UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
AVON FUEL AND SUPPLY CO. and FREBRO, INC.	)	**Docket No. CWA-03-2003-0269**
RESPONDENTS	)	

DEFAULT ORDER AND INITIAL DECISION

Respondents are hereby found in default because each Respondent has failed to submit a prehearing exchange, 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.

The Complaint in this case was filed with the Regional Hearing Clerk on June 26, 2003. The Complaint alleges that Respondents violated Section 311(j) of the Clean Water Act ("CWA"), 33 U.S.C. § 1321(j), and its implementing regulation, 40 C.F.R. § 112.20(a), for failing to prepare and submit a Facility Response Plan for their oil storage facility in Avondale, Pennsylvania to the Regional Administrator by August 30, 1994.[1] In the Complaint, the Complainant proposed that the Regional Administrator assess an administrative penalty against Respondents in the amount of $126,750, pursuant to Section 311(b)(6)(B)(ii) of the CWA, 33 U.S.C. § 1321(b)(6)(B)(ii).

The Complaint was sent to Respondents by certified mail, return receipt requested, in accordance with 40 C.F.R. § 22.5(b)(1)(i).[2] Respondents received copies of the Complaint on June 27, 2003, as evidenced by photocopies of the certified mail return receipt signed by Respondents. Respondents filed a joint Answer to the Complaint on July 28, 2003.[3]

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[1] Complainant provided public notice of the proposed penalty, as required by the statute, and no comments were received by the Regional Hearing Clerk. *See* 33 U.S.C.A. § 1321(b)(6)(C)(i).

[2] The Complaint was sent to Mr. Joseph Frezzo as Partner of Avon Fuel and Supply Co. and as President of Frebro, Inc.

[3] Respondents' joint Answer was filed by counsel, Attorney Mark A. Stevens, on behalf of both Respondents.

This Tribunal's Prehearing Order, issued September 12, 2003, required that Complainant submit its prehearing exchange by January 9, 2004; that Respondents submit their prehearing exchanges by February 9, 2004; and that Complainant submit its rebuttal prehearing exchange by February 23, 2004. That Prehearing Order stated, in part:

> If either Respondent elects only to conduct cross-examination of Complainant's witnesses and to forgo the presentation of direct and/or rebuttal evidence, that Respondent shall serve a statement to that effect on or before the date for filing its prehearing exchange. **Each party is hereby reminded that failure to comply with the prehearing exchange requirements set forth herein, including Respondent's statement of election only to conduct cross-examination of Complainant's witnesses, can result in the entry of a default judgment against the defaulting party.**

Prehearing Order at 4 (emphasis added).

Complainant timely filed its prehearing exchange on January 9, 2004. On February 3, 2004, Respondents moved for an extension of time in which to file their joint prehearing exchange. By order issued February 3, 2004, I granted Respondents' motion for additional time and extended the date for the filing of Respondents' prehearing exchange to April 9, 2004.

On March 15, 2004, counsel for the Respondents, Mark A. Stevens, filed a motion for an order allowing his firm to withdraw from representation of the Respondents in this case. In an Order entered March 16, 2004, I granted Respondents' counsel's unopposed Motion for Withdrawal of Appearance.[4] As part of counsel's Motion for Withdrawal, Attorney Stevens submitted an affidavit attesting that he had repeatedly advised Respondents of the deadlines in this matter, including the deadline for serving the prehearing exchange. The March 16, 2004 Order Granting Motion for Withdrawal of Appearance advised Respondents that the granting of the motion "did not disturb the requirement for meeting the April 9, 2004 deadline for filing their prehearing exchange"(s). Since the withdrawal of Mr. Stevens' firm from this case, no new counsel has entered an appearance on behalf of Respondents.

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[4] The March 16, 2004 Order was sent to Mr. Gabriel Frezzo and Mr. Joseph Frezzo, Avon Fuel Supply, by first class mail but the Order was returned as undeliverable mail because there was "no mail receptacle." Believing that Respondents' address was incorrect, the March 16, 2004 Order was resent by first class mail on April 1, 2004. When the March 16, 2004 Order resent on April 1, 2004 was returned as undeliverable mail because there was "no mail receptacle," the March 16, 2004 Order, along with the Prehearing Order dated September 12, 2003, was sent on April 21, 2004 to Mr. Gabriel Frezzo and Mr. Joseph Frezzo by certified mail, return receipt requested, regular mail, and facsimile. The April 21, 2004 mailing was received by Mr. Joseph Frezzo, as evidenced by the certified mail return receipt signed by him on April 24, 2004, and the facsimile was received on April 21, 2004.

Upon Respondents' failure to file their prehearing exchange(s), an Order to Show Cause was issued to Respondents on June 10, 2004, requiring them to explain why they failed to meet the extended deadline for filing their prehearing exchange and why the Court should not issue a default order against them.[5] On June 25, 2004, Respondents submitted Respondents' "Response to Order to Show Cause" ("Response") to counsel for Complainant which contained a general description of financial problems that Respondents had been experiencing.[6] Respondents' submittal also requested that the action against Respondents be stayed in this matter. More than three months have elapsed since the passing of the April 9, 2004 deadline and Respondents still have not filed their prehearing exchange(s).

Section 22.17 of the Rules of Practice applicable to this proceeding, 40 C.F.R. § 22.17, 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).

On July 1, 2004, Complainant filed a Motion for a Default Order, along with a Memorandum of Law in Support of the Motion for a Default Order with Exhibits and a Memorandum of Law in Opposition to the Respondents' Answer to the Order to Show Cause. In its Motion for a Default Order, Complainant argues that the Respondents are in default of the September 12, 2003 Prehearing Order, as amended on February 3, 2004, and violated Section

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[5] The Order to Show Cause sent to Gabriel Frezzo and Joseph Frezzo was received on June 15, 2004, as evidenced by the certified mail return receipt signed by Gabriel Frezzo on June 15, 2004.

[6] Respondents' Response was not served on the undersigned Administrative Law Judge.

22.19(a) of the Consolidated Rules of Practice, 40 C.F.R. § 22.19(a). Complainant also argues that a default by the Respondents constitutes their admission of all the facts alleged in the Complaint and that the proposed penalty is consistent with the evidence and the law.

Respondents failed to file a prehearing exchange by April 9, 2004, or to date as required by the Prehearing Order, as amended. Nothing in Respondents' pleadings provides "good cause" why Respondents failed to meet the April 9, 2004 prehearing exchange filing deadline or why a default order should not be issued against Respondents. Respondents' Response was not served on the undersigned. *See* 40 C.F.R. § 22.5(b).

The Complaint in this case seeks $126,750, which is less than the amount allowed pursuant to the regulation.[7] Complainant stated in the Complaint that the penalty amount takes into account the factors identified at Section 311(b)(8) of the CWA, 33 U.S.C. § 1321(b)(8), including: the seriousness of the violation, the economic benefit to the violator resulting from the violation, the degree of culpability involved, any other penalty for the same incident, any history of prior violations, the nature, extent, and degree of success of any efforts of the violator to minimize or mitigate the effects of the violation, the economic impact of the penalty on the violator, and any other factors as justice may require. *See* Complaint, at 6.

The Complaint also states that the "proposed penalty may be adjusted if the Respondents establish bona fide issues of ability to pay or other defenses relevant to the appropriate amount of the proposed penalty." *See* Complaint, at 6. Respondents' Answer did not address the ability to pay issue. Respondents' Response to the Order to Show Cause states that it is an explanation concerning Respondents' completion of the work sought by the Environmental Protection Agency ("EPA"). The Response provides a vague synopsis of Respondents' financial situation that is not supported by any financial documents, such as tax forms or audits, or sworn statements by Respondents. The Response includes a "Settlement Statement" from the sale of property by Frebro, Inc. on April 27, 2004 that shows disbursements of the seller's proceeds from the sale for various liens, judgments, and taxes. The Response also includes a June 24, 2004 statement by Respondents' contractor concerning Respondent Avon Fuel's actions to bring its facility into compliance with the Spill Prevention Control and Countermeasure regulations. *See* Respondents' Response to Order to Show Cause, Attachment.

Assuming that Respondents' Response is deemed to have been received by the undersigned and that it is responsive to the Order to Show Cause, I find that the Response does not constitute a prehearing exchange and that the information contained in the Response does not provide "good cause" to avoid a default judgment. Thus, Respondents are found to be in default.

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[7] Pursuant to Section 311(b)(6)(B)(ii) of the CWA, 33 U.S.C. § 1321(b)(6)(B)(ii), and 40 C.F.R. Part 19, Respondents may have been liable for civil penalties of up to $11,000 per violation up to a maximum of $137,500.

Default by Respondents constitutes admissions of all facts alleged in the Complaint and waivers of Respondents' rights to contest such factual allegations. *See* 40 C.F.R. § 22.17(a). The facts alleged in the instant Complaint establish Respondents' violation of the CWA as charged. Finally, upon review, I conclude that the penalty requested by Complainant is not "clearly inconsistent" with the record of the proceeding or the Act. *See* 40 C.F.R. § 22.17(c). Accordingly, the civil administrative penalty of $126,750 proposed in the Complaint is assessed against Respondents.

ORDER

1. Respondents are found in default for failing to comply with the Prehearing Order of the Administrative Law Judge, as amended, and no good cause is shown why a default order should not be issued.

2. Respondents' request that this matter be stayed is denied.

3. Respondents Avon Fuel and Supply Co. and Frebro, Inc. are assessed a civil administrative penalty in the amount of $126,750.

4. 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 $126,750, payable to "Treasurer, United States of America," and mailed to:

   Oil Spill Liability Trust Fund
   Commander, National Pollution Funds Center
   U.S. Coast Guard
   The Ballston Common Office Building, Suite 1000
   4200 Wilson Boulevard
   Arlington, VA 22203

5. A transmittal letter identifying the subject case and EPA docket number (CWA-03-2003-0269)), as well as Respondents' names and addresses, must accompany the check.

6. If Respondents fail 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 EAB elects, *sua sponte*, to review this decision.

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Barbara A. Gunning
Administrative Law Judge

Dated: July 16, 2004
Washington, D.C.

In the Matter of Avon Fuel And Supply Company, Frebro, Inc., Respondents
Docket No. CWA-03-2003-0269

CERTIFICATE OF SERVICE

I certify that the foregoing **Default Order and Initial Decision**, dated July 16, 2004, was sent this day in the following manner to the addressees listed below:

_____
Maria Whiting-Beale
Legal Staff Assistant

Dated: July 19, 2004

Original and One Copy by Pouch Mail to:

Lydia A. Guy
Regional Hearing Clerk (3RC00)
U.S. EPA
1650 Arch Street
Philadelphia, PA 19103-2029

Copy By Pouch Mail To:

John J. Monsees, Esquire
Assistant Regional Counsel (3RC42)
U.S. EPA
1650 Arch Street
Philadelphia, PA 19103-2029

Copy By Certified Mail to:

Mr. Joseph Frezzo
Avon Fuel and Supply Co.
P.O. Box 477
Avondale, PA 19311

Mr. Joseph Frezzo
Frebro, Inc.
P.O. Box 477
Avondale, PA 19311

Copy by Regular Mail to:

Gabriel Frazzo
Avon Fuel and Supply Company
P.O. Box 477
Avondale, PA 19311