

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:)	
)	
AMERICAN PROGRESSIVE)	DOCKET NO. RCRA-05-2003-0020
CIRCUITS, INC.,)	
)	
RESPONDENT.)	

ORDER FINDING RESPONDENT IN DEFAULT

Because Respondent has failed to submit a Prehearing Exchange (“PHE”), motion for extension of time, or statement that it is electing only to conduct cross-examination of the Complainant’s witnesses, as required by Orders of this Tribunal, Respondent is hereby found in default.

This Tribunal’s Prehearing Order, issued February 19, 2004, required that Complainant submit its PHE by March 12, 2004; that Respondent submit its PHE by April 2, 2004; and that Complainant submit its Rebuttal PHE by April 14, 2004. That Prehearing Order stated, in part:

If the Respondent intends to elect only to conduct cross-examination of Complainant’s witnesses and to forgo the presentation of direct and/or rebuttal evidence, the Respondent shall serve a statement to that effect on or before the date for filing its prehearing exchange. The Respondent is hereby notified that its failure to either comply with the prehearing exchange requirements set forth herein or to state that it is electing only to conduct cross-examination of the Complainant’s witnesses can result in the entry of a default judgment against it.

Prehearing Order at 4-5 (emphases in original).

On February 26, 2004, this Tribunal issued an Order Granting Complainant’s Motion for Extension of Time to engage in Prehearing Exchange, requiring that Complainant submit its PHE by April 9, 2004; that *Respondent submit its PHE by April 30, 2004*; and that Complainant submit its Rebuttal PHE by May 12, 2004.

Complainant timely filed both its PHE and its “Rebuttal” PHE. However, Respondent has not submitted any PHE, motion for extension of time, or statement that it is electing only to conduct cross-examination of Complainant’s witnesses. Complainant states in it’s “Rebuttal” PHE that: “Complainant has expressly informed Respondent that it will not and does not agree to an extension of, or otherwise waive, the prehearing exchange schedules of the Prehearing Order.” Complainant’s

Rebuttal PHE at 1. Although Complainant states that it “believes that a settlement in principle has been reached,” (*Id.*), this Tribunal’s Prehearing Order specifically states that:

THE MERE PENDENCY OF SETTLEMENT NEGOTIATIONS OR EVEN THE EXISTENCE OF A SETTLEMENT IN PRINCIPLE DOES NOT CONSTITUTE A BASIS FOR FAILING TO STRICTLY COMPLY WITH THE PREHEARING EXCHANGE REQUIREMENTS.

Prehearing Order at 5 (emphases in original).

Section 22.17 of the Rules of Practice applicable to this proceeding, 40 C.F.R. Part 22, provides, in pertinent part:

(a) *Default.* A party may be found in default ... upon failure to comply with the information exchange requirements of § 22.19(a) or an order of the Presiding Officer; ... Default by the respondent constitutes, for the purpose 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.

* * *

(c) *Default order.* When the Presiding Officer finds that a 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 ... shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act.

(d) *Payment of penalty; effective date of compliance...* Any penalty assessed in the default order shall become due and payable by respondent without further proceedings 30 days after the default order becomes final under § 22.27(c).

The Complaint in this case seeks “an amount not greater than \$27,500 per day of violation for each of the six counts alleged herein.” Complaint at 29. This Tribunal’s Prehearing Order required Respondent to submit as part of its PHE “... if and when a specific penalty amount is proposed, a separate Penalty Calculation Worksheet detailing exactly how the proposed penalty was calculated...” PHO at 3, ¶(2)(K). Complainant’s Rebuttal PHE states: “Complainant hereby specifies a total proposed penalty in the amount of \$26,500.00, representing the total penalty amount for the counts of the Complaint for which it has sought a penalty.” Complainant’s Rebuttal PHE at 2. Upon review, I conclude that the penalty requested by Complainant is not “clearly inconsistent” with the record of the proceeding or the Act.

ORDER

1. For failing to comply with the Prehearing Order of the Presiding Officer, as enumerated above, Respondent is hereby found in **DEFAULT**.
2. Respondent American Progressive Circuits, Inc. is assessed a civil administrative penalty in the amount of \$26,500.
3. Payment of the full amount of this civil penalty shall be made within thirty (30) days of the effective date of the final order by submitting a cashier's check or a certified check in the amount of \$26,500, payable to "Treasurer, United States of America," and mailed to:

U.S. Environmental Protection Agency, Region 5
(Regional Hearing Clerk)
77 West Jackson Boulevard, E-19J
Chicago, IL 60604-3590

4. A transmittal letter identifying the subject case and EPA docket number (RCRA-05-2003-0020), 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.

Appeal Rights

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 Default Order, which constitutes an Initial Decision pursuant to 40 C.F.R. § 22.17(c), shall become the Final Order of the Agency unless an appeal is filed with the Environmental Appeals Board (EAB) within thirty (30) days after service of this Order, or the Environmental Appeals Board elects, *sua sponte*, to review this decision.

Susan L. Biro
Chief Administrative Law Judge

Dated: May 13, 2004
Washington, D.C.

In the Matter of American Progressive Circuits, Inc., Respondent
Docket No. RCRA-05-2003-0020

CERTIFICATE OF SERVICE

I certify that the foregoing **Order Finding Respondent In Default**, dated May 13, 2004 was sent this day in the following manner to the addressees listed below.

Maria Whiting-Beale
Legal Staff Assistant

Dated: May 14, 2004

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:

Michael J. McClary, Esquire
Associate Regional Counsel
U.S. EPA
77 West Jackson Boulevard, C-14J
Chicago, IL 60604-3590

Copy By Certified Mail Return Receipt to:

Christopher T. Nowotarski, Esquire
Stone, Pogrund & Korey
221 North LaSalle Street, Suite 3200
Chicago, IL 60601