty and compliance order proposed in the Complaint be imposed on Respondents, or in the alternative, that an adverse inference be drawn from their failure to provide information.

On August 3, 2012, the undersigned issued a Default Order and Initial Decision. *Joseph Oh & Holly Investment, LLC*, EPA Docket No. RCRA-10-2011-0164 (ALJ, Aug. 3, 2012) (hereinafter "Default Order"). Respondents were found to be in default on the basis that after receiving "clear and abundant warnings of the consequences" for failure to comply with the Tribunal's orders, Respondents failed to comply with the order on Complainant's motion to compel discovery dated July 16, 2012 ("Discovery Order"), "failed to fully or timely comply with the Prehearing Order issued on December 7, 2011, . . . failed to appear at the prehearing conference" scheduled by the Order dated July 24, 2012, and otherwise "demonstrated a pattern of delay and disengagement in this proceeding." *Id.* at 6–8.

On September 17, 2012, Respondents filed a Motion to Reopen Case and Set Aside Default Order of August 3, 2012 ("Motion"), with the following attachments: (1) an unwitnessed "Affidavit of Joseph Oh in Support of Motion to Set Aside Default Order of August 3, 2012" dated August 15, 2012 ("Oh Declaration" or "Oh Decl."); (2) an unwitnessed "Affidavit of Gregory S. Tift in Support of Motion to Set Aside Default Order of August 3, 2012" dated August 15, 2012 ("Tift Declaration" or "Tift Decl."); (3) a letter from Complainant's counsel to Dallas W. Jolley dated July 12, 2012 ("Exhibit A"); and (4) work orders, an invoice and emails from Northwest Tank & Environmental Services ("Exhibit B"). Respondents do not contest liability in the Motion, but state they are "asking for the case to be reopened for the purpose of presented relief from penalty only." Motion at 4. On October 9, 2012, the Region filed Complainant's Response Opposing Respondents' Motion to Reopen Case and Set Aside Default Order ("Response"). The Response included the following attachments: (1) a Declaration of Katherine M. Griffith ("Griffith Declaration" or "Griffith Decl."); (2) a Notice of Intent to File Administrative Complaint and Compliance Order from Complainant to Mr. Oh dated April 8, 2011, and a document entitled "Description of Violations and Summary of Proposed Penalty" ("Attach. 2").

II. Legal Standards

"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; or upon failure to appear at a conference or hearing." 40 C.F.R. § 22.17(a). When a default occurs, the Presiding Officer "shall issue a default order against the defaulting party . . . unless the record shows good cause why a default order should not be issued." 40 C.F.R. § 22.17(c). Following entry of default, the Presiding Officer may set the default aside upon a showing of good cause. 40 C.F.R. § 22.17(c); *see* 40 C.F.R. § 22.27(c)(3). "Thus, the issue of 'good cause' informs both the inquiry whether a default order should be entered in the first place and, whether once entered, a default order should be set aside." *JHNY, Inc.*, 12 E.A.D. 372, 384 (EAB 2005).

The Environmental Appeals Board has developed a significant body of case law

regarding default in administrative environmental enforcement cases. The Board considers the "totality of the circumstances" when evaluating the merits of a request to set aside a default order. *Rybond, Inc.*, 6 E.A.D. 614, 624 (EAB 1996); *JHNY, Inc.*, 12 E.A.D. at 384. While the Board endorses the general principle of law disfavoring resolution of cases based on default, it observes that "when fairness and balance of the equities so dictate, a default order will be set aside." *Thermal Reduction Co., Inc.,* 4 E.A.D. 315, 319 (EAB 1999). "First and foremost," the Board has examined "the alleged procedural omission that prompted the default order, considering such issues as whether a procedural requirement was indeed violated, whether a particular 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, Inc.*, 12 E.A.D. at 384. The Board has determined that "the neglect of a party or a party's attorney does not excuse an untimely filing, nor does lack of willfulness, by itself, affect the determination." *Ag-Air Flying Services, Inc.,* FIFRA Appeal No. 06-01, 2006 EPA App. LEXIS 40 *16 (EAB, September 1, 2006)(quoting *Pyramid Chem. Co.*, 11 E.A.D. 657, 667 (EAB 2004).

In reviewing particular procedural violations and whether they are proper grounds for a default order, the Board has declined to set aside a default order where a pro se respondent's prehearing exchange was untimely, did not include an explanation of why the penalty should be reduced or eliminated and did not include copies of exhibits intended to be introduced into evidence, and thus failed to include all of the information and documents required to be included in the prehearing exchange. *JHNY, Inc.,* 12 E.A.D. at 379, 388-389. The Board also has declined to set aside a default order where a respondent submitted an untimely and incomplete prehearing exchange and an untimely and incomplete response to an order granting a request for additional discovery. *Ag-Air Flying Services, Inc.,* 2006 EPA App. LEXIS 40 *12. As explained by the Board:

> [B]ecause federal administrative litigation developed as a truncated alternative to Article III courts that intends expedition . . ., the prehearing exchange plays a pivotal function – ensuring identification and exchange of all evidence to be used at hearing and other related information . . . . By compelling parties to provide this information in one central submission, the prehearing exchange clarifies the issues to be addressed at hearing and allows the parties and the court an opportunity for informed preparation for hearing. Given the key role of the prehearing exchange to administrative practice, it is not surprising that the regulations recognize that failure to comply with an ALJ's order requiring exchange is one of the primary justifications for entry of default.

JHNY, Inc., 12 E.A.D. at 382. The Board has explained further:

> The efficient and timely exchange of information pursuant to 40 C.F.R. § 22.19 is central to achieving timely administrative case resolutions. Further, the efficiency of administrative adjudications depends upon the ability of the ALJ to exercise her discretion in order to conduct proceedings in a fair manner that assures that facts

are elicited and issues adjudicated without delay, as prescribed by 40 C.F.R. § 22.4(c).

Ag-Air Flying Services, Inc., 2006 EPA App. LEXIS 40 *12-13.

Another factor the Board has considered is "whether the defaulting party would likely succeed on the substantive merits if a hearing were held." *JHNY, Inc.*, 12 E.A.D. at 384 (citing *Jiffy Builders, Inc.*, 8 E.A.D. 315, 319 (EAB 1999); *Rybond*, 6 E.A.D. at 625; *Midwest Bank & Trust Co., Inc.*, 3 E.A.D. 696, 699 (CJO 1991). The burden is on the respondent "to demonstrate that there is more than the mere possibility of a defense, but rather a 'strong probability' that litigating the defense will produce a favorable outcome." *Pyramid Chem. Co.*, 11 E.A.D. at 662. The Board has considered as part of this inquiry an examination of "whether the penalty assessed in the default order is a reasonable one." *JHNY*, *Inc.*, 12 E.A.D. at 384.

III. Arguments of the Parties

A. Motion

Respondents state in their Motion that "[i]t appears from the record [that] Respondents are in default for good cause." Motion at 2. Respondents concede that the Default Order and Initial Decision contain "an accurate recital of the facts which demonstrate neglect and inadvertence by Respondent[s] . . . ." *Id.* They argue, however, that the entry of default should be set aside because their conduct in this proceeding should be viewed as "excusable neglect" within the meaning of Federal Rule of Civil Procedure 60(b). *Id.* at 1. Respondents make several new factual allegations in support of their position.

Respondents state that Mr. Oh "is a Korean immigrant who speaks limited English," and that while his associate Gregory Tift "can understand what Mr. Oh is saying it typically requires a translator to interpret what Tift or others are trying to communicate." *Id.* at 2. Respondents claim "[t]his is typically not a problem when significant lead time is granted but it creates difficulties when a response is needed on any shortened time scenario." *Id.* In a written declaration attached to the Motion, Mr. Oh states that throughout this proceeding he was "unable to effectively have information translated to [him] as [his] daughter was away at law school" in New York. Oh Decl. ¶ 5. Respondents also claim that it "appears from the record that Mr. Joseph Oh and Holly Investment, LLC were completely disconnected from the hearing deadlines and phone conferences," and that the "majority of the communication was transmitted through Mr. Tift and later through the chapter 11 bankruptcy attorney but almost never directly with . . . Joseph Oh." *Id.* In a footnote Respondents further state: "The EPA did transmit by electronic means all requests and timelines as well as by mail it appears from the record [sic]." *Id.* at 2 n.1. Mr. Tift is identified in the Motion as Mr. Oh's "hotel partner[] on the Rainer Inn." *Id.* at 3 n.2. In an unwitnessed written declaration attached to the Motion, Mr. Tift states that Mr. Oh asked him "to assist with the EPA Complaint upon receipt in September of 2011." Tift Decl.

¶ 1.

Attached to the Motion is a letter dated July 12, 2012 from Complainant's counsel to Dallas Jolley, Respondents' bankruptcy attorney (the "Letter" or "Jolley Letter"), in which Complainant's counsel recounts a conversation she had with Mr. Jolley on June 19, 2012. Motion, Exhibit A. In that conversation Complainant's counsel informed Mr. Jolley of the Complaint pending against Respondents, and Mr. Jolley asked what needed to be done to bring the USTs at the Totem Grocery & Deli into compliance. *Id.* Complainant's counsel then summarized the corrective actions that the Region believed were necessary. *Id.* at 1–4. In closing, Complainant's counsel wrote:

> Please contact me . . . if you have any questions concerning this letter or if you decide to represent Mr. Oh and Holly Investment, LLC in the EPA administrative enforcement action. It is not too late to attempt to negotiate a settlement of the EPA case prior to the administrative hearing, but the window of opportunity to do so is quickly closing. Meanwhile, the parties must continue to prepare for the hearing . . . in accordance with the Administrative Law Judge's orders.[1]

Id. at 4. The Letter's signature line indicates that copies of the Letter were sent via e-mail to Mr. Oh and to Mr. Tift. *Id.*

Respondents claim that Mr. Oh "did not operate the Grocery and Deli that covered the two underground storage tanks" between November 13, 2009 and May 14, 2012, but instead entrusted operations to a management team consisting of Helen Ho and Chan Ho. Motion at 2. Respondents claim that this management team "kept the EPA warning and notices originally hidden from" Mr. Oh, and that "[u]pon receipt of the EPA Complaint Mr. Oh directed Helen Ho to work with Mr. Tift to attempt to satisfy the requirements of the EPA Complaint." *Id.* at 2–3. Respondents state that the management team "reassured Mr. Oh and Mr. Tift that corrections were to be made" and that Northwest Tank and Environmental Services, Inc. ("Northwest Tank") was hired to correct the violations. *Id.* at 3. Respondents claim that "evidence of those corrected violations was never presented to the EPA because the Grocery and Deli and Mr. Oh could never tender payment" to Northwest Tank and Environmental Services. *Id.*

In support, Respondents present correspondence between Northwest Tank and Respondents, which contains a Notice of Work Order/Contract dated October 3, 2011, for services to be performed at Marine Drive Gas Station. Motion, Exhibit B at 1–3. The Notice of Work Order/Contract is signed by Mr. Tift as an "Authorized Representative" with the title of "Member." *Id.* at 3. Respondents also present an Invoice dated October 18, 2011, for services performed on October 7, 2011 described as "Cathodic Protection Testing - Galvanic 1 - 4 tanks,"

[1] Mr. Jolley did not file a notice of appearance in this matter.

"5 LB Magnesium Anode w/ lead 10' #12," "Engineering Fee," and "Labor - time on site to make repairs and retest." *Id.* at 4. In addition, Respondents present an e-mail exchange between Mr. Tift and representatives of Northwest Tank that took place between November 4, 2011, and February 27, 2012. *Id.* at 5–8. In the e-mail exchange the Marine Drive Gas Station is identified as Totem Grocery. *Id.* at 7. Also in the exchange, a representative from Northwest Tank informs Mr. Tift that reports "identifying the lines that had a line tightness test," "the line that had the automatic line leak detector test," "where the additional anodes were placed and the date they were installed," the dates of the line tests, and the final results all tests would not be released until the Invoice was paid in full. *Id.* at 5–8. In his declaration, Mr. Tift avers that he "was never able to have the management team pay the invoice to" Northwest Tank. Tift Decl. ¶ 6.

Respondents further claim in their Motion that Mr. Oh "was forced to file personal bankruptcy chapter 11" on March 21, 2012. Motion at 3. Respondents state that "[a]ny assistance Mr. Tift could provide immediately was delegated to legal counsel Dallas Jolley as he was the approved chapter 11 counsel," and that Respondents became "inundated with court appearances . . . ." *Id.* at 4. Respondents state that on May 13, 2012, Mr. Oh terminated Helen Ho and Chan Ho, and that this action revealed "the Grocery and Deli had additional hidden debt that included NSF checks and numerous nonpayment to suppliers and distributors of goods." *Id.* Respondents claim they were "of the belief that the bankruptcy filing afforded [them] more time to respond to the EPA Complaint and focus on the stores financial problems [sic]." *Id.* Respondents further claim that the "number of new issues raised by the bankruptcy, [and] the delays in communications due to interpretations caused the Respondent[s] to be unavailable to file coherent pleadings responsive to the hearings and deadlines set by the EPA." *Id.* In his written declaration, Mr. Oh states that he "was actively monitoring [his] bankruptcy along with numerous court appearances," and he "was unable to respond to the default motion before the EPA." Oh Decl. ¶ 4.

Respondents argue that "[d]efault judgments are not favored in law" and note that Federal Rule of Civil Procedure 60(b)(1) allows a court to "set aside any order or final judgment obtained as a result of mistake, inadvertence, or excusable neglect." *Id.* at 5. Respondents cite the United States Supreme Court case of *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993), an appeal from a bankruptcy proceeding addressing the meaning of "excusable neglect" as used in Federal Rule of Bankruptcy Procedure 9006(b)(1), for the proposition that "[e]xcusable neglect is an equitable determination" requiring "the court to take into account all of the relevant circumstances, including the reason for delay, the length of the delay and its potential impact on the proceedings, the danger of prejudice to the nonmoving party, and whether the moving party acted in good faith." Motion at 5–6; *see Pioneer Investment Servs. Co.*, 507 U.S. at 387–95. Respondents further argue that when "ruling on a motion to set aside a judgment, the court considers four facts" including "whether there is evidence to support a defense," "failure to respond was occasioned by mistake, inadvertence, surprise or excusable neglect," "the moving party acted with due diligence after notice of the default judgment," and whether "hardship will result to the opposing party." Motion at 5.

Respondents contend that in this case "the factors weigh in favor of an order to reopen the hearing and set aside default [sic] for the purpose of setting aside the penalty of $48,078.00." *Id.* Respondents argue that "there is evidence to support a defense" because "Mr. Oh is in bankruptcy so clearly there is evidence that Respondents insolvency should be considered to reduce or eliminate the penalty." *Id.* at 6. Respondents argue that the factual allegations in the Motion show that their "failure to respond was occasioned by mistake, inadvertence, surprise, or excusable neglect," and that they "acted with due diligence after" the entry of default by filing the present Motion. *Id.* Respondents also contend that an order setting aside the default solely for the purpose of determining the amount of penalty would not compromise "the EPA mission statement and the Default Order," and therefore would not prejudice either party. *Id.* at 6–7. Finally, Respondents claim that they are "actively executing the compliance order" contained in the Default Order. *Id.* at 7.

B. Response

Complainant opposes Respondents' Motion on the ground that "Respondents have failed to show good cause for setting aside the default order and reopening the case." Response at 1–2. Complainant notes that the Federal Rules of Civil Procedure cited by Respondents are not directly applicable to this administrative proceeding. *Id.* at 5. Complainant argues that to the extent the Supreme Court decision in *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership* provides persuasive legal authority, the facts of that case are distinguishable from the facts of this matter. *Id.* Complainant argues that *Pioneer Investment Services Co.* involved a "one time failure to timely file a proof of claim" in a bankruptcy proceeding, while this matter centers on Respondents' "repeated failures to comply with the ALJ's orders even after warnings that such failures may result in a default order . . . ." *Id.*; *see Pioneer Investment Servs. Co.*, 507 U.S. at 384 (respondents filed proof of claims in bankruptcy proceeding twenty days after deadline).

Complainant states that "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." *Id.* at 6. Complainant argues that each of these orders was "issued in plenty of time to provide Respondents with the opportunity to seek help if Respondents needed them to be translated . . . ." *Id.* Complainant further argues that Respondents have not acted "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," and that "they have presented no evidence to support their claim of excusable neglect" apart from "summary statements." *Id.* Complainant contends that Respondents' "pro se status should not excuse [their] failure to comply with the ALJ's orders." *Id.* at 7.

Addressing the statements made by Mr. Oh in his written declaration, Complainant argues that several of those statements "are not consistent with the facts of this case." *Id.* at 6. While Mr. Oh states that he "was unaware of the various failed testing until it was reported to

[him] by way of the EPA Complaint," and that "[t]he management team consisting of Helen Ho and Chan Ho who were in direct control of the Totem Grocery and Deli physically did not advise [Mr. Oh] of any failed readings or warnings concerning the EPA requirements for underground storage" (Oh Decl. ¶¶ 1–2), Complainant claims that the Region "sent letters and talked to Mr. Oh about the violations observed at the facility as early as November 2009," and that "the violations were first documented during the September 14, 2009 inspection when Mr. Oh's employee, John Kim, was managing the facility." Response at 6–7. Complainant supports its claim with citations to the Declaration of Katherine Griffith, Complainant's Prehearing Exchange Exhibits ("CX") 13 through 16 , and a letter identified as Attachment 2 to the Response. *Id.*

Complainant's Exhibit 13 is an e-mail exchange with the subject heading "Totem Gas EPA UST Field notice of Non-compliance 1727," between Carlo Bertani, an Environmental Scientist with EPA Region 10, and John Kim, an individual using the e-mail address "totemgas@hotmail.com." CX 13 at 1. Mr. Bertani is identified as one of two EPA Inspectors in the UST Field Notice of Non-compliance No. 1727 issued to Totem Grocery and Gas on September 14, 2009. CX 10 at 1. Mr. Kim, in an e-mail dated September 23, 2009, requests from Mr. Bertani an extension of time in which to remediate certain violations and pay a $750 fine. *Id.* In a response e-mail dated September 30, 2009, Mr. Bertani extends the applicable compliance deadline to November 14, 2009. *Id.* Complainant's Exhibit 14 is a handwritten document titled "Totem Phone Log" ("Phone Log") that was purportedly prepared by Mr. Bertani. CX 14 at 1; Griffith Decl. ¶ 6.

The Phone Log notes the September 30, 2009 e-mail correspondence between Mr. Bertani and Mr. Kim, identifying Mr. Kim as an employee of Totem Gas and Grocery. CX 14 at 1. The Phone Log then documents that on October 23, 2009, a phone call was placed to Totem Gas and Grocery, and that during that phone call John Kim "said the owner 'Joseph Oh' would need more time to" complete the remedial actions at the facility. *Id.* On November 15, 2009, Mr. Kim indicated in an e-mail that he had been fired, and on November 19, 2009, a phone message was left for Mr. Oh at a number purported to be connected to his cellular phone. *Id.* The Phone Log shows that on November 20, 2009, Mr. Bertani placed a phone call to Totem Gas and Grocery and spoke with Helen Ho, that on December 18, 2009, Mr. Bertani "called [and] left a message with Joseph Oh about paying the $750 fine," and that additional phone calls were placed to Mr. Oh on January 14, 2010, and March 11, 2010. *Id.* at 1–2. The Phone Log indicates that messages were left on both occasions. *Id.* The Phone Log further indicates that on March 11, 2010, Mr. Bertani received Mr. Oh's address from Helen Ho, and that on March 23, 2010, a letter was sent to Mr. Oh by certified mail. *Id.* at 2; *see* CX 16 at 1. The letter purportedly "stated that if" Mr. Oh did not "pay the fine [within] two weeks - additional enforcement actions could be assessed." CX 14 at 2. Also on March 23, 2010, Mr. Bertani purportedly spoke with Mr. Oh, who stated "that he did not have a copy of the field citation so he didn't know what/how to pay the fine." *Id.* The Phone Log indicates that Mr. Bertani told Mr. Oh that "a letter [was] coming with the enclosed information [and] a copy of the field citation." *Id.* The last entry on the Phone Log is dated April 14, 2010, and it indicates that no payment had been received from Mr. Oh. *Id.*

Complainant's Exhibit 16 is a copy of a letter dated March 23, 2010, from Mr. Bertani to Mr. Oh. CX 16 at 1. The letter bears the heading "Re: Totem Gas and Grocery Underground Storage Tank (UST) Inspection." *Id.* In the letter, Mr. Bertani wrote that "[o]n September 14, 2009, the United States Environmental Protection Agency (EPA) conducted an UST inspection of the above reference facility [sic] and documented several violations . . . ." *Id.* Mr. Bertani also wrote: "I just spoke with you over the phone, and you said that you would pay the fines as soon as I gave you the information / paperwork to do so. Please pay the fine within the next 14 days, or this case will be elevated to a formal enforcement case with penalties that can exceed $16,500 per tank, per day." *Id.*

Ms. Griffith asserts that she was present at an inspection of Totem Gas and Grocery on July 1, 2010, and that on October 4, 2010, she "mailed a certified letter to Mr. Oh's home address at 4905 70th Avenue West . . . " listing "the existing violations and the steps required to bring the facility into compliance with the UST regulations." Griffith Decl. ¶¶ 7–8. Ms. Griffith states that "[o]n October 14, 2010, [she] called Mr. Oh and spoke with him about the violations and informed him that [she] had sent him a certified letter waiting for his signature at the post office." *Id.* at ¶ 9. Ms. Griffith claims: "Mr. Oh stated that he would pick up the letter that day and call me if he had any questions," but the "letter was subsequently returned to EPA by the postal service as unclaimed." *Id.* Ms. Griffith states that "[o]n April 8, 2011, EPA mailed a certified letter to Mr. Oh at his home address" containing "a list of the violations observed during both the September 14, 2009 and July 1, 2010 inspections, a proposed penalty, and an offer to negotiate a settlement of the case prior to filing a complaint." *Id.* at ¶ 10. A copy of the letter was also sent by regular first class mail to Arnie Kim, the registered agent for Holly Investment LLC at the same address." *Id.*

Ms. Griffith further states that "[o]n April 21, 2011, [she] called Mr. Oh to inform him that the April 8th certified letter was waiting for his signature at the post office," and that "Mr. Oh responded that he did not know of the inspections and that he was not aware that his facility was out of compliance." *Id.* ¶ 11. Ms. Griffith claims that Mr. Oh requested that she "send the letter to him by email" and that she "contact Helen Ho." *Id.* Ms. Griffith states that she "emailed the April 8, 2011 letter to Mr. Oh on April 21st at josephoh405@gmail.com," that the certified letter to Mr. Oh was returned as unclaimed, and that the "copy of the August 8th letter sent to Arnie Kim by regular first class mail was not returned." *Id.*

Ms. Griffith recounts that on June 24, 2011, she "participated in a conference call with Greg Tift, Hyung Kim, environmental consultant, and the EPA attorney," but that "[f]or whatever reason, Mr. Oh opted not to participate in the conference call." *Id.* ¶ 12. The Complaint in this matter was filed on September 28, 2011. Ms. Griffith claims that she called Mr. Oh on December 16, 2011, and "asked him if he would send any compliance documentation that he may have to assist with an upcoming settlement meeting," and that "Mr. Oh stated that he would prefer that [Ms. Griffith] talk with Mr. Tift and that he would have Mr. Tift call [her] back." *Id.* ¶ 13. Ms. Griffith states that she never received a call from Mr. Tift, and that she did not "call Mr. Tift because at the time [she] did not have his telephone number." *Id.*

Regarding Respondents' claims of financial hardship, Complainant argues that a claim of inability to pay is an affirmative defense that Respondents have the burden of proving because "[i]t is not one of the statutory penalty factors in Section 9006(c) of RCRA . . . ." Response at 7 (citing *Carroll Oil Co.*, 10 E.A.D. 635, 662 (EAB 2002)). Complainant argues the filing of Mr. Oh's bankruptcy petition is not per se "evidence of an inability to pay the proposed penalty." *Id.* Complainant contends that "Respondents have not provided documents to support their claim and have therefore failed to meet their burden" of proving they are unable to pay the penalty. *Id.* at 8. Complainant alternatively argues that because Respondents "stated in their motion that they do not contest the liability determination . . . the ALJ should limit any issues addressed in a reopened case to Respondents' inability to pay the proposed penalty." *Id.* at 8.

IV. Discussion

Though the Federal Rules of Civil Procedure may "aid in the interpretation and application" of the Rules of Practice, Federal Rule 60(b)'s "excusable neglect" standard for granting relief from a final judgment or order does not apply to this administrative proceeding. *Carroll Oil Co.*, 10 E.A.D. at 649 n.13; *Midwest Bank & Trust Co., Inc.*, 3 E.A.D. 696, 699 n.7 (EAB 1991). The Rules that do govern this proceeding allow the presiding officer to grant a party relief from a default order if the "totality of the circumstances" demonstrate that there is "good cause" to set aside the entry of default. 40 C.F.R. § 22.17(c); *JHNY, Inc.*, 12 E.A.D. at 384; *Rybond, Inc.*, 6 E.A.D. at 624; *see* 40 C.F.R. § 22.27(c)(3). As noted above, the Environmental Appeals Board has identified two primary factors to be considered in determining "good cause" to set aside a default order.

A. Procedural Omissions Leading to Default

1. Procedural violations and grounds for default

As to the first factor, the procedural omissions leading to the default order were Respondents' failure to comply with the Discovery Order, failure to fully or timely comply with the Prehearing Order issued on December 7, 2011, and failure to appear at the prehearing conference set by the Notice of Hearing Location and Order Scheduling Prehearing Conference dated July 24, 2012. Default Order at 7. Respondents do not dispute these findings. With respect to compliance with the Prehearing Order, under 40 C.F.R. § 22.19(a) Respondents were required to file a prehearing exchange containing the components specified in 40 C.F.R. § 22.19(a)(2) and 22.19(a)(3), and in accordance with the Prehearing Order. Respondents' Prehearing Exchange indicated that they intended to introduce documents into evidence at the hearing, but did not submit copies of them in the prehearing exchange as required by 40 C.F.R. § 22.19(a)(2)(ii). Instead, they stated that "Respondent intends to introduce all of the evidence used by Complainant" and that "Respondent has other evidence to present and expects to receive reports from Northwest Tank and Environmental Services Inc. within 20 days" and "[t]hese will be forwarded to Complainant upon receipt." They did not subsequently submit any proposed

exhibits, but only submitted some documents from Northwest Tank and Environmental Services after the Default Order was issued. Motion, Exhibit B. Respondents' Prehearing Exchange also did not include any narrative statement, and did not state a location where Respondents prefer the hearing to be held or an estimate of how long their direct case may take at hearing, as specifically required by the Prehearing Order. Respondents' Prehearing Exchange did not include any explanation of why the proposed penalty should be reduced or eliminated, as required by 40 C.F.R. § 22.19(a)(3).

Furthermore, these procedural violations constitute "proper grounds for a default order." *JHNY, Inc.*, 12 E.A.D. at 384. "[F]ailure to comply with the information exchange requirements of § 22.19(a)," including failure to file a timely and/or complete prehearing exchange, constitutes grounds for default under 40 C.F.R. § 22.17(a). *See, JHNY, Inc.*, 12 E.A.D. at 388-389 (declining to set aside default order where pro se respondent's prehearing exchange was untimely, did not include an explanation of why the penalty should be reduced or eliminated and did not include copies of exhibits intended to be introduced into evidence). In addition, "failure to comply with . . . an order of the Presiding Officer," including failure to file a timely and/or complete response to discovery order under 40 C.F.R. § 22.19(e), constitutes grounds for default under 40 C.F.R. § 22.17(a). *See, Ag-Air Flying Services, Inc.,* 2006 EPA App. LEXIS 40 *12 (declining to set aside a default order where a respondent submitted an untimely and incomplete prehearing exchange and an untimely and incomplete response to an order granting a request for additional discovery).

Furthermore, Respondents "may be found to be in default . . . upon failure to appear at a conference . . . " under 40 C.F.R. § 22.17(a). The prehearing conference informs the parties and addresses questions regarding issues, witnesses, exhibits, procedures, and logistics for the hearing to ensure that the facts are fully elicited at the hearing, that each party is able to properly present its case, and that the hearing is fair, impartial and efficient.[2] *See*, 40 C.F.R. §§ 22.4(c), 22.19(b). The information provided at the prehearing conference is particularly essential for pro se litigants. The importance of the prehearing conference escalates even more when a litigant has not fully complied with the prehearing exchange or has otherwise not clearly revealed the facts which it disputes or alleges. Respondents' Answer simply indicated that Mr. Oh lacked sufficient knowledge or information to form a belief as to the truth of the allegations in the Complaint and denied that Complainant was entitled to relief but did not include any affirmative defense or assertion regarding a penalty. Their Prehearing Exchange and descriptions of witness testimony did not indicate any facts or issues to be presented at the hearing. Where, as here, an order was issued by the undersigned directing the parties to participate in the conference on a particular date and time and providing clear notice and warnings of default, and particularly in

[2] The fact that the conference was conducted by telephone by the undersigned's staff attorney does not undermine the significance of the failure to appear. Almost all prehearing conferences under the Rules are conducted by telephone for the convenience of the parties and to save time and resources. The Rules do not require that the conference be conducted by the judge, but indicate that the judge "direct the parties" to participate in the conference.

view of the multiple efforts to contact Mr. Oh and the importance of the prehearing conference in this case, Mr. Oh's failure to appear at the prehearing conference constitutes proper grounds for default .

2.. Excuse for procedural violations

The next consideration as to the first factor is whether there was a valid excuse or justification for not complying with the procedural requirement. Respondents raise a number of excuses in their Motion. Few of these directly relate to the procedural violations that form the basis for default, and none of them excuse Respondents' noncompliance. Respondents first claim that their ability to participate in this proceeding was hampered by Mr. Oh's limited English language skills. Federal "courts have found that a lack of proficiency in English constituted good cause to set aside default where the default was an innocent mistake resulting from the language barrier." *Allstate Ins. Co. v. Contreras*, 2011 U.S. Dist. LEXIS 101542, at *6 (N.D. Ind. Sept. 8, 2011) (citing *Geico Cas. Co. v. Beauford*, No. 8:05-cv-697-T-24EAJ, 2006 U.S. Dist. LEXIS 94551, 2006 WL 3848000, at *4 (M.D. Fla. Nov. 8, 2006); *Equitable Life Assur. Society v. First Colonial Trust Co.*, No. 94 C 6362, 1996 U.S. Dist. LEXIS 7552, 1996 WL 296592, at *2 (N.D. Ill. May 31, 1996)). However, the effect of an alleged language barrier must be evaluated on a case-by-case basis, and a party may be found "culpable if he has received actual or constructive notice of the filing of the action and failed to answer." *See, Cabusora v. United States Dep't of Hous. & Urban Dev.*, 1993 U.S. App. LEXIS 29321, **2–3 (9th Cir. Nov. 1, 1993) (quoting *Price v. Seydel*, 961 F.2d 1470, 1473 (2d Cir. 1992)) (defaulting party had actual notice of action and evidence suggested that the party's claimed inability to understand English was not credible).

Respondents state that Mr. Oh "typically requires a translator," and Mr. Oh claims that he was "unable to effectively have information translated to [him] as [his] daughter was away at law school" in New York. Motion at 2; Oh Decl. ¶ 5. However, Respondents concede that Mr. Oh received and understood the Complaint in this matter. Motion at 3; Oh Decl. ¶ 1. He therefore had actual notice of this action against him and Holly Investment, LLC. Respondents do not explain why Mr. Oh did not procure translation services apart from those provided by his daughter, or why she could not assist him remotely if no other services were available. Respondents also did not raise the issue of Mr. Oh's language skills prior to the entry of default, and never requested additional time to allow Mr. Oh to secure language assistance. They did not respond to the requirement in the Prehearing Order (at 2) to state "whether translation services will be necessary in regard to the testimony of any witness(es)." Importantly, Respondents do not claim that Mr. Oh's limited English language skills prevented him from understanding any particular order from this Tribunal or the general nature of this proceeding. Respondents nonetheless repeatedly failed to comply with the orders of this Tribunal and the Rules of Procedure. Under the circumstances, Mr. Oh's limited ability to understand English is not a valid excuse for Respondents' failure to comply with the procedural requirements.

Respondents next claim that they "were completely disconnected from the hearing

deadlines and phone conferences," and that the "majority of the communication was transmitted through Mr. Tift and later through the chapter 11 bankruptcy attorney but almost never directly with the Respondent Joseph Oh." Motion at 2. Respondents concede that Mr. Oh received the Complaint in this matter, as demonstrated by Respondents' timely Answer signed by Mr. Oh, and a signature appearing to be that of Mr. Oh is on Respondents' Prehearing Exchange. *Id.* at 3; Oh Decl. ¶ 1. Attached to every order issued by this Tribunal, and to every document filed by Complainant, is a Certificate of Service indicating that a copy of the order or filing was mailed to the same address as the Complaint. Electronic copies of several filings were also sent by e-mail to addresses associated with Mr. Oh. At minimum, Respondents had constructive notice of every deadline and procedural requirement in this proceeding. Respondents cannot claim that they were "completely disconnected from the hearing deadlines," and this excuse is not valid.

Regarding Respondents' claim as to the involvement of the chapter 11 bankruptcy attorney, the record shows that Complainant contacted Mr. Jolley twice, once by phone and once by letter. The record shows that a copy of the letter was sent to Mr. Oh. There is no indication that Complainant communicated any material information to Mr. Jolley but not to Mr. Oh, or that there was confusion about Mr. Jolley's role in this proceeding. Regarding the involvement of Mr. Tift, the record does show that Mr. Tift participated in a number of telephone conferences with Complainant, communicated with the undersigned's staff attorney, and was served with copies of several orders or filings. The record also shows, and Respondents admit, that Mr. Oh relied on Mr. Tift for assistance and delegated to Mr. Tift significant responsibilities. Motion at 2–4; Tift Decl. ¶¶ 1–2, 5, 7, 8; Griffith Decl. ¶¶ 12–13. However, the record does not indicate that material information was communicated to Mr. Tift but not to Respondents. Given that Respondents had notice of all procedural requirements in this case, there is no reason that the involvement of Mr. Tift, apparently at Mr. Oh's behest, would have prevented Respondents from attending to their own defense.

Respondents also claim that prior to the filing of the Complaint, the management team of Helen Ho and Chan Ho hid the notices and warnings issued by the Region from Mr. Oh, and that Mr. Oh was unaware of the problems at the facility. Motion at 3–4; Oh Decl. ¶¶ 1–2. Complainant has presented significant documentation in support of its position that this claim is unreliable. Significantly, this claim does not explain why Respondents failed to comply with the procedural requirements of this administrative action or the orders of this Tribunal.

Respondents claim that documents show certain violations at the facility were remedied, but that Respondents have been unable to obtain those documents because of Respondents' financial difficulty. Specifically, Respondents assert that Northwest Tank was hired to correct "some" of the violations at the facility, but that Respondents have been unable to pay Northwest Tank for these services and consequently "could not secure proof that some corrections were in fact resolved." Motion at 3. Respondents have not offered documentation showing their financial condition or other material evidence of financial hardship. Assuming that Respondents are in fact unable to obtain particular documents evincing corrective action due to financial hardship, this might excuse their failure to produce those particular documents as part of their

prehearing information exchange or in response to the Discovery Order. However, it would not excuse Respondents' failure to comply with other information exchange requirements, their failure to file any response to the Discovery Order, their failure to appear at the prehearing conference, or their general disregard for this proceeding.

Respondents further claim that their failure to comply with the procedural requirements of this proceeding should be excused because of Mr. Oh's bankruptcy case. At the outset it is worth noting that Respondents did not notify this Tribunal that Mr. Oh had filed for bankruptcy. Respondents never requested an extension of time to accommodate the demands allegedly imposed by the bankruptcy court, and never submitted any documentation indicating that either of the Respondents were in bankruptcy proceedings. Thus Respondents' claim that Mr. Oh was overwhelmed by his obligations in the bankruptcy proceeding does not excuse Respondents' failure to act in this proceeding. *See* Motion at 3–4; Oh Decl. ¶ 4. Regarding Respondents' alleged "belief that the bankruptcy filing afforded [them] more time to respond to the EPA Complaint," this "belief" was not reasonable given that Respondents did not notify this Tribunal of the bankruptcy proceeding. Neglect or lack of willfulness does not excuse untimeliness. *Ag-Air Flying Services, Inc.,* 2006 EPA App. LEXIS 40 *16; *Pyramid Chem. Co.*, 11 E.A.D. at 667 (EAB 2004).

In sum, Respondents have not demonstrated "a valid excuse or justification for not complying with the procedural requirement[s]." *JHNY, Inc.*, 12 E.A.D. at 384.

B. Likelihood of Succeeding on the Merits

As to the second factor to consider in determining whether to set aside default, "whether the defaulting party would likely succeed on the substantive merits if the hearing were held" (*Id.*), Respondents do not contest the issue of liability in their Motion. Motion at 4. Instead, Respondents ask that the default be set aside to allow them "to apply for waiver of penalty [sic] [based on] inability to pay." *Id.* at 5. Respondents raise the issue of ability to pay the proposed penalty for the first time in the present Motion, as they did not raise it in either their Answer or their Prehearing Exchange. When considering whether they would likely succeed on the merits of their "ability to pay" claim at hearing, it is therefore relevant to consider whether they would be able to assert that claim at all.

1. Whether claim of inability to pay was waived

The statutory penalty factors under RCRA "are restricted to 'seriousness of the violation' and 'good faith' efforts to comply. Considering 'ability to pay' is not part of the Agency's prima facie burden in determining a penalty amount." *Carroll Oil Co.*, 10 E.A.D. at 662; *see* 42 U.S.C. § 6991e(c). Therefore, under RCRA, the respondent has the burden of raising and proving

"ability to pay" as an affirmative defense.[3] *Carroll Oil Co.*, 10 E.A.D. at 662–63 (citing 40 C.F.R. § 22.24; *Bil-Dry Corp.*, 9 E.A.D. 575, 611–12 (EAB 2001); *Cent. Paint & Body Shop, Inc.*, 2 E.A.D. 309, 313–14 (CJO 1987)).

Generally, a respondent is deemed to have waived any affirmative defense not raised in its responsive pleading, i.e. its answer to the complaint. *Lazarus, Inc.*, 7 E.A.D. 318, 331, 333 (EAB 1997) ("The Board's decisions have established that matters required to be included in the answer may be waived, although the Part 22 rules do not expressly provide for a waiver."); *New Waterbury, Ltd.*, 5 E.A.D. 529, 542 (EAB 1994). However, the Environmental Appeals Board has followed the federal courts and "expressly adopted the policy behind [Federal Rule of Civil Procedure] 15(a) regarding liberal amendment of pleadings and has applied it to administrative adjudications." *Lazarus, Inc.*, 7 E.A.D. at 333. A respondent in an administrative adjudication may move "to amend its answer at any time until the motions deadline," and a motion to amend "may be filed even after the motions deadline if accompanied by a motion for leave to file out of time." *City of St. Charles*, EPA Docket No. CAA-05-2008-0003, 2008 EPA ALJ LEXIS 25, at *10 & n.2 (ALJ, June 30, 2008) (Order Denying Motion to Vacate); *see* 40 C.F.R. § 22.15(e) ("The respondent may amend the answer to the complaint upon motion granted by the Presiding Officer."). Thus "the rule of waiver is not automatically applied" because a respondent may seek to amend its answer to include an affirmative defense long after the responsive pleading was filed. *See Lazarus, Inc.*, 7 E.A.D. at 331, 334 (citing *Lucas v. United States*, 807 F.2d 414, 417 (5th Cir. 1986)) (discussing practice in federal courts).[4]

A motion to amend a pleading will generally be granted absent "undue delay, bad faith or dilatory motive on the part of the movant, . . . undue prejudice to the opposing party, . . . [or] futility of amendment." *Foman v. Davis*, 371 U.S. 178, 182 (1962)). A litigant's "ability to raise an affirmative defense outside of the answer will largely depend on the absence or presence of prejudice to the opposing party, although the degree of delay may also factor into the analysis." *Lazarus, Inc.*, 7 E.A.D. at 332, 334. While "[d]elay by itself is generally an insufficient reason to deny a litigant the opportunity to raise a defense . . . delay is frequently considered in combination with the potential for prejudice to the opposing party." *Id.* A party may suffer undue prejudice where there is "unfair surprise, i.e., a lack of adequate notice and opportunity to respond to the defense; the need for significant new discovery and/or trial preparation; or, the defense requires inquiry into factual issues." *Id.* (emphasis and footnotes omitted).

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[3] The issue of "ability to pay" is not "an affirmative defense in the traditional sense that financial hardship, if demonstrated, would completely bar imposition of a penalty; rather" it is treated "as a mitigating factor that must raised and substantiated by the respondent." *Carroll Oil Co.*, 10 E.A.D. at 663 n.25.

[4] The Environmental Appeals Board has noted that in federal courts this liberal amendment policy "has been used to preserve affirmative defenses even when a defendant has not sought to amend its answer." *Id.* at 332 n.27.

As a practical matter, a respondent who does not raise "ability to pay" as a defense in its answer generally may raise it as part of its prehearing information exchange. *See, City of St. Charles*, 2008 EPA ALJ LEXIS 25, at *11 (discussing propriety of allowing "ability to pay" defense to be raised for first time in prehearing exchange). Where a respondent produces documentation of its financial condition as part of its prehearing exchange, the complainant is unlikely to suffer any undue prejudice as a result of surprise or delay, and the policy in favor of allowing amendments to pleadings weighs in the respondent's favor. *See id.* ("[A] claim of inability to pay stated in an answer, enabling Complainant to promptly request relevant documents from Respondent . . . does not necessarily result in more efficient proceedings than a claim of inability to pay first raised in a prehearing exchange . . . .). However, "where a respondent does not raise its ability to pay as an issue in its answer, or fails to produce any evidence to support an inability to pay claim after being apprised of that obligation during the pre-hearing process, the Region may properly argue and the presiding officer may conclude that any objection to the penalty based upon ability to pay has been waived . . . ." *New Waterbury, Ltd.*, 5 E.A.D. at 542.

Respondents have not provided any explanation or excuse for their lengthy delay in asserting this defense to the penalty. Respondents also have not produced any evidence to support their claim of financial hardship despite being ordered to do so by both the Prehearing Order dated December 11, 2011, and the Discovery Order dated July 16, 2012. The record indicates that Complainant provided Respondents with standard forms used to support a claim of inability to pay on March 29, 2012, but that those forms were never completed and returned. Default Order at 4; Response at 7–8. While Complainant had notice prior to the entry of default that Respondents might raise the issue of ability to pay, Respondents' refusal to produce any financial documentation deprived Complainant of an opportunity to respond to that defense, or to prepare documentation and witnesses for the hearing. Allowing Respondents to raise the claim at this late stage of the proceeding would necessitate significant new discovery regarding Respondents' financial condition. There is no assurance that Respondents will actually produce any financial documents, or produce sufficient documentation of inability to pay the penalty. The claim may be merely another delay tactic, and allowing additional discovery regarding the claim could delay this proceeding indefinitely.

Under the circumstances, where Complainant sought to compel discovery regarding Respondents' ability to pay, where Respondents inexplicably ignored two orders directing them to state whether they intended to raise a defense of ability to pay and produce evidence in support of that defense, and where a default was subsequently entered against Respondents, they have waived any claim of inability to pay the penalty.

2. Whether Respondents would likely succeed on the merits

Assuming arguendo that Respondents' claim of inability to pay the penalty were not waived, the factors that support a finding of waiver also show that Respondents have failed to demonstrate "a 'strong probability' that litigating the defense will produce" an outcome in their

favor. *JHNY, Inc.*, 12 E.A.D. at 384. Respondents have not produced any financial documentation relevant to their ability to pay the penalty, and have not submitted any records relating to a bankruptcy action that would enable an evaluation of Mr. Oh's financial condition in relation to the proposed penalty. Further, nothing in the record suggests that any bankruptcy petition of Mr. Oh implicates the financial condition of Holly Investment, LLC. Respondents have therefore not met their burden of demonstrating a strong probability that a hearing on their ability-to-pay claim would produce an outcome in their favor.

Respondents also have not shown that they would likely be able to demonstrate that the penalty is unreasonable based on the other factual allegations in their Motion. In the Default Order, the undersigned found that the proposed penalty of $48,078, as calculated in Complainant's Exhibit 39, was "neither clearly inconsistent with the record of the proceeding nor clearly inconsistent with" RCRA, and was "the appropriate civil penalty to be assessed against Respondents." Default Order at 10. The penalty calculation for Counts 1 and 5 included an upward violator specific adjustment ("VSA") of "15% for willfulness or negligence" because "as of [the date of calculation] there has been no evidence presented to show the facility is in compliance." CX 39 at 3, 8.

Respondents assert that the facility's management team hid information from Mr. Oh and that Mr. Oh had no knowledge of the violations prior to the filing of the Complaint, but this is irrelevant to the issue of culpability. RCRA holds owners and operators of USTs strictly liable, and Respondents cannot escape responsibility by claiming that they relied upon employees to ensure the facility was in compliance. *See, Euclid of Virginia, Inc.*, 13 E.A.D. at 665–66, 702 (EAB 2008). Respondents also claim that a contractor was hired to correct *some* of the violations, but that "evidence of those corrected violations was never presented" because Respondents "could never tender payment to the correction company," Northwest Tank. Motion at 3. The invoice Respondents submitted to support this claim does not show that any violations had been corrected, and therefore does not justify a reduction of the 15% VSA. To date, Respondents have not presented evidence showing that the facility is in compliance with RCRA.

V. Conclusion

Respondents have not demonstrated good cause to set aside the Default Order and Initial Decision. Accordingly, Respondents' Motion to Reopen Case and Set Aside Default Order of August 3, 2012 is **DENIED**.

Pursuant to 40 C.F.R. § 22.27(c), the Default Order and Initial Decision shall become a final order forty-five (45) days after service of this Order upon the parties and without further proceedings, unless an appeal to the Environmental Appeals Board is taken within thirty (30) days after this Order is served upon the parties, or the Environmental Appeals Board elects to initiate review pursuant to 40 C.F.R. § 22.30(b). *See* 40 C.F.R. § 22.27(c)(3); *B&L Plating, Inc.*,

11 E.A.D. 183, 190 (EAB 2003) (citing 40 C.F.R. §§ 22.27(c)(3), 22.28(b)); *Allen Barry*, CWA Appeal No. 11-07, 2011 EPA App. LEXIS 40, at *7 (EAB, Dec. 5, 2011) (motion to set aside default stays "deadlines for appeal or for Board election to review the initial decision").

M. Lisa Buschmann
Administrative Law Judge