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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
TESTOR CORPORATION,	)	Docket No. V-W-90-R-16
	)	
Respondent	)	

ORDER DENYING MOTION FOR DEFAULT AND SETTING FURTHER PROCEDURES

On December 31, 1990, Complainant filed a motion for a default order against the Respondent, pursuant to Section 22.17(a)(2) of the EPA Rules of Practice (Rules), 40 C.F.R. §22.17(a)(2). The basis for the motion is the Respondent's failure to file its prehearing exchange information on the due date of December 21, 1990. The motion seeks entry of a default order assessing the recommended civil penalty in the Complaint in the amount of $121,786.

The motion notes that the prehearing exchange date was originally set by order of the Presiding Judge for July 23, 1990, was extended once by order until October 23, 1990, and again extended until December 21, 1990. This last extension was granted by oral order on October 5, 1990, and was confirmed by correspondence of that date from the Complainant to the Respondent and to the Presiding Judge. That correspondence is appended to the motion as attachments. Complainant notes in the motion that it has filed the prehearing exchange material and that the Respondent has failed and continues to fail to file its prehearing exchange material. As a result, Complainant requests that a default order assessing the civil penalty noted above be entered against the Respondent for the violations of Sections 3008(c) and (g) of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§3008(c) and (g), as set forth in the Complaint.

Respondent, on January 7, 1991, submitted a response opposing the motion for default and requesting an extension until January 21, 1991, to file its prehearing exchange.[1] The response

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[1]On January 10, 1991, Respondent requested permission to file its response to the Complainant's prehearing exchange on January 21, 1991. There was no objection by the Complainant, who by agreement would have until February 11, 1991, to submit a response to the Respondent's prehearing exchange, if the motion for default is not granted. These requests were granted by oral order on January 15, 1991.

avers that the failure to meet the prehearing exchange deadline of December 21, 1990, was inadvertent and not done in bad faith. Respondent indicates that the prior extension had been for ninety days but that the extension at issue was for 59 days[2], and that it failed to note this change when the Complainant's confirmation letter of October 5, 1990 was received. Respondent states that it made efforts to check on the exchange date upon receiving the Complainant's prehearing exchange but was unsuccessful in doing so until a January 3, 1991 telephone call to Complainant's counsel to discuss settlement. Respondent avers that it has actively been pursuing settlement and has spent considerable time and resources to resolve the case but is willing to go to hearing if necessary.

Respondent argues that its failure to meet the deadline was inadvertent, not intentional, and submits that the motion for default should not be granted because to do so would unfairly punish the Respondent for its mistake.

On analysis, it is clear that the Respondent was in violation of the Presiding Judge's order to file its prehearing exchange material by December 21, 1991. And, Section 22.17(a) of the Rules provides that a party may be found to be in default "(2) after motion or sua sponte, upon failure to comply with a prehearing or hearing order of the Presiding Officer. . ." However, this inadvertent violation on the part of Respondent is not sufficient to warrant entry of a default against the Respondent and, as a matter of discretion, a default will not be entered. The rationale for this ruling follows.

As a general rule in Federal court, default judgments are not favored and cases should be decided upon their merits whenever reasonably possible, Eitel v McCool, 782 F.2d 1470, 1471-72 (9th Cir. 1986); Wilson v. Winstead, 84 F.R.D. 218, 219 (E.D. Tenn. 1979). Also, it is clear that disposition of a request for default judgment lies within the court's sound discretion, and that, inter alia, consideration should be given to whether any prejudice has occurred to the party seeking the default judgement, 6 Moore's Federal Practice ¶ 55.05[2] (1990). Also, it is pertinent to note that:

> Where a defendant's failure to plead or otherwise defend is merely technical, or where the default is de minimis, the court should generally refuse to enter a default judgment. On the other hand, where there is reason to believe that defendant's default resulted from bad faith in his dealings with the court or opposing party, the district court may

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[2]The October 5, 1990 extension was for ninety days from the date of the request, September 21, 1990, but fifty-nine days from the then scheduled prehearing exchange date of October 23, 1990.

amount of penalty proposed in the complaint is taken into account, it must be concluded that Complainant's Motion for Default should be and hereby is denied.

Also, in view of the disposition of the Motion for Default, there is good cause to grant the Respondent's request for an extension and the Respondent is given until January 22, 1991 to make its prehearing exchange.

SO ORDERED.

Daniel M. Head
Administrative Law Judge

Dated: January 16, 1991
Washington, D.C.

IN THE MATTER OF TESTOR CORPORATION, Respondent
Docket No. V-W-90-R-16

CERTIFICATE OF SERVICE

I certify that the foregoing Order Denying Motion for Default and Setting Further Procedures, dated 1-16-91, was sent in the following manner to the addressees listed below:

Original by Regular Mail to:

Ms. Beverely Shorty
Regional Hearing Clerk
U.S. Environmental Protection Agency, Region V
230 South Dearborn Street
Chicago, IL 60604

Copy by Regular Mail to:

Counsel for Complainant:

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Maria A. Stirling for
Secretary

Dated: January 16, 1991
Washington, D.C.