



UNITED STATES
 ENVIRONMENTAL PROTECTION AGENCY
 REGION 7
 DENVER, CO 80202



IN THE MATTER OF:)
)
 KEVINS'S AUTO REPAIR &)
 RESTORATION)
)
) DOCKET NO. UIC-AO-90-07
 RESPONDENTS)
)
)

RULING AND ORDER

The case is before the undersigned on Complainant's motion objecting to Respondent's request for a hearing, Complainant's request for a recommendation to issue a proposed order, and the Respondent's Motion to Set Aside Order. For the reasons set forth below, the motions are denied.

I. FACTUAL BACKGROUND

On August 28, 1990, the Complainant, the United States Environmental Protection Agency, Region VIII (hereinafter "EPA or "Agency"), issued a Proposed Administrative Penalty Order to the Respondent, Kevin's Auto Repair and Restoration, for alleged violations of the Safe Drinking Water Act, as amended (hereinafter "SDWA" or "the Act"), and the underground injection regulations (UIC) promulgated pursuant thereto.⁽¹⁾

The Order proposed to assess a civil penalty in the amount of \$7000 for alleged violations of the Act. The Respondent was also ordered to answer and submit a Class V Disposal system questionnaire within fifteen (15) days of the effective date of the proposed order (emphasis ours).

The U.S. Marshall personally served the Respondent with the cover letter and proposed administrative order on September 6, 1990. The Respondent had 30 days from this date in which to request a hearing, or by October 8, 1990.⁽²⁾

On October 29, 1990, the Respondent's counsel filed a Motion to Set Aside Order, which included a request for a hearing.

Attached thereto was a copy of a letter to Chet Pauls, who is presently the EPA Region VIII, UIC Program and Enforcement Section Chief, from the Respondent dated September 18, 1990, which appeared to be a partial attempt to comply with the August 28, 1990, Order.⁽³⁾ This letter was sent well within the 30 days of receipt of the proposed EPA Order by the Respondent.

On December 10, 1990, the EPA filed an "Objection to Request for Hearing and Request for Recommendation to Issue Proposed Order". The matter was subsequently submitted to the Regional Presiding Officer for determination.

II. DISCUSSION

The issue before the Presiding Officer is whether "good cause" is shown to justify waiving the requirement that the respondent submit a request for a hearing within 30 days after receiving notice thereof.⁽⁴⁾

Competing interests must be considered in deciding whether the 30-day time limit should be extended. On the one hand, the Respondent must be afforded due process. This includes written notice of the Administrator's proposal to issue an order and the opportunity to request a hearing.⁽⁵⁾ Substantive due process requires that the notice clearly informs the Respondent of the statutory or regulatory requirements, especially where potential penalties are involved for non-compliance (emphasis ours).

On the other hand, there is a need for finality of the Agency's actions. The Complainant's motion noted that "[the] legislative history of the amendments to the Safe Drinking Water Act, establishes that an order becomes final and nonappealable 30 days after its issuance."⁽⁶⁾

Administrative actions under Section 1423(c) of the SDWA, 42 U.S.C. 300h-2(c), are governed by procedures set forth in EPA's UIC Administrative Order Issuance Procedures Guidance (hereinafter "the Guidance") dated November 28, 1986.

The Guidance, under Opportunity for Hearing, 144.04 states:

"(b) The respondent waives the right to a hearing if the respondent does not submit the request [for a hearing] to the official designated in the notice of the proposed order within 30 days after receiving notice. **For good cause shown the Presiding Office may grant a hearing if the respondent submits a late request** (emphasis ours).

In its motion, the Agency correctly states the general rule - that deadlines for administrative proceedings are treated as statutes of limitations, which may be tolled for good cause shown. See Arzanipour v. Immigration and Naturalization Service, 866 F.2d 743 (5th Cir. 1989). However, good cause is an elastic concept,⁽⁷⁾ which entitles the respondent to the application of the broad equitable principles of justice and good conscience. See Alonzo v. Department of the Air Force, 4 MSPB 262, 4 M.S.P.R.

180, 184 (1980).

The Guidance does not set forth any specific criteria for determining when "good cause" has been shown for waiving the time limitation for filing a request for a hearing. In Alonzo, a Federal employee challenged dismissal of his appeal, as not timely filed, under a regulation which provided that a presiding official may waive a Board regulation in an individual case upon a showing of "good cause". Alonzo articulated certain factors that the presiding official should consider in determining whether sufficient basis exists to warrant a waiver of the time limitation. These factors include, but are not limited to: the length of delay; whether appellant was notified of the time limit or was otherwise aware of it; the existence of circumstances beyond the control of the appellant which affected his ability to comply with the time limits; the degree to which negligence by the appellant has been shown to be present or absent; circumstances which show that any neglect involved is excusable neglect; a showing of unavoidable casualty or misfortune; and the extent and nature of the prejudice to the agency which would result from waiver of the time limit. Id. 4 M.S.P.B. 263; 4 M.S.P.R. 180.

In applying these factors to the instant case, the Agency in its proposed administrative penalty Order (p.5) ordered "The Respondent [to] answer and submit the Class V disposal system questionnaire within fifteen (15) days of the effective date of the proposed order" (emphasis ours). However, the transmittal letter that noticed the proposed order merely stated [the Order] requires compliance with EPA's request for information within 15 days. The order defines the effective date as 30 days from the date of issuance, August 28, 1990, unless an appeal is taken pursuant to Section 1423(c)(6) of the Act. Official notice is taken that a request for a hearing also tolls the effective date of the order. It is therefore apparent that the Respondent would not be able to determine the due date of the information request from the face of the subject notice or order, since the effective date of the Order depends on other factors, as noted above.

In my judgment, the above constitutes a sufficient showing of the existence of circumstance beyond the control of the respondent which affected his ability to comply with the time limits of the order for answering and submitting the questionnaire.

In Pfaehler v. Merit Systems Protection Board, 783 F. 2d 187, the court found that a discharged Federal employee, who obtained reinstatement, showed "good cause" for the Board to waive a regulatory requirement that a request for attorney fees be made within ten days of the "final date of the decision," where she was proceeding pro se. The court noted in that case that "...the

agency's motion for a stay of the Board's order could well lead a pro se litigant to believe that the legal proceedings were not finally ended...." It further stated that the purpose of the regulation cannot be to trap the unsophisticated, or to provide an excuse for denial of meritorious cases". Id. 783 F.2d at 189.

In the initial stages of this action, the Respondent was acting pro se. It is understandable that he may have been misled by the order for a request for information to be answered within 15 days of the Order's effective date, where this date could not be immediately ascertained with certainty, from the notice or Order.

Further, the record clearly shows that the Respondent made an attempt to comply, by his telephone conversations with Tom Pike and Linda Kato on September 18, 1990. These conversations and the letter to Chet Pauls on the same date were well within the 30 day deadline. In my opinion this demonstrates a good faith effort to comply which indicates a lack of negligence by the Respondent.

A final factor to be considered in determining a showing of "good cause" is whether the agency is adversely affected, Alonzo 4 M.S.P.R. 180 (1980). The Agency does not allege nor does the record reflect that it was adversely affected by a 21 day delay by the Respondent in filing a request for a hearing.

III. CONCLUSION

Given the apparent ambiguities in the notice letter and the Order, which could have misled the Respondent, the lack of negligence, and no demonstration that the Agency was adversely affected, the interest of justice and good conscience requires a finding of "good cause" to waive the 30 day time limit for the Respondent to file a request for a hearing.

WHEREFORE, for the above reasons the Agency's "Objection to Request for Hearing and Request for Recommendation to Issue Proposed Order" is denied, and the Respondent's "Motion to Set Aside Order" is denied, and an **ORDER** is hereby entered granting the Respondent's request for a hearing.

Alfred C. Smith

Regional Presiding Officer

Dated: _____.

KEVIN'S AUTO REPAIR & RESTORATION
Respondent

CERTIFICATE OF SERVICE

I certify that the foregoing **RULING AND ORDER** was sent this day in the following manner to the addressees below:

Original received by:

Joanne Mckinstry
Regional Hearing Clerk
U.S. Environmental Protection Agency
Region 8
999 18th Street, Suite 500
Denver, Colorado 80202

Copy hand-delivered to:

Linda Kato, Esquire
Office of Regional Counsel
U.S. Environmental
Protection Agency
Region 8
999 18th Street, Suite 500
Denver, Colorado 80202

Copy mailed to:

Bruce L Hussey
Attorney at Law
P.O. Box 7995
Missoula, Montana 59807

Date: _____

Joanne Mckinstry

Regional Hearing Clerk

1. . See 40 C.F.R. Part 144.
2. . Since the 30th day fell on Saturday, the Respondent is given until the first subsequent working day to request a hearing.
3. . Administrative Record, Respondent's Motion to Set Aside, Exhibit B.
4. . JIC Administrative Order Issuance Procedures Guidance, November 28, 1986, 144.04.
5. . See 42 U.S.C. 300h-2(c)(3)(A), Section 1423(c)(3)(A) of the SDWA.
6. . See 1986 U.S. Code Cong. & Ad. News, Vol. 4, p. 1583.
7. . See Dinko v. Wall, 531 F. 2d 68 at 75 (2nd Cir. 1976).