



UNITED STATES
 ENVIRONMENTAL PROTECTION AGENCY
 REGION 6
 DALLAS, TEXAS



IN THE MATTER OF:)
)
)
 RASMUSSEN GROUP, INC. d/b/a)
 CAPITAL STEEL AND IRON COMPANY) DOCKET NO. EPCRA-06-2003-0502
 OKLAHOMA CITY, OKLAHOMA)
)
 RESPONDENT)
)

ORDER SETTING ASIDE DEFAULT ORDER AND INITIAL DECISION

On April 30, 2003, this Presiding Officer issued a Default Order and Initial Decision which dismissed the Complaint against the Respondent with prejudice. The basis for the Decision was the Complainant's failure to respond to the Presiding Officer's April 9, 2003 Order to Show Cause. On May 7, 2003, the Complainant filed a motion to set aside the default order and initial decision. In this motion, the Complainant admitted, *inter alia*, the following:

1. Although service of the Complaint occurred on October 21, 2002, the return receipt green card was not filed until April 13, 2003, in response to the Order to Show Cause.
2. "An informal answer" was sent to the Complainant on December 31, 2002, but was not filed with the Regional Hearing Clerk.¹

¹The Complainant contends that this document constitutes an answer. Whether the response actually meets the
 (continued...)

3. The Complainant did not file a response to the Order to Show Cause.

4. A Consent Agreement and Final Order (CAFO) was in concurrence prior to the response date, but was not signed by the Regional Administrator until May 2, 2003.

5. The Complainant received the signed CAFO from Regional Administrator's office on May 6, 2003. The Complainant filed the CAFO with the Regional Hearing Clerk on May 6, 2003, but has not mailed the CAFO to the Respondent.

The standard for setting aside a default order is set forth in 40 C.F.R. § 22.17(c), which provides that "[f]or good cause shown, a Presiding Officer may set aside a default order."

In evaluating a motion to set aside a default order, one must take

"the totality of the circumstances presented" into consideration. (citations omitted). Setting aside a default order is essentially a form of equitable relief. It is appropriate to examine whether fairness and a balance of the equities dictate that a default order be set aside (citations omitted).

In Re Rybond, Inc., 6 E.A.D. 614, 624 (EAB 1996).

¹(...continued)
requirements of 40 C.F.R. § 22.15 is for a Presiding Officer to make. Although the Presiding Officer declines to make such a determination at this time, he does note that the document references acceptance of the penalty proposed in the Complaint. Thus, it is also possible that the Respondent did not intend this document to constitute an answer. The December 31, 2002 document also references other correspondence with the Complainant. These documents were not filed with the Regional Hearing Clerk.

The Complainant admits to several failures: (1) failing to timely file the return receipt green card; (2) failing to file the December 21, 2002 document with the Regional Hearing Clerk; and (3) failing to file a response to the Order to Show Cause. However, the Complainant contends that the Respondent did file an answer, and that it responded to the Order in what is assumed was an adequate matter.

First, the Complainant's contends that because the Respondent did answer the Complaint,² this somehow excuses its failure to respond to the Order to Show Cause. The Presiding Officer fails to understand how this item is relevant. Second, the only excuse the Complainant gave for failing to file a response is that the CAFO was in concurrence before the response was due. Apparently, the Complainant believed that the Regional Administrator would sign the Order before the deadline passed. However, this did not occur. When it appeared to the Complainant that the CAFO would not be signed by the response deadline, it would have been very easy for the Complainant to file a short response with the Regional Hearing Clerk stating that the CAFO was in concurrence. The Complainant failed to explain why it failed to file such a response.

Further compounding the Complainant's situation is the fact that the Order to Show Cause was also served on a Branch Chief in the Office of Regional Counsel (ORC), and still no response was filed.

²See footnote 1, *supra*.

After a similar incident a couple of years ago, this Presiding Officer was asked to include the appropriate ORC Branch Chief on all certificates of service so that the branch chiefs could prevent similar situations from occurring. It is also troubling that despite the fact that the Complaint was dismissed with prejudice prior to the CAFO being signed by the Regional Administrator, the Complainant went ahead and filed the CAFO with the Regional Hearing Clerk anyway.

Therefore, the Presiding Officer believes that the Complainant's excuses by themselves, considering the totality of the circumstances, are not sufficient to meet the good cause standard. However, the Respondent failed to timely file a response to the Complainant's motion to set aside the default order and initial decision. 40 C.F.R. § 22.16(b) provides that

[a] party's response to any written motion must be filed within 15 days after service of any such motion . . . Any party who fails to respond within the designated period waives any objection to the granting of the motion.

Thus, because the Respondent failed to respond to the motion, it has waived any objection to granting the motion. Therefore, it is hereby **ORDERED** that the Default Order and Initial Decision dated April 30, 2003 is set aside.

Finally, the CAFO requires that a civil penalty be paid within 30 days of the effective date of the CAFO and that the CAFO is effective upon filing with the Regional Hearing Clerk. However,

because the Complaint was dismissed prior to the the CAFO being filed, the previous effective date of the CAFO is no longer relevant. Therefore, the Complainant is hereby **ORDERED**, pursuant to the authority granted to the Presiding Officer in 40 C.F.R. § 22.4(c)(10), to refile the CAFO with the Regional Hearing Clerk with a new certificate of service. It is further **ORDERED** the effective date of the CAFO shall be the date that the CAFO is refiled.

Dated this 29th day of May, 2003.

_____/s/_____
Evan L. Pearson
Regional Judicial Officer

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of May, 2003, I served true and correct copies of the foregoing Order Setting Aside Default Order and Initial Decision on the following in the manner indicated below:

CERTIFIED MAIL - RETURN RECEIPT REQUESTED _____

Wayne Nyberg, President
Capitol Steel and Iron Company
5500 N.E. 22nd Street
Des Moines, Iowa 50313

CERTIFIED MAIL - RETURN RECEIPT REQUESTED _____

Clerk of the Environmental
Appeals Board (1103B)
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-0001

CERTIFIED MAIL - RETURN RECEIPT REQUESTED _____

J.P. Suarez
Assistant Administrator
Office of Enforcement and Compliance
Assurance (2201A)
Ariel Rios Building
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

INTEROFFICE MAIL

Stan Lancaster
EPCRA 313 Enforcement Officer
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Richard Bartley, Chief
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Lorena S. Vaughn
Regional Hearing Clerk