

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6

FILED
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EPA REGION VI

IN THE MATTER OF	§	DOCKET NO. SDWA-06-2014-1106
	§	
Page One Plus Wholesale, Inc.	§	
Tulsa, OK	§	
	§	
Respondent	§	

COMPLAINANT’S RESPONSE TO RESPONDENT’S MOTION TO
VACATE INITIAL DECISION AND DEFAULT ORDER

COMES NOW COMPLAINANT, the Director of the Compliance Assurance and Enforcement Division, United States Environmental Protection Agency (“EPA”), Region 6, by and through its attorney, provides the following Response to the Motion to Vacate Initial Decision and Default Order filed by Page One Plus Wholesale, Inc. (“Respondent”) on July 13, 2015. For the reasons set forth below, Complainant requests for the Regional Judicial Officer (“RJO”) to deny Respondent’s motion.

I. Procedural History

1. Complainant filed an Administrative Complaint (“Complaint”) on January 14, 2014. The Complaint alleged that Page One Plus Wholesale, Inc. (“Respondent”) violated the Safe Drinking Water Act and failed to comply with an Administrative Order that became final on July 11, 2013. The Complaint sought a civil penalty of seven thousand dollars (\$7,000.00).

2. Respondent filed, *pro se*, on March 3, 2014, what the RJO considered to be the Respondent’s Answer to the Complaint. Respondent did not request a hearing or dispute the facts in its answer, but instead sought to have the Complaint “rescinded.”

3. Respondent later filed an additional letter on November 5, 2014, in which it stated that it did not consent to the proposed Consent Agreement and Final Order ("CAFO"). Respondent further stated its intention to turn the well in question, Well No. D54, into an oil producing well eventually and once again requested for Complainant to rescind the Complaint.

4. The RJO issued an Order on November 4, 2014. The Order directed Complainant and Respondent to engage in a settlement conference before December 19, 2014. The Order further directed that the parties must either file a fully executed Consent Agreement and Final Order, submit a motion for an extension of time, or prepare for hearing by having Complainant submit its prehearing exchange by February 9, 2014. Respondent would afterward be required to reply with its own prehearing exchange by February 24, 2015.

5. Complainant and Respondent engaged in discussions on December 10, 2014, and Complainant subsequently filed a timely status report on December 18, 2014. After Complainant and Respondent continued to not make progress with regard to settlement, Complainant timely filed its prehearing exchange on February 9, 2015.

6. To date, Respondent has not filed its prehearing exchange.

7. The RJO issued an Order to Show Cause to Respondent on March 3, 2015, in which he ordered Respondent "to show good cause on or before March 13, 2015, as to why it failed its prehearing exchange by the required deadline and why [the RJO] should not issue a Default decision against Respondent."

8. Respondent failed to meet its deadline, and in response, the RJO issued an Initial Decision and Default Order on June 9, 2015, against Respondent pursuant to Section 22.17 of

EPA's Consolidated Rules of Practice, 40 C.F.R. Part 22. In the first page of his Initial Decision and Default Order, the RJO explained:

Not only has Respondent failed to adhere to the information exchange requirements, Respondent has failed to comply with both the November 4, 2014, Order and March 3, 2015, Order to Show Cause I issued in this matter. Therefore, based on the Rules of Practice, the record in this proceeding, and the reasons set forth below, this shall constitute my Initial Decision pursuant to 40 C.F.R. 22.17(c), and I find Respondent in default and order (1) assessment of the full amount of the \$7,000 penalty Complainant sought against Respondent and (2) satisfaction by Respondent of the Compliance Order set forth in the Administrative Complaint dated January 14, 2014.

9. Respondent filed a document entitled "Motion to Vacate Initial Decision and Default Order" on July 13, 2015, in which it alleges the RJO erred in his Findings of Facts. Respondent further asserts that the penalty will cause great harm to the business. Finally, Respondent states that it does not consent to the RJO's findings and asks that both the RJO's Initial Decision and Default Order as well as EPA's Administrative Order be closed immediately.

II. Respondent's Failure to File its Prehearing Exchange and Failure to Show Good Cause for its Failure to do so Justify the RJO's Default Order

10. Respondent exhibited a clear disregard for the compliance deadlines the Regional Judicial Officer set and thus has no legitimate justification for its request that the RJO vacate his Initial Decision and Default Order.

11. This administrative enforcement proceeding is governed by the procedures set forth in the revised Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits contained in 40 Code of Federal Regulations ("C.F.R.") part 22, including the Supplemental Rules for Administrative

Proceedings not Governed by the Administrative Procedures Act. (Initial Decision at 1).

Respondent's continued failure to follow these procedures led to the RJO's Initial Decision and Default Order and should likewise lead to the rejection of its motion to vacate the Initial Decision and Default Order.

12. Although the Environmental Appeals Board often prefers to resolve close default cases in favor of allowing adjudication on the merits, "it has not hesitated to affirm or enter default orders in cases where it is clear a default judgment is warranted." *In re Rocking BS Ranch, Inc.*, CWA Appeal No. 09-04, at 7 (EAB Apr. 21, 2010) (Final Decision and Order); *E.g.*, *In re Las Delicias Cmty.*, SDWA Appeal No. 08-07, slip op. at 8 n.7 (EAB Aug. 17, 2009), 14 E.A.D. _____. Failure to adhere to the procedural requirements set forth in 40 C.F.R Part 22 constitutes grounds for entry of a default judgment. *Rocking BS Ranch, Inc.*, at 8; *See also, e.g. In re Tri-County Builders Supply*, CWA Appeals No. 03-04, at 7 (May 24, 2004) (Order Dismissing Appeal) ("The filing requirements specified in 40 C.F.R. § 22.30 are not merely procedural niceties. Rather, they serve an important role in helping to bring repose and certainty to the administrative enforcement process."). Where a Respondent "has multiple opportunities to comply with the procedural requirements of [40 C.F.R. Part 22], and takes no action...until entry of a default judgment, a default order is proper given the Respondent's inattention to its responsibilities under [40 C.F.R. Part 22]." *Rocking BS Ranch, Inc.*, at 8; *See also, e.g. In re Rybond, Inc.*, 6 E.A.D. 614, 625-628 (EAB 1996).

13. The Environmental Appeals Board has acknowledged that it shows some lenience with respect to *pro se* petitioners. *Rocking BS Ranch, Inc.*, at 10; *See also Rybond*, 6 E.A.D. at

627 (citing *In re Envotech*, 6 E.A.D. 260, 268 (EAB 1996)) (“[T]he Board endeavors to construe petitions broadly, particularly when they are filed by persons unrepresented by legal counsel ***.”). Yet, while the Board affords *pro se* litigants some latitude, *pro se* litigants are not excused from compliance with the rules contained in 40 C.F.R Part 22. *Rocking BS Ranch, Inc.*, at 10-11 (citing *In re Jiffy Builders, Inc.*, 8 E.A.D. 315, 320-321 (EAB 1999)). The Environmental Appeals Board has said that it cannot excuse a Respondent’s abject failure to adhere to the requirements of the procedural rules of practice. *Rocking BS Ranch, Inc.*, at 11; e.g. *In re Pyramid Chem Co.*, 11 E.A.D. 657, 681-682 (EAB 2004) (“[T]he Board has made clear that it reserves its finite resources for those parties who are diligent enough to comply with EPA’s procedural rules.”); *Jiffy Builders, Inc.*, 8 E.A.D. at 320 (“The governing rules do not support the notion that a Presiding Officer must show inexhaustible patience in reckoning with a party’s inattentiveness; rather, they suggest the contrary—that default is an essential ingredient in the efficient administration of the adjudicatory process.”). Finally, the lack of willful intent to delay the proceedings on the part of Respondent does not excuse noncompliance with EPA’s procedural rules. *Rocking BS Ranch, Inc.*, at 11; see also *Pyramid Chem.*, 11 E.A.D. at 662; *Jiffy Builders*, 8 E.A.D. at 320 & n. 8.

14. In the present case, Respondent has abjectly failed to adhere to the requirements of EPA’s procedural rules. In particular, Respondent’s failure to submit its prehearing exchange is grounds for default. Section 22.17(a) of 40 C.F.R. provides:

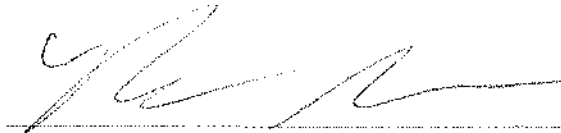
A party may be found to be in default: after motion, upon failure to file a timely answer to the complaint; upon failure to comply with the information exchange requirements of § 22.19(a) or an order of the Presiding Officer; or upon failure to appear at a conference or hearing. Default by respondent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

15. The RJO's November 4, 2014 Order required Respondent to file its prehearing Exchange by February 24, 2015, should the sides fail to reach a settlement. To date, Respondent has not filed its prehearing exchange. The RJO gave Respondent another chance to comply when he issued an Order to Show Cause to Respondent on March 3, 2015. To date, Respondent has likewise failed to show good cause for its failure to submit its prehearing exchange. Further, Respondent's Motion does not make any attempt to remedy or excuse these failures. Instead, Respondent offers a mere bald assertion that the RJO's Initial Decision and Default Order should be vacated. Respondent's continued failure to submit its prehearing exchange leads to the inescapable conclusion that Respondent has not made a good faith effort to comply.

16. Respondent's pattern of failing to not only to meet the procedural deadlines, but to submit any response whatsoever, indicates an abject failure on Respondent's part. The finite resources of both the RJO and Complainant are best reserved for those parties who attempt to follow the EPA's procedural rules. Accordingly, Complainant respectfully requests that the RJO reject Respondent's motion to vacate the RJO's Initial Decision and Default Order.

RESPECTFULLY SUBMITTED,

A handwritten signature in black ink, appearing to read 'Russell Murdock', is written over a horizontal dotted line.

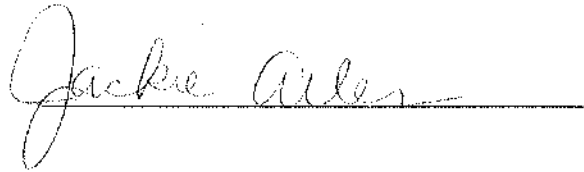
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CERTIFICATE OF SERVICE

I certify that the original of the foregoing COMPLAINANT'S RESPONSE TO RESPONDENT'S MOTION TO VACATE INITIAL DECISION AND DEFAULT ORDER was hand-delivered to and filed with the **Regional Hearing Clerk**, U.S. Environmental Protection Agency, Region 6, 1445 Ross Avenue, Dallas, Texas 75202-2733, and a true and correct copy was sent to the following on this 24 day of July, 2015, in the following manner:

VIA CERTIFIED FIRST CLASS U.S. MAIL:

Mr. Terrance L. Lewis
Page One Plus Wholesale, Inc.
P. O. Box 691335
Tulsa, OK 74169

A handwritten signature in cursive script that reads "Jackie Allen" is written over a solid horizontal line.