



UNITED STATES
 ENVIRONMENTAL PROTECTION AGENCY
 REGION 6
 DALLAS, TEXAS



IN THE MATTER OF:)
)
 HERMAN ROBERTS)
 OKMULGEE COUNTY, OKLAHOMA) OPA DOCKET NO. 99-512
)
 RESPONDENT)
)
)
)

**ORDER CLARIFYING APRIL 14, 2000 ORDER,
 DENYING COMPLAINANT'S MOTION FOR RECONSIDERATION,
 AND GRANTING COMPLAINANT'S MOTION FOR EXTENSION OF TIME**

On April 14, 2000, the Presiding Officer issued an Order Denying Complainant's Motion for Default Order (April 14, 2000 Order). The Presiding Officer found that the Respondent was in default, and thus admitted all facts alleged in the Complaint and waived its right to contest such factual allegations. However, since the Complainant failed to show in its motion that it pled a prima facie case in the Complaint, the Presiding Officer found good cause for not entering a default order. Thus, the Complainant's motion for a default order was denied. The Complainant was ordered to file another motion for a default order on liability and penalties by May 1, 2000. April 1, 2000 Order at 6 - 7.

On May 1, 2000, the Complainant filed a Notice of Appearance and Motion for Clarification and Extension of Time. First, the Complainant claimed confusion with what evidence, if any, is needed

to prove a prima facie case on liability. Second, the Complainant requested reconsideration of the requirement for it to file a motion for default order on penalties. Finally, if its motions for clarification and reconsideration were denied, then the Complainant requested an extension of time to file its response to the April 14, 2000 Order.

A. PROOF REQUIRED FOR MOTION FOR DEFAULT

First, the Complainant claimed confusion with what evidence, if any, is needed to prove a prima facie case on liability. The Complainant is correct that no additional evidence is needed for a default order on liability. What is needed is for the Complainant to set forth the elements necessary to prove the violation(s) alleged in the Complaint, and then show how these elements are met by citing to various paragraphs of the Complaint.¹ Although the Presiding Officer could conduct this analysis on his own, it is more appropriate for the Complainant to make this showing. After all, the Complainant is responsible for prosecuting the case, not the Presiding Officer. The Complainant, as the movant, also has the burden of showing that it is entitled to the requested relief. The Presiding Officer should not

¹See *In the Matter of Solv-Ex Corporation*, 1998 WL 1536379 (EPA Region VI) (October 2, 1998) and *In the Matter of Oryx Energy Company*, 1999 WL 1678473 (EPA Region VI) (February 19, 1999) for examples of the analysis needed to prove that the Complainant pled a prima facie case in its complaint.

have to do the Complainant's work. Therefore, the Presiding Officer has properly placed this burden on the Complainant.

B. AUTHORITY OF THE PRESIDING OFFICER TO REQUIRE COMPLAINANT TO SUBMIT MOTION FOR DEFAULT ORDER ON PENALTIES

The Complainant also asked the Presiding Officer to reconsider the requirement for the Complainant to submit a motion for a default order on penalties. The Complainant argues that 40 C.F.R. § 22.17 does not impose such a requirement, contending that this section gives the Complainant prosecutorial discretion to determine when to seek a motion for default on all or part of the issues.

The Complainant is correct that 40 C.F.R. § 22.17 allows the Complainant to only seek a default order on liability. However, there is a difference between what the Complainant can do on its own initiative, and what the Presiding Officer can required the Complainant to do. First, 40 C.F.R. § 22.4(c) requires the Presiding Officer to conduct a fair and impartial hearing, and avoid delay. Second, 40 C.F.R. § 22.4(c)(10) gives the Presiding Officer the authority to "do all other acts and take measures necessary for the maintenance of order and for the efficient, fair, and impartial adjudication of issues arising in [the] proceeding."

As noted in the April 14, 2000 Order,

The Order to Show Cause was issued because almost six months had passed since the Complaint was filed, and the Respondent had not filed an answer. Furthermore, proof of service of the Complaint had not been filed with the

Regional Hearing Clerk, as required by 40 C.F.R. § 22.5(b)(1)(iii). Thus, there was no proof that service of the Complaint had been completed. The Complainant also had not filed a motion for a default order. The Presiding Officer could not, *sua sponte*, find the Respondent in default for failing to file an answer. The Presiding Officer noted that unless some action was taken by the Complainant, this case could remain on his docket indefinitely.

April 14, 2000 Order at 2 (footnote omitted).

Thus, in order to avoid delay and promote the efficient adjudication of the issues (e.g., liability and penalties), the Presiding Officer has the authority to require the Complainant to submit a motion for default order on penalties. See 40 C.F.R. § 22.4(c). As to the Complainant's concern that the motion for default order on penalties may jeopardize settlement, the opposite is more likely. Filing such a motion may increase the likelihood of settlement and the amount of the penalty negotiated.² The Complainant has also additional leverage, since the Respondent has been found in default, and could obtain an order awarding the entire amount proposed in the Complaint.³ In this case, the Complainant

²The Complainant cannot also be viewed by the Respondent as negotiating in bad faith because it is not filing the motion on its own initiative, but has been ordered to file the motion by the Presiding Officer.

³Assuming that the Complainant provides proper factual and legal support for the proposed penalty, 40 C.F.R. § 22.17(c) provides that "the relief proposed in the complaint or motion for default shall be ordered unless the requested relief is *clearly inconsistent with the record of the proceeding or the Act.*" (emphasis added).

noted that "subsequent to filing Complainant's motion for default, the undersigned received a phone call from an attorney recently retained by the Respondent in which settlement possibilities were discussed." Complainant's Motion at 3 (May 1, 2000). In fact, the Complainant now believes settlement is likely. *Id.* at 4. In other words, if it wasn't for the action of the Presiding Officer in requiring the Complainant to submit a motion for default order, the Respondent, in all likelihood, would not be discussing settlement with the Complainant.

Furthermore, the Presiding Officer has issued numerous orders requiring Complainants to file motions for default order in other cases in which the Respondent had not filed a answer. Each time, the case has settled, or the Complainant has withdrawn the complaint.⁴ Thus, keeping pressure on the Parties by moving the case forward usually results in a quicker settlement than if the Presiding Officer did nothing. Therefore, the request to reconsider the requirement for the Complainant to submit a default order on penalties is denied.

C. MOTION FOR EXTENSION OF TIME

The Complainant also requested an extension of time to file its default motion. The Complainant contends that the 14 days provided

⁴Excludes two pending motions.

for in the April 14, 2000 Order was insufficient.⁵ However, there was sufficient time for the Complainant to draft a motion for a default order. 40 C.F.R. § 22.16(b) provides for a **15 day** time frame from the date of service to respond to a motion. This section also gives the Presiding Officer the authority to shorten the response time. Prior to amendment of Part 22 in July 1999, the rules provided for a **10 day** response time. Given the limited amount of analysis needed to establish liability,⁶ and the ability to e-mail other EPA attorneys to get examples of motions for default orders and affidavits for penalty calculations, 14 or 16 days is more than enough time to prepare a motion for default order on liability and penalties. However, given the fact that the Complainant is engaged in settlement negotiations, the Presiding Officer will grant an extension to the Complainant. This extension will provide sufficient time for settlement negotiations to be completed or to file a motion for default order if settlement cannot be reached.

Therefore, it is hereby **ORDERED** that the Complainant shall file a motion for default order on liability and penalties by **June 5, 2000. No further extensions of time will be granted.**

⁵The Complainant actually had sixteen days from the date the Order was issued.

⁶See footnote 1, *supra*.

Dated this 4th day of May, 2000.

/S/

Evan L. Pearson
Regional Judicial Officer

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of May, 2000, I served true and correct copies of the foregoing Order Clarifying April 14, 2000 Order, Denying Complainant's Motion for Reconsideration, and Granting Complainant's Motion for Extension of Time on the following in the manner indicated below:

CERTIFIED MAIL - RETURN RECEIPT REQUESTED _____

Herman Roberts
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CERTIFIED MAIL - RETURN RECEIPT REQUESTED _____

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Lorena S. Vaughn
Regional Hearing Clerk