

**UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY**

**BEFORE THE ADMINISTRATOR**

**In the Matter of:** )  
 )  
**ISOCHEM NORTH AMERICA, LLC,** ) **Docket No. TSCA-02-2006-9143**  
 )  
**Respondent.** )

**ORDER ON RESPONDENT’S UNOPPOSED MOTION TO EXTEND TIME AND  
COMPLAINANT’S MOTION FOR DEFAULT,  
OR IN THE ALTERNATIVE, FOR AN EXTENSION OF TIME**

**I. Background and Arguments of the Parties**

This action was initiated on March 21, 2006 by an Administrative Complaint filed against Respondent Isochem North America, LLC, by Complainant United States Environmental Protection Agency (“EPA”), Region 2. The Complaint, as now pending, alleges in one count (Count 1) that Respondent failed to timely submit, *i.e.* by December 23, 2002, for its 2002 fiscal year, a “Partial Updating of the Inventory Data Base Production and Site Report,” otherwise known as a “Form U,” as required by 40 C.F.R. § 710.33(b), in regard to 19 chemicals it manufactured and/or imported in excess of 10,000 pounds. Fourteen of these chemicals were allegedly manufactured and/or imported at its New Jersey facility and five at its Texas facility. For these alleged violations of Section 15(3)(B) of the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2614(3)(B), Complainant proposes a penalty of \$355,300.<sup>1</sup>

Respondent, through counsel, filed an Answer to the Complaint on June 2, 2006, and an Amended Answer on November 13, 2006, wherein it admitted that it currently owns and operates the New Jersey facility identified in the Complaint, previously owned and operated the identified Texas facility, that it manufactured and/or imported more than 10,000 pounds of the 19 chemicals listed in the Complaint in its 2002 fiscal year, and that it submitted a Form U for those chemicals on or about November 22, 2004. *See*, Amended Ans. ¶¶ 8, 17, 18, 23. Respondent’s Amended Answer further indicated that it “objects to and disagrees with the conclusions of law” set forth in the Complaint as to its actions constituting TSCA violations, set

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<sup>1</sup> The Complaint as originally filed contained three counts and sought a combined total penalty of \$399,300. However, on October 20, 2006, Complainant moved to withdraw Counts 2 and 3 of the Complaint, and this request was granted by Order dated November 20, 2006.

forth a series of affirmative defenses, and requested a hearing. Amended Ans. ¶¶ 25, 40-74.<sup>2</sup>

The parties subsequently were offered an opportunity to participate in this Tribunal's Alternative Dispute Resolution process, but failed to respond to said offer, and the case was directly assigned to a Judge for hearing.<sup>3</sup> Thereafter, on July 7, 2006, a Order establishing Prehearing Proceedings was issued and in response thereto the parties submitted their Prehearing Exchanges in or about August 2006.<sup>4</sup> Certain pre-hearing motions were later filed and ruled upon including Respondent's Motion to Conduct Voir Dire of Complainant's Expert, which was denied by Order dated January 17, 2007.

On March 14, 2007, Complainant filed a Motion for Accelerated Decision on Liability, to which Respondent failed to respond within the 15-day time set therefor by 40 C.F.R. § 22.16(b). However, on April 5, 2007, by letter, Respondent requested an extension of time to respond to Complainant's Motion and an "adjournment" of the hearing then set to begin on April 16, 2007, to which requests Complainant filed an Opposition and Cross-Motion for Default on April 6,

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<sup>2</sup> Only the first five and last of Respondent's eight affirmative defenses raised in its Amended Answer are directed to Count 1, the remaining live count in this action. *See*, Amended Ans. ¶¶ 40-74. Those six "affirmative defenses" alleged that: (1) the Inventory Update Rule, of which 40 C.F.R. § 710.33(b) is part, does not include a "clearly stated provision" to impose civil penalties for its violation; (2) the Agency is estopped from asserting the alleged violations based upon a four-year reporting interval by having determined that such requirement imposed an "onerous" burden and switching to a five year reporting interval; (3) the Notice of Inspection extended to sales, personnel and research data in violation of 15 U.S.C. § 2610(b)(2); (4) that it maintained the requisite records and "[i]f and to the extent Respondent failed to submit Form U . . . [by] December 23, 2002, such failure was the result of clerical error" of which Complainant was aware by November 30, 2004, and the commencement of this action is therefore barred by 40 C.F.R. § 710.1; (5) that the proposed penalty fails to take into proper account the factors set forth in 15 U.S.C. § 2615(a)(2)(B) and follows the "dictates of the inflexible framework of the EPA TSCA Penalty Policy;" and (6) that Respondent does not have the ability to pay the proposed penalty. *See*, Amended Ans. ¶¶ 40-66, 73-74.

<sup>3</sup> This case was initially assigned to Judge Carl C. Charneski for hearing and upon his resignation from the Agency was reassigned on April 9, 2007 to the undersigned.

<sup>4</sup> A motion to extend the prehearing exchange deadlines filed by Complainant on July 24, 2006 was denied by Order dated July 26, 2006, and Complainant timely submitted its Prehearing Exchange on August 7, 2006, but the Respondent did not, resulting in the issuance of a Show Cause Order on August 11, 2006. Thereafter, Respondent filed a response thereto indicating it had relied upon Complainant's erroneous misreading of the Prehearing Order and, by Order dated August 21, 2006, was given until August 23, 2006 to file its Prehearing Exchange, which it did. Complainant subsequently filed a Motion to Supplement its Prehearing Exchange which was granted by Order dated November 22, 2006.

2007. Nevertheless, Respondent's request was granted by Order dated April 9, 2007, and Respondent was given until April 17, 2007 to file its response to Complainant's Motion for Accelerated Decision. In addition, the hearing of this matter was postponed until further notice.

On April 17, 2007, Respondent submitted by facsimile and first class mail an "Unopposed Motion to Extend Time," requesting that it be given one additional day, until April 18, 2007, to file its response to the Accelerated Decision Motion, alleging as good cause therefor that recently its counsel was unexpectedly out of town longer than anticipated and otherwise engaged in responding to storm water damage in his home. This Motion was not ruled upon before the relevant filing deadline of April 17, 2007 or the requested extended deadline of April 18, 2007 passed.<sup>5</sup>

On April 19, 2007, Respondent served by "Fed Ex or personal delivery" its Response to Complainant's Motion for Accelerated Decision on Liability and Cross-Motion to Amend Answer and Dismiss the Complaint (Response). See, Response and Certificate of Service attached to Response.<sup>6</sup> The undersigned received a copy of the Response by facsimile on that date. The Response was unaccompanied by a motion to file late.

On April 20, 2007, Complainant submitted a "Motion for Default, or, in the alternative, for an Extension of Time to File Answering Papers to the ISOCHEM Submission of April 19, 2007" (Complainant's Motion). In its Motion, pursuant to 40 C.F.R. § 22.17(a), Complainant seeks default again based upon Respondent's failure to initially respond to its Motion for Accelerated Decision in a timely manner, and additionally asks for default based upon Respondent's failure to respond in a timely manner to this Tribunal's Order of April 9, 2007 giving it an extension until April 17, 2007 to respond to such Motion. Complainant notes that Respondent did not even abide by its "own (proposed) self-imposed deadline of April 18<sup>th</sup>" in filing a response to the Motion and that its' actions exhibit a "pattern of failing to comply with the procedural requirements in this proceeding," the orders of this Tribunal, and the applicable procedural Rules. C's Mot. at 5-7. Such actions, Complainant asserts, warrant issuance of a default order, citing this Tribunal's decision in *Ag-Air Flying Services, Inc.*, EPA Docket. No. FIFRA-10-2005-0065, 2006 EPA ALJ LEXIS 36 ( (Jan. 27, 2006)), *aff'd* FIFRA Appeal No. 06-

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<sup>5</sup> This Tribunal carries a full calendar of cases and hearings are held across the nation. A party's time crisis caused by its own late-filed motion for extension does not create a corresponding time crisis for this Tribunal and will not be permitted to cause the diversion of attention and resources from other older or more pressing matters.

<sup>6</sup> It is not clear as to exactly what date the Unopposed Motion to Extend Time or the Response was "filed" on in that the Rules provide that a document is deemed "filed" "when it is received by the appropriate Clerk." See, 40 C.F.R. § 22.5(a). Further, while the Rule provides that the Presiding Officer can "authorize facsimile or electronic service, subject to any appropriate conditions and limitations," it appears no such authorization has ever been granted in this case.

01, 2006 EPA App. LEXIS 40 (EAB, Sept. 1, 2006) (unpublished opinion). *Id.* at 6.

In the alternative, Complainant requests in its Motion an extension until Friday, May 4, 2007, to reply to Respondent's Response to Complainant's Motion for Accelerated Decision on Liability and Cross-Motion to Amend Answer and Dismiss the Complaint, noting that under 40 C.F.R. § 22.16(b), the time for filing a "reply" to a written response to a pending motion is 10 days, but that the time for filing a "response" to a (new) motion is 15 days, and in light of the simultaneous filing of Respondent's Response and Cross-Motion, and with the intent to submit a single set of papers, Complainant requests the additional five days provided under the rules to file its reply to the Response.

On April 24, 2007, Respondent submitted its Response in Opposition to Complainant's Motion for Default (Opposition). In the Opposition, Respondent characterizes the Motion for Default as "disgraceful and disingenuous," asserting that its Response to the Accelerated Decision Motion was "all completed and executed on either April 17 or 18, 2007, and ready to be served on April 18<sup>th</sup>," and that it advised Complainant on that date, that in light of the on-going pendency of the Unopposed Motion to Extend Time, Respondent would not file or serve its Response to the Motion for Accelerated Decision until "authorized to do so," and Complainant expressed no objection. Further, Respondent asserts that it has agreed to Complainant's request for extension in the Motion for Default, and that Complainant has sought additional time previously in this matter. Respondent asserts that "[e]quity alone" demands that this matter be decided on its merits and the Motion for Default be denied. Respondent attached to the Opposition as Exhibits A-F is a series of e-mails reflecting a generally cooperative cordial professional course of dealings between the parties in regard to extending deadlines, rescheduling the hearing, supplementing witnesses, etc.

## **II. Discussion and Conclusions**

### **A. Respondent's Unopposed Motion to Extend Time/Request to File Out of Time**

Rule 22.7(b) states that "the Presiding Officer may grant an extension of time for filing any document: upon timely motion of a party to the proceeding, for good cause shown, and after consideration of prejudice to other parties; or upon its own initiative." 40 C.F.R. § 22.7(b). That Rule goes on to state that "any motion for an extension of time ***shall be filed sufficiently in advance of the due date*** so as to allow other parties reasonable opportunity to respond ***and to allow the Presiding Officer ... opportunity to issue an order.***" 40 C.F.R. § 22.7(b) (emphases added). Thus, Rule 22.7(b) clearly mandates that motions for "extensions of time" be filed sufficiently before the relevant time limit has expired so this Tribunal, in the normal course of work, will have adequate time to review the substance of it and draft and issue an order on it, prior to the deadline expiring. There is no exception in the Rule to this requirement for

“unopposed” motions.<sup>7</sup>

In this case, on April 17, 2007, the day its deadline for filing its Response to Complainant’s Accelerated Decision Motion expired, Respondent submitted its Unopposed Motion to Extend Time requesting a one day extension of the deadline. Filing at such point did not provide this Tribunal with an adequate period of time to review and rule on such Motion prior to the expiration of the filing deadline sought to be extended therein or even by the extended date requested. Thus, at this point the Motion is moot.

Moreover, as noted by Complainant, Respondent did not even file its Response within the period of extension requested in its Motion, and its response, filed the next day, was not accompanied by a Motion to submit it out of time.<sup>8</sup> As noted previously by this Tribunal -

A motion for leave to file a responsive pleading out of time filed after expiration of the deadline may impose a heavier burden upon the movant than a motion for an extension of time filed before the expiration of the deadline. Although the Part 22 Rules of Practice do not speak to a motion for leave to file "out of time," the Federal Rules of Civil Procedure ("FRCP") do address this distinction. Specifically, FRCP 6(b) ("Enlargement") states:

When ... an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

FRCP 6(b) (emphases added). Thus, in ruling upon a motion for an "extension of time" made prior to expiration of the deadline, this Tribunal considers the possible prejudice to other parties and whether the movant has shown "good

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<sup>7</sup> As Respondent should have been aware from this Tribunal’s prior Order of July 26, 2006, denying the Complainant’s Motion for Extension of Time to file the prehearing exchange, as to which Respondent consented, merely because a motion is not opposed does not guarantee it will be granted by this Tribunal and party assuming otherwise does so at its own risk.

<sup>8</sup> Respondent notes in his Opposition that he contacted this Tribunal on April 19, 2007 to inquire about the status of the pending Unopposed Motion to Extend the filing deadline through April 18, 2007, was advised that the Tribunal had not had an opportunity to rule upon it and that the Motion was now moot, and was advised to file and serve the responsive papers, which it did. Opp. at 4.

cause." In ruling on a motion for leave to file a response "after the expiration of the specified period" (i.e., "out of time"), FRCP 6(b) would require consideration of the additional factor of whether the movant has shown that its neglect is "excusable." That being said, this Tribunal must "assure that the facts are fully elicited, adjudicate all issues and avoid delay," and is empowered to "take all measures necessary for the ... efficient, fair and impartial adjudication of issues." 40 C.F.R. §§ 22.4(c) and (c)(10).

*Degussa Engineered Carbons*, EPA Docket No. CAA-05-2004-0044, 2005 EPA ALJ LEXIS 73, \*5-6 (ALJ, Nov. 4 2005) (footnote omitted) (noting that where the Consolidated Rules of Practice at 40 C.F.R. Part 22 do not address a particular issue, analogous federal rules and decisions may be looked to for guidance.).

While it does not explicitly so request, to the extent that Respondent asks in its Opposition to the Default Motion that this matter be "determined on the merits," noting that it has filed a twelve page Response and Cross-Motion to Dismiss to Complainant's Accelerated Decision Motion, Respondent appears to be *implicitly* requesting that it be allowed to file its Response and Cross-Motion out of time. Opp. at 5. The justification therefor offered in the Opposition for failing to timely file is that Respondent was awaiting decision on the Unopposed Motion to extend Time and did not wish to file without such authorization, and that it advised Complainant that it intended to do so, and Complainant "expressed no objection." Opp. at 1, 4.

By a very slim margin, such explanation and the basis for needing additional time provided by Respondent in the Unopposed Motion, warrants a finding of "good cause" and "excusable neglect" for the two day delay in filing, and for that reason, and in order to assure that all the facts are fully elicited and all issues adjudicated as discussed more fully below, Respondent's Response to Complainant's Motion for Accelerated Decision on Liability and Cross-Motion to Amend Answer and to Dismiss Complaint, is hereby accepted for filing out of time.

#### B. Complainant's Motion for Default

The Rules provide at 40 C.F.R. § 22.17(a) that "[a] party may be found to be in default ... upon failure to comply with . . . an order of the Presiding Officer . . . . Default by respondent constitutes, for the purposes 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." The Rules provide at 40 C.F.R. § 22.17(c), "[w]hen 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." The question here is whether the record of this proceeding shows good cause not to issue a default order or, in the alternative, whether to consider Respondent to have waived any objection to the granting of Complainant's Motion for Accelerated Decision on Liability in accordance with 40 C.F.R. § 22.16(b)("[a]ny party who fails to respond within the designated period waives any objection to

the granting of the motion.").

Default is a harsh and disfavored sanction, reserved only for the most egregious behavior. "A default judgment is appropriate where the party against whom the judgment is sought has engaged in 'willful violations of court rules, contumacious conduct, or intentional delays.'" *Forsythe v. Hales*, 255 F.3d 487, 490 (8th Cir. 2001) (quoting *Fingerhut Corp. v. Ackra Direct Mktg. Corp.*, 86 F.3d 852, 856 (8th Cir. 1996)). "[D]efault judgment is not an appropriate sanction for a "marginal failure to comply with the time requirements [and] . . . should be distinguished from dismissals or other sanctions imposed for willful violations of court rules, contumacious conduct, or intentional delays." *Time Equipment Rental & Sales, Inc. v. Harre*, 983 F.2d 128, 130 (8th Cir. 1993)(12 day delay in filing answer did not warrant entry of default). Moreover, Administrative Law Judges have broad discretion in ruling upon motions for default. Issuance of such an order is not a matter of right, even where a party is technically in default. *See, Lewis v. Lynn*, 236 F.3d 766 (5th Cir. 2001). This broad discretion is informed by "the type and the extent of any violations and by the degree of actual prejudice to the Complainant." *Lyon County Landfill*, EPA Docket No. 5-CAA-96-011, 1997 EPA ALJ LEXIS 193 \*14 (ALJ, Sept.11, 1997).

Unquestionably, Respondent is technically in default because of its failure to file its Response to Complainant's Motion for Accelerated Decision on or before April 17, 2007, as provided by this Tribunal's Order of April 9, 2007, which courteously granted Respondent an extension of time to file such response even though Respondent made such request after the deadline for filing for such extension had passed. *See*, 40 C.F.R. § 22.7(b)("Any motion for an extension of time shall be filed sufficiently in advance of the due date so as to allow other parties reasonable opportunity to respond and allow the Presiding Officer . . . reasonable opportunity to issue an order."). Moreover, such technical default is not cured by the Respondent's filing of the Unopposed Motion to Extend Time, in that said Motion, having been filed on the due date (April 17, 2007) also was an untimely request for extension in violation of Rule 22.7(b), and in that the Response was filed even after the additional time requested therein.

Thus, Complainant is correct that Respondent's actions in this proceeding have to date exhibited, if not willful, a repeated neglectful disrespect for the Rules of this Proceeding and the Orders of this Tribunal. However, Complainant has not alleged that it has or will suffer any prejudice from the delay caused by Respondent's late filed Response. Moreover, this Tribunal is charged by the Rules with the responsibility not only to "avoid delay," but also to "conduct a fair and impartial proceeding, assure that the facts are fully elicited, [and] adjudicate all issues . . . ." 40 C.F.R. § 22.4(c). Respondent's Response to Complainant's Motion alleges that it cannot be held liable in this action in that, despite its admission in its Answer and Amended Answer to the contrary, during the relevant time period it (Isochem North America LLC) did not "own, operate or control," the facility at issue in Texas, that such facility was at such time owned by SNPE Chemicals, Inc., a company in which Respondent never owned any interest and which is a "wholly separate subsidiary" of Respondent's parent company, SNPE, Inc. R's Resp. at 2-4. Additionally, Respondent argues that it cannot be held liable for failing to file a Form U in this proceeding because, as a "small manufacturer or importer" (as defined by 40 C.F.R. § 704.3), it

was exempt from such filing requirement under 40 C.F.R. §710.29. In support of these assertions, Respondent attaches to its Motion the Declaration of Daniel M. Slick, its President and Chief Executive Officer.

Thus, while Respondent is technically in default because of its failure to file timely its Response to Complainant's Motion, the entry of a default judgment against it at this time is deemed inappropriate.

**Nevertheless, having so concluded, Respondent is well advised to strictly comply with the Rules of Practice and Orders of this Tribunal for the duration of this proceeding, lest it run the very tangible risk of the imposition of the severest sanction for even the slightest divergence, barring a cogent justification for such noncompliance.** Further, in the event Respondent fails to strictly abide by the requirements of this Order or the Rules regarding proceedings in this case, Complainant's Motion for default may be revived or refiled.

### C. Complainant's Motion for Extension

In the alternative to entry of default, Complainant requests an additional five days, until May 4, 2007, to file its "answering papers" to the Respondent's "Submission" of April 19, 2007 responding to its Motion for Accelerated Decision. Complainant's Motion states good cause for such a brief extension, specifically the efficiency of filing a single response to the Respondent's Reply to its Motion for Accelerated Decision and Response to Respondent's Cross-Motion to Amend and Dismiss. In addition, the complexity of the legal and factual issues raised by Respondent's Response clearly warrants the additional time. Moreover, Respondent does not appear to object to such extension and it is noted that Respondent has had the benefit of an extended period of time (from filing on March 14, 2007 until April 19, 2007) to respond to Complainant's Motion for Accelerated Decision.<sup>9</sup> Therefore, Complainant's request to have until May 4, 2007 to file its Reply to Respondent's Response to its Accelerated Decision Motion and Response to Respondent's Cross-Motion to Amend its Answer and to Dismiss the Complaint will be granted.

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<sup>9</sup> Respondent suggests in its Opposition that Complainant's Motion seeking additional time is "unnecessary," in that it suggested to Complainant in an e-mail accompanying the Response that it was receptive to providing it with extended time. Opp. at 2. Again, as Respondent should be aware from prior rulings in this proceeding and the applicable Rules, the parties themselves cannot effectuate valid extensions of time and even unopposed requests for extensions may be denied by this Tribunal.

**ORDER**

- A.. Respondent's Unopposed Motion to Extend Time, dated April 17, 2007, is hereby denied as moot.
- B. Respondent's Response to Complainant's Motion for Accelerated Decision on Liability and Cross-Motion to Amend Answer and Dismiss the Complaint are hereby accepted for filing out of time.
- C. Complainant's Motion for Default, or, in the alternative, for an extension of Time to File Answering Papers to the ISOICHEM Submission of April 19, 2007, is hereby denied in part as to the entry of default, and granted in part as to the request for an extension of time;
- D. Complainant shall file on or before **May 4, 2007** its Reply and Response to Respondent's Response in opposition to Complainant's Motion for Accelerated Decision on Liability and Cross-Motion to Amend Answer and to Dismiss the Complaint.

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Susan L. Biro  
Chief Administrative Law Judge

Issued: April 25, 2007  
Washington, D.C.