9-23-92

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
1108 K Street Associates, L.P.,	)	Docket No.RCRA-UST-III-9006-016
	)	
	)	
Respondent	)	

ORDER DENYING MOTION FOR DEFAULT ORDER

This action was initiated by a complaint filed on September 24, 1991, pursuant to Section 9006 of the Solid Waste Disposal Act, 42 U.S.C. § 6991e, commonly referred to as the Resource Conservation and Recovery Act (RCRA), as amended by the Hazardous and Solid Waste Amendments of 1984 (HSWA). The complaint alleged that Farr Development Corporation was the "owner" and "operator" of "underground storage tanks" (USTs) at a facility, 1108 K Street Associates, located at 929 12th Street, NW or 1150 K Street, NW, Washington, DC. Respondent was alleged to have violated section 9003 of RCRA, 42 U.S.C. § 6991b, and regulations thereunder at 40 C.F.R. Part 280, by failing, inter alia, to submit a Corrective Action Plan (CAP) to the implementing agency pursuant to 40 C.F.R. § 280.66. The implementing agency in this case is the Environmental Control Division, District of Columbia Department of Consumer and Regulatory Affairs (DCRA). The requested CAP was to set forth corrective actions regarding free product and soil contamination and removal of USTs and drums after Respondent had discovered and excavated eight USTs installed by previous owners.

The complaint included a Civil Compliance Order and proposed the assessment of a civil penalty of $28,470.

By letter, dated October 25, 1991, Farr Development Corporation filed an answer effectively denying all alleged violations and stating, inter alia, that it was not liable, because it was neither the owner nor the operator of the subject tanks or property within the meaning of the law.

Under date of January 7, 1992, Complainant filed a motion to amend the complaint and an amended administrative complaint, nearly identical to the original complaint, including the same compliance order and the same proposed penalty, except that 1108 K Street Associates was named as Respondent in place of Farr Development Corporation.

In support of the motion, Complainant alleged that prior to referral of the matter to EPA for enforcement, DCRA had entered into discussions and negotiations with individuals who were principals and/or employees of Farr Development Corporation (Farr) for the purpose of initiating corrective action at the Facility, that an environmental site assessment for the Facility was performed for Farr by Briggs, Inc. and that, in addition, several items of correspondence in connection with the Facility, addressed to DCRA, were on Farr letterhead. For these reasons, Complainant asserted that it was under the mistaken impression that the Facility was owned by Farr. Counsel for Farr reportedly indicated that he would be representing 1108 K Street Associates in the proceeding and that he would not oppose a motion to amend to

reflect the change in parties. By an order, dated February 21, 1992, the motion to amend the complaint was granted and Respondent, 1108 K Street Associates, L.P., was directed to file an answer within 30 days from the date of the order.

Under date of May 6, 1992, Complainant moved for issuance of a default order based on the newly named Respondent's failure to answer the amended complaint within the time directed by the ALJ in the February 21, 1992, order. By a letter, dated May 12, 1992, Respondent filed an Opposition to Motion for Default and an answer to the amended complaint. In its Opposition, Respondent asserted that following discussions between counsel, the present Respondent was identified as the proper party and counsel agreed to accept service of an amended complaint. Respondent claimed to have received Complainant's motion for default order on May 12, 1992, the date of its response to the motion. The answer it filed was nearly identical to the answer filed by Farr to the initial complaint. Respondent alleged that Complainant's motion for default was filed without inquiry of or notice to Respondent despite the initiation of settlement negotiations and, even though the original respondent, Farr Development Corporation, to which 1108 K Street Associates is related, had filed a timely answer. Respondent asserted that, while awaiting the Agency's response to a hydrogeologic site assessment forwarded under date of March 10, 1992, [the need for] a formal response to the amended complaint was [overlooked or] omitted. Under these circumstances, Respondent argues that the motion for default is surprising and unfair. It

says that Respondent obviously intends to defend the amended complaint and urges that the motion be denied.

D I S C U S S I O N

Although filing a timely answer to a RCRA complaint is considered to be jurisdictional,[1/] under the circumstances present here, jurisdictional requirements have been satisfied. Firstly, a timely answer to the initial complaint and a request for hearing were filed by Farr Development Corporation. Secondly, there were discussions between counsel prior to filing the motion to amend the complaint and it was agreed that counsel for Farr Development Corporation, who would also represent the present Respondent, 1108 K Street Associates, L.P., would accept service of an amended complaint and would not oppose the motion. Thirdly, there were ongoing settlement negotiations, which were initiated prior to the time the complaint was amended and which continued through and beyond the period an answer was due to be filed. Finally, although the relationship between Farr Development Corporation and 1108 K Street Associates, L.P., is not clear, the latter entity was referred to in the initial complaint and this matter may be regarded as an ongoing proceeding involving essentially the same

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[1/] RCRA § 9006(b) (42 U.S.C. § 6991e(b)) provides in pertinent part: "(a)ny order issued under this section shall become final unless, no later than thirty days after the order is served, the person or persons named therein request a public hearing."

parties. Complainant has based its motion solely on Rule 22.17, "Default order," rather than on "jurisdictional grounds."[2/]

The language of Rule 22.17(a)--"(a) party may be found in default. . . ."--makes it clear that a finding of default is not mandated by the mere fact a party may be tardy or delinquent in complying with some rule or order. Instead, the matter is committed to the sound discretion of the ALJ.[3/] The general rule is that forfeitures are not favored and that cases should be decided on their merits whenever possible. Applying that rule here, it is concluded that the motion be denied. Although most decisions denying motions for default deal with discovery orders such as failure to timely file pre-hearing exchanges,[4/] it has been concluded that the failure at which instant motion is directed is not jurisdictional. Respondent promptly filed an answer once the omission was called to its attention and the answer to the amended complaint is virtually identical to the initial answer. In

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[2/] Rule 22.17(a) provides in pertinent part:

> (a) Default. A party may be found to be in default (1) after motion, upon failure to file a timely answer to the complaint; * * * *.

[3/] See, e.g., Detroit Plastic Molding Company, TSCA Appeal No. 87-7 (CJO, March 1, 1990) (finding of default reviewed under an abuse of discretion standard).

[4/] See, e.g., General Electric Company, Docket No. TSCA-IV-89-0016 (Order Denying Motion For Default Order, March 5, 1990) and Allied Metal Finishing Corp., Docket No. RCRA-III-182 (Order, September 12, 1990).

view thereof, the general rule disfavoring forfeitures will be applied and the motion for default denied.

O R D E R

The motion for default is denied.

Dated this 23rd day of September 1992.

Spencer T. Nissen
Administrative Law Judge

CERTIFICATE OF SERVICE

This is to certify that the original of this **ORDER DENYING MOTION FOR DEFAULT ORDER**, dated September 23, 1992, in re: 1108 K Street Associates, L.P., Dkt. No. RCRA-UST-III-9006-016, was mailed to the Regional Hearing Clerk, Reg. III, and a copy was mailed to Respondent and Complainant (see list of addressees).

Helen F. Handon
Helen F. Handon
Legal Staff Assistant

DATE: September 23, 1992

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