

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR**

In the Matter of:)
)
DAVID R. SWEEZEY,) **Docket No. CWA-10-2008-0131**
)
Respondent.)

**ORDER ON RESPONDENT’S REQUEST FOR ADDITIONAL TIME TO RESPOND
AND ON COMPLAINANT’S MOTION FOR DEFAULT ORDER**

I. Background and Request for Additional Time to Respond

A Prehearing Order was issued in this matter on October 7, 2008, setting a due date of November 14, 2008 for the parties to file a Consent Agreement and Final Order (CAFO) or for Complainant to file its Initial Prehearing Exchange, and a due date of December 5, 2008 for Respondent’s Prehearing Exchange. Complainant timely filed its Initial Prehearing Exchange, but Respondent did not file anything on or before the due date for its Prehearing Exchange. Consequently, on December 15, 2008, Complainant filed a Motion for Default Order, requesting under 40 C.F.R. § 22.17 that Respondent be held in default, that the allegations in the Complaint be deemed admitted by Respondent and that he be held liable for the violations and a proposed penalty of \$15,000.

On January 6, 2009, Respondent filed a document entitled “Advice to Hearing Officer and Request for Additional Time to Respond” (Motion), stating that the parties have been negotiating a settlement of this matter and have agreed to the amount of sanctions to be imposed, but are in the process of negotiating a restoration order as a condition of the settlement. Respondent states in the Motion that review and negotiation is anticipated to occur until January 19 to determine whether an agreement can be reached. Therefore, Respondent requests until January 19 to file a response to the Motion for Default Order, “at which time evidence of excusable neglect will be offered if necessary.” Motion at 1.

The Certificate of Service on the Motion indicates that it was served on the Regional Hearing Clerk and Complainant’s counsel, but not on the undersigned. Having received the Motion for Default Order and not having received any response thereto or any document from Respondent other than the Answer to the Complaint, this Tribunal was prepared to grant the Motion for Default Order. However, upon inquiry to the Regional Hearing Clerk from the undersigned’s staff, this Tribunal was informed of the existence of the Motion and was provided with a copy.

The Motion therefore is not compliant with the Rules of Practice governing this proceeding, 40 C.F.R. part 22 (Rules), which provide that “A copy of each document filed in the proceeding shall be served on the Presiding Officer . . . and on each party.” 40 C.F.R. § 22.5(b). Furthermore, the Motion is untimely. The Motion for Default Order having been served on December 15, 2008, Respondent’s response was due to be filed, that is, received by the Regional Hearing Clerk, on January 5, 2009, under the Rules, 40 C.F.R. §§ 22.5(a) 22.7(a) and (c) and 22.16(b). 40 C.F.R. § 22.7(b) provides 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 . . . reasonable opportunity to issue an order.” The Motion was filed on January 6, 2009, *after* the due date. In addition, the Motion does not state whether or not Complainant concurs in the relief requested, and thus is not compliant with the direction in the Prehearing Order, “Prior to filing any motion, the moving party is directed to contact the other party . . . to determine whether the other party has any objection to the granting of the relief sought in the motion.”

Finally, the Motion does not set forth any good cause for allowing an extension of time. The fact that the parties are negotiating a settlement does not stay the litigation of this case and does not explain why Respondent could not timely file a response to the Motion for Default Order. Respondent merely alludes to an “expense” without any explanation of the need for additional time to file a response. Accordingly, the Request for Additional Time to Respond is denied.

II. Motion for Default

The Rules provide at 40 C.F.R. § 22.17(a):

[a] party may be found to be in default . . . upon failure to comply with the information exchange requirements of § 22.19(a) or 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 further provide that “[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.” 40 C.F.R. § 22.17(c). The Rules do not require a finding of prejudice to the party moving for default nor a finding of ability to pay the proposed penalty. *JHNY, Inc.*, CAA App. No. 04-09, 2005 EPA App. LEXIS 22 * 43 (EAB, Sept. 30, 2005).

To date, Respondent has filed neither a prehearing exchange nor a motion for an extension of time in which to file its prehearing exchange. *See*, 40 C.F.R. § 22.7(b). Such

failure provides a basis for finding Respondent in default.

In general, default is a harsh and disfavored sanction, and 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)). Default 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).

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). To determine whether a default order should be entered, the Environmental Appeals Board applies a “totality of circumstances” test, considering the procedural omission and any valid excuse or justification presented for failing to comply. *JHNY, Inc.*, 2005 EPA App. LEXIS 22 * 28. As to the procedural omission, the prehearing exchange is not merely a “procedural nicety,” but “plays a pivotal function” in the proceeding. *Id.* * 23. The Environmental Appeals Board has upheld default judgment for a single failure to file a timely prehearing exchange. *Id.* * 41-42; *Detroit Plastic Molding Co.*, 3 E.A.D. 103, 107 (CJO 1990); *House Analysis & Associates*, 4 E.A.B. 501, 505-08 (1993). As to any excuse or justification for failing to comply with the prehearing exchange requirement, Respondent, facing the drastic sanction of a default order, has not made any effort to timely respond to the motion for default by a simple statement to show good cause for failing to file the prehearing exchange. In the totality of circumstances, Respondent’s omissions are not merely a “marginal failure to comply with the time requirements,” but a failure to file a prehearing exchange, a failure to respond to a motion for default, and an untimely motion for extension of time to respond.

Moreover, Respondent was served with a copy of the Rules along with service of the Complaint, and was warned of the consequences of failure to file a timely prehearing exchange in the Prehearing Order, which stated as follows (emphasis in original):

If the Respondent elects 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. . . . THE MERE PENDING 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. ONLY THE FILING WITH THE HEARING CLERK OF A FULLY EXECUTED CONSENT AGREEMENT AND FINAL ORDER, OR AN ORDER OF THE JUDGE, EXCUSES NONCOMPLIANCE WITH FILING DEADLINES.

Despite such clear and emphasized warning, Respondent failed to comply with the prehearing exchange requirements set forth in the Prehearing Order. *See*, 40 C.F.R. § 22.19(a)(“In accordance with an order issued by the Presiding Officer, each party shall file a prehearing information exchange”).

The Presiding Judge is charged with the responsibility not only to avoid delay, but also to conduct a fair and impartial proceeding. 40 C.F.R. § 22.4(c). Respondent represents in its Motion that the parties are in agreement as to the amount of sanctions to be imposed, and that they are negotiating a restoration order. If a settlement with a restoration order is executed and filed, the parties will have achieved not only the cost savings of avoiding litigation, but an environmental benefit. Holding Respondent in default and assessing the proposed penalty would not result in an environmental benefit. Additionally, it does not clear from the case file that Respondent willfully violated the Rules or Prehearing Order, or that it acted with contumacious conduct or using any willful delaying tactics. Entry of a default order is therefore not warranted.

On the other hand, to deny the Motion for Default Order and allow Respondent to continue to disregard the prehearing exchange requirement can only serve to prolong unnecessarily the settlement negotiations and/or the litigation of this case. It does not appear that Complainant would suffer any significant prejudice on the basis of a delay in receiving Respondent’s prehearing exchange where the parties are settling the case. The hearing has not yet been scheduled, so even if the parties do not settle this case, Complainant is unlikely to suffer any undue prejudice from the delay.

Therefore, the Respondent will be allowed additional time to file his prehearing exchange. If Respondent does not file a prehearing exchange in accordance with the Rules and Prehearing Order on or before the due date set herein below, and the parties have not filed a fully executed CAFO by that date, then Complainant may renew its Motion for Default Order.

ORDER

1. Respondent's Request for Additional Time to Respond is **DENIED**.
2. Complainant's Motion for Default Order against Respondent is **DENIED**.
3. Respondent shall file its prehearing exchange **on or before January 30, 2009**, if the parties have not filed a fully executed CAFO beforehand.
4. Complainant shall file its rebuttal prehearing exchange on or before **February 13, 2009**, if the parties have not filed a fully executed CAFO beforehand.

Respondent is hereby advised to strictly follow the Rules of Practice and instructions set forth in orders issued in this proceeding from this day forward, as such leniency may not be shown again in this proceeding. Respondent is also advised to follow the rules regarding filing and service of documents, and to include service not only on the Regional Hearing Clerk and EPA counsel, but also on the undersigned.

Susan L. Biro
Chief Administrative Law Judge

Date: January 16, 2009
Washington, D.C.