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BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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IN THE MATTER OF: :  
LAKEVIEW COAL COMPANY, : Docket No. CWA-III-179  
Respondent : :

ORDER TO SHOW CAUSE

This matter comes before the Regional Judicial Officer "for further appropriate action" on an ORDER REMANDING CASE TO REGIONAL JUDICIAL OFFICER, issued June 2, 1997, by Chief Administrative Law Judge Susan L. Biro. Because Complainant has failed to comply with Judge Biro's March 20, 1997 ORDER TO SUBMIT PROOF OF SERVICE, Complainant is subject to the Default Order Provisions of 40 C.F.R. § 22.17. Complainant will be allowed twenty (20) days to show cause why a Default Order, dismissing the Administrative Complaint with prejudice, should not be issued by the Regional Judicial Officer.

BACKGROUND

The record shows that the Administrative Complaint, signed and filed on September 30, 1996, was transmitted by an undated letter addressed to: John A. Laurita, Vice President, Lakeview Coal Company, 130 Fayette Street, Morgantown, West Virginia, 26505. Complainant is apparently unable to prove service of the Administrative Complaint at this address.

A letter dated October 31, 1996, submitted by Robert G. McCluskey of Jackson & Kelly, Attorneys at Law, on behalf of one Patrick Rundle, responded to the statutorily-required public notice soliciting comments on the proposed administrative penalty assessment, which notice appeared in the Dominion-Post in Morgantown, West Virginia, on October 18, 1996. See 33 U.S.C. § 309(g)(4)(A). On November 27, 1996, the Regional Hearing Clerk transmitted copies of the Administrative Complaint and Mr. McCluskey's letter, which she characterized as Respondent's Answer and Request for Hearing, to the-then Chief Administrative Law Judge for assignment to a Presiding Officer. Judge Biros was assigned as the Presiding Officer on February 5, 1997.

In Judge Biro's INITIAL ORDER of February 10, 1997, Mr. McCluskey's letter was characterized as "responding to the Complaint." Judge Biro explicitly determined in her INITIAL ORDER that the letter failed to constitute an Answer under the applicable rules. Judge Biro ordered Respondent to file a proper Answer on or before March 5, 1997, or face the possibility of a default. No Answer was filed by March 5.

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On March 14, 1997, Complainant filed a Status Report indicating it had learned of a new address for the Respondent, and stated: "On March 13, 1997, Complainant re-served the Complaint at Respondent's current address by mailing a copy of the Complaint, certified mail, return receipt requested." (Emphasis added). Complainant failed to note 40 C.F.R. § 22.07(c): "Service of the complaint is complete when the return receipt is signed." Complainant apparently is still unable to prove service of the Administrative Complaint.

Taking Complainant's representation as to re-service of the Administrative Complaint literally, Judge Biro ordered Complainant to submit proof of service in accordance with 40 C.F.R. § 22.05(b)(v), by Order dated March 20, 1997. Complainant, being unable to prove service, cannot comply with Judge Biro's March 20 ORDER TO SUBMIT PROOF OF SERVICE.

The Procedural Rules

Under 40 C.F.R. § 22.17(a), a party may be found to be in default sua sponte upon failure to comply with a prehearing order of the Presiding Officer. Judge Biro was the Presiding Officer on March 20, when she issued her ORDER TO SUBMIT PROOF OF SERVICE. While the Consolidated Rules do not expressly provide for the Remand to the Regional Judicial Officer, they do not prohibit the Remand either. The Remand empowered the Regional Judicial Officer to take "further appropriate action," and it is my determination that this ORDER TO SHOW CAUSE is appropriate.

An alleged defaulting party shall have twenty (20) days from service to reply to this ORDER TO SHOW CAUSE. 40 C.F.R. § 22.17(a). Absent a showing of good cause for Complainant's failure to comply with Judge Biro's March 20 ORDER, I will sua sponte find Complainant to be in default. The last sentence in 40 C.F.R. § 22.17(a) reads: "Default by the complainant shall result in the dismissal of the complaint with prejudice."

Since there has been no Answer filed, Complainant may elect to withdraw the Administrative Complaint without prejudice under 40 C.F.R. § 22.14(e), but, given the circumstances of this case, such withdrawal must be filed within twenty (20) days of service of this ORDER. If the Administrative Complaint is not withdrawn or good cause is not shown for Complainant's failure to comply with Judge Biro's March 20 ORDER within twenty (20) days of this ORDER, I will find Complainant to be in default and dismiss the Administrative Complaint with prejudice.

SO ORDERED.

  
BENJAMIN KALKSTEIN  
Regional Judicial Officer

Dated: June 14, 1997