

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 2
290 Broadway
New York, New York 10007

U.S. ENVIRONMENTAL AGENCY-REG. II
PROTECTIVE NOTICE
MAY 29 A 11:17
REGIONAL HEARING
CLERK

<p>In the matter of</p> <p>Oil Energy System, Inc. P. O. Box 711 Mayagüez, Puerto Rico 00681</p> <p>Respondent.</p> <p>Proceeding under Section 3008 of the Solid Waste Disposal Act, as amended, 42 USC §6928</p>	<p>Complaint, Compliance Order, and Notice of Opportunity for Hearing</p> <p>Docket No. RCRA-02-2011-7107</p>
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**MOTION IN COMPLIANCE TO AN ORDER TO SHOW CAUSE
TO THE ENVIRONMENTAL PROTECTION AGENCY:**

COMES NOW Respondent Oil Energy System, Inc.,
hereinafter "Respondent" through the undersigned
attorney, and very respectfully states, alleges and
request as follows:

1. Issued and notified on May 9, 2012, we received an
"Order to show cause" due on or before May 25,
2012;
2. The order was based on our lack of compliance to
file a prehearing exchange of information on or
before April 27, 2012;

3. Accordingly, we begin our argumentation expressing our most sincere apologies to all the administrative staff that in one way or another have been affected by our delay, but more specifically to Assistant Regional Counsel, Lourdes del Carmen Rodriguez, Esq., and the Administrative Judge assigned to the case.
4. When we received the "Prehearing Order" dated February 29, 2012, we incorrectly marked in our agenda our compliance date as May 27 instead of April 27. Eventually, when we were notified of the order to show cause, we realized the monumental mistake that we had made;
5. However, as part of our response to the complaint, we had already served Complainant seven (7) exhibits that we intend to introduce as evidence at the hearing. Also, as part of our motion in compliance with the prehearing exchange, we add only four more exhibits, number eight (8), nine (9), ten (10) and (11);
6. In view of all the above stated and in accordance with the Rules of Practice and its various

interpretations, we very respectfully understand that Respondent have not caused an actual prejudice to Complainant as a consequence of our misreading to the terms expressed in the "Prehearing Order";

7. Before this regrettable incident, Respondent had complied with the entire schedule ordered on this case. In that order, upon receipt of the complaint and compliance order, Respondent timely requested an extension of time and eventually complied with the term provided to do so. On the same date that we submitted our answer to the complaint and later, as a result of our dialogue through the ADR process with the EPA personnel, we presented all the evidence that we had by that time. That documentation and exhibits will only supplemented today with four new exhibits (a manifest ledger, site photo, our answer to the complaint and Mr. Raymond Huddleston curriculum vitae) along with the designation of our witnesses;

8. On this particular issue, the federal regulations governing default in EPA administrative proceedings are found at Section 22.17 of the Rules of Practice and are codified at 40 C.F.R. § 22.17. Section 22.17(a) concerning default states, in pertinent part:

"A party may be found to be in default: after motion, upon failure to file a timely answer to the complaint; upon failure to comply with the information exchange requirements of § 22.19(a) or an order of the Presiding Officer; or upon failure to appear at a conference or hearing. Default by respondent constitutes, for 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." 40 C.F.R. § 22.17(a).

9. Section 22.17(c) concerning default orders states, in pertinent part:

"When the Presiding Officer finds that 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 or in the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act. For good cause shown, the Presiding Officer may set aside a default order." 40 C.F.R. § 22.17(c).

10. The above-cited regulatory language of 40 C.F.R. § 22.17(a) concerning a finding of default for failing to comply with the information exchange requirements of 40 C.F.R. § 22.19(a) or an order of the Administrative Law Judge is couched in discretionary terms. If a party is found to be in default, the Rules of Practice seemingly place a mandatory obligation on the Administrative Law Judge to issue a default order against the defaulting party unless the record shows good cause why a default order should not be

issued. 40 C.F.R. § 22.17(c). Thus, pursuant to the Rules of Practice, the Administrative Law Judge has discretion in applying § 22.17(a), and even upon a finding of default, need not issue the order if the record shows good cause;

11. As it is hereby discussed below, under the circumstances of this case, we respectfully understand that a default order against Respondent is unwarranted;

12. Default and exclusion are harsh and disfavored sanctions, 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)). 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). 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). Administrative Law Judges have broad discretion in ruling upon motions for default. See *Gard Products, Inc., supra*;

13. Under the law cited above and the circumstances surrounding this case, we insist that Complainant

has not suffered any prejudice. The EPA already had received substantially similar information as a consequence of Respondent's Answer to Complaint and thru the ADR process and therefore was not prejudiced by our late filing. Most of our Pre-Hearing Exchange had been done when the evidence intended to be relied upon by us had already been provided to the EPA.

WHEREFORE, Respondent respectfully prays from this Agency to find the Respondent in compliance with the order to show cause; resolve that Respondent failed to submit the prehearing exchange due to a good and involuntarily cause; again accept our most sincere apologies for our delay; and find the respondent in compliance with the prehearing exchange order in view of the fact that a separate motion with all exhibits on that behalf will be sent by mail on or before May 25, 2012.

IT IS HEREBY CERTIFIED that on this same date a true and exact copy of this document was sent via certified mail to: Lourdes del Carmen Rodríguez, Esq., Assistant Regional Counsel, U.S. Environmental Protection Agency, Region 2, Office of Regional Counsel, Caribbean Team, Guaynabo, Puerto Rico 00968-8069. By regular mail to:

Administrative Law Judge: The Honorable M. Lisa Buschmann, Office of Administrative Law Judges, US EPA, Franklin Court Building, 1099 14th Street, N.W., Suite 350, Washington DC 20005. For filing purposes, the Original and One (1) Copy of this document has been sent to: Karen Maples, Regional Hearing Clerk, U.S. Environmental Protection Agency, Region 2, 290 Broadway-16th Floor - Room 1631, New York, New York 10007-1866.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 23rd day of May 2012.



JOSE JAVIER LUGO TORO, ESQ.

Counsel to Respondent

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