



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

**In the Matter of:** )  
 )  
**MUNICIPALITY OF RIO GRANDE,** ) **DOCKET NO. CWA-02-2009-3458**  
 )  
**Respondent.** )

**ORDER ON MOTION FOR REMEDIES**

On or about October 9, 2009, Complainant filed a Motion for Remedies (“Motion”). The Motion alleges that Respondent failed to timely file its Prehearing Exchange and that the Exchange it did file otherwise fails to meet the requirements of the Prehearing Order issued in this matter on July 16, 2009. Based thereon, Complainant requests entry of a Default Order or in the alternative that Respondent’s evidence be stricken. It further requests an extension of time to submit its Rebuttal Prehearing Exchange. To date, no response to the Motion has been received, but none is deemed required.

Upon consideration, for the reasons stated below, the Motion is hereby **DENIED IN PART** and **GRANTED IN PART**.

The Prehearing Order issued in this matter on July 16, 2009 required Respondent to file its Initial Prehearing Exchange on or before September 25, 2009. It further required that Respondent submit a *curriculum vita* or resume for each expert witness it intended to call at hearing and, in section 3 thereof, ordered Respondent to also submit the following as part of its Prehearing Exchange:

(A) a narrative statement, and a copy of any documents in support, explaining in detail the legal and/or factual basis for the denial of the allegation in Paragraph 8 of the Complaint that the Respondent owns and operates a Small Municipal Separate Storm Sewer System (MS4);

(B) a narrative statement, and a copy of any documents in support, explaining in detail the legal and/or factual basis for the denial of the allegation in Paragraph 10 of the Complaint that Respondent’s MS4 is located in an urbanized area of Rio Grande, Puerto Rico;

(C) if Respondent takes the position that Respondent is unable to pay the proposed penalty, a copy of any and all documents it intends to rely upon in support of such position; [and]

(D) if Respondent takes the position that the proposed penalty should be reduced or eliminated on and other grounds, a copy of any and all documents it intends to rely upon in support of such position; . . .

Additionally, it is observed that Section 22.5 of the Rules of Practice provides in pertinent part that:

(a) Filing of documents. (1) The original and one copy of each document . . . shall be filed with the Regional Hearing Clerk. . . . ***A document is filed when it is received by the appropriate Clerk. . . .***

\* \* \*

**(3) A certificate of service shall accompany each document filed or served in the proceeding.**

40 C.F.R. § 22.5(a)(1), (a)(3).

Furthermore, Section 22.17(a) of the Rules provides that:

[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.

40 C.F.R. § 22.17(a).

This Rule also states 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).

On October 6, 2009, the undersigned received from Respondent a document erroneously titled “Complainant’s [sic] Initial Prehearing Exchange.” The document bears a U.S. EPA “?EPD-DIRECTOR OFFICE” date stamp of September 25, 2009. The envelope containing the document evidences that it was sent by Respondent to the undersigned by certified mail on September 25, 2009.<sup>1</sup> No Certificate of Service accompanies the pleading. However, the Motion

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<sup>1</sup> The envelope containing Respondent’s filing was addressed to this Tribunal’s *Office address* at 1099 14<sup>th</sup> Street, N.W., at which only certain hand-delivered packages may be

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suggests that Complainant received this pleading in its offices on September 25, 2009.

In its filing, Respondent identified two expert witnesses for hearing, a Certified Public Accountant and a Professional Engineer, but failed to submit a curriculum vita or resume for either, and failed to respond in any way to the requests made in section 3 of the Prehearing Order. Thus, to this extent, and perhaps others, Respondent's Prehearing Exchange filing clearly violates the requirements of the Prehearing Order. Furthermore, such filing violated the applicable Rules in that the document was not timely filed with the Regional Hearing Clerk in that to be timely filed it had to be **received by** such Clerk *on or before September 25, 2009* (not mailed by that date), and no Certificate of Service was attached thereto.

While the Rules permit this Tribunal to grant a default or exclusion of evidence under these circumstances, such remedies 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 (8<sup>th</sup> Cir. 2001)(quoting *Fingerhut Corp. v. Ackra Direct Mktg. Corp.*, 86 F. 3d 852, 856 (8<sup>th</sup> 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 (8<sup>th</sup> 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 (5<sup>th</sup> 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).

Respondent *is* technically in default for its failure to strictly meet the September 25, 2009 filing deadline for its Prehearing Exchange, its failure to submit a Certificate of Service with its pleading, and its failure to fully respond to the Prehearing Order issued in this matter. However, Complainant will not suffer any substantive prejudice due to such failures on Respondent's part, particularly where, as here, Complainant apparently actually received the Prehearing Exchange by the due date, where Respondent will be ordered to supplement its Prehearing Exchange, and where Complainant will be provided with additional time to file its Rebuttal Prehearing 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). It does not appear that Respondent willfully violated the Rules or Prehearing Order, or that it acted with contumacious

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<sup>1</sup>(...continued)

received. *As indicated in the Prehearing Order, filings sent to the Tribunal by first class or certified mail must be addressed to the Agency's mail room located at 1200 Pennsylvania Ave., N.W., Washington, D.C. 20005.* Failure to do so will significantly delay receipt of filings by the Tribunal.

conduct or using any willful delaying tactics. Entry of a default order is therefore not warranted. **However, 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 a certificate of service with each document filed, showing that it timely mailed the Regional Hearing Clerk the original document and that EPA counsel and the undersigned each have been sent a copy.**

Accordingly, Complainant's Motion for Remedies is denied in part and granted in part as follows:

- a. Complainant's request for default or exclusion of evidence is hereby **DENIED**;
- b. On or before **November 5, 2009**, Respondent shall submit a Supplemental Initial Prehearing Exchange which shall fully and completely respond to the Prehearing Order issued in this matter on July 16, 2009, and shall include, *inter alia*, the *curriculum vita* or resume of each expert witness it intends to call at hearing and a response to each of the inquires put to it by this Tribunal in section 3 of the Prehearing Order.
- c. Complainant's request for an extension of time to file its Rebuttal Prehearing Exchange is hereby **GRANTED**, and Complainant shall have until **November 20, 2009**, to file its Rebuttal Prehearing Exchange;
- d. In the event that Respondent fails to fully and timely file its Supplemental Prehearing Exchange, Complainant shall be permitted to renew its Motion for Default and such default may be granted without further prior notice to Respondent.

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Susan L. Biro  
Chief Administrative Law Judge

Dated: October 19, 2009  
Washington, D.C.