



UNITED STATES
 ENVIRONMENTAL PROTECTION AGENCY
 REGION 3
 PHILADELPHIA, PENNSYLVANIA



IN THE MATTER OF:)	
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)	
Gulfstream Development Corp.)	DOCKET NO. CWA-III-070
Dewey Beach, DE 19930)	
)	
RESPONDENTS)	
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)	

ORDER DENYING MOTION FOR RECONSIDERATION

Gulfstream Development Corporation, through counsel, has moved for reconsideration of the Presiding Officer's June 15, 1992 Order Directing Entry of Respondent's Default As To Liability. Counsel for Complainant submitted an Answer opposing this Motion. For the reasons set forth below, the **Motion is DENIED.**

Counsel for Gulfstream asserts that it is unclear from the record whether Respondent's response to the administrative complaint was timely filed. (Motion, paragraph 2). Counsel correctly points out that under proposed 40 C.F.R. § 28.7(c) (the Consolidated Rules governing this proceeding) a participant in a proceeding under these Consolidated Rules shall be deemed to have complied with a deadline if the appropriate document is posted by first class mail (or any messengered service that is no less speedy and reliable) by the applicable deadline. However, it is not true that "it is unclear from the record when such posting took place." (Motion, paragraph 2). The record shows that Respondent's transmittal to the Regional Hearing Clerk was posted by Federal Express on May 28, 1992, two days after the conceded deadline of May 26, 1992. (Answer, Attachment A). The Hearing Clerk prudently filed the Recipient's Copy of the Federal Express Airbill with the request for hearing.

If there had been any uncertainty as to that point before the Presiding Officer issued the Order Directing Entry Of Respondent's Default As To Liability, examination of Exhibit B, attached to the Motion, would certainly have eliminated that uncertainty. Exhibit B, a copy of Respondent's response to the

administrative complaint, is dated May 29, 1992, three days after the deadline for filing and one day after the Federal Express package containing the request for hearing was posted.

Accordingly, the record is quite clear that Respondent's response was not filed timely.

Counsel for Respondent correctly observed that the Presiding Officer was not served with Respondent's response, which purports to deny factual and legal allegations posed in the administrative complaint. (Motion, paragraph 3). As noted above, this document was dated May 29, 1992, was not included in the transmittal to the Regional Hearing Clerk, and therefore was not in the record when the Presiding Officer issued the Order Directing Entry of Respondent's Default As To Liability.

Counsel for Respondent next asserts that his client was inadequately informed of the possible consequences of failing to respond to the administrative complaint by the applicable deadline, that Respondent was unrepresented at the time, and that Complainant may have unintentionally misled Respondent regarding the critical nature of the response. (Motion, paragraph 4). The language contained in the administrative complaint itself and in Complainant's letter transmitting the administrative complaint (quoted in Complainant's Answer to this Motion) and in the Consolidated Rules enclosed with the administrative complaint are more than sufficient to put the Respondent on notice of the potential consequences of failure to file a timely, legally sufficient response. Moreover, the record shows that Respondent was more than likely quite aware of the deadline issue, in that its transmittal letter to Complainant's counsel was dated May 13, 1992, and its letter to the Regional Hearing Clerk was dated May 5, 1992. The record shows these letters were not posted until May 28, 1992.

I am not persuaded that Respondent's choice to forego legal representation until the filing of this Motion should in any way affect the entry of Respondent's default. As observed above, the record shows Respondent was acting consistent with at least some awareness of the deadline issue without such representation, and counsel has not suggested how legal representation would have made any difference. Indeed, by directing the Presiding Officer's attention for the first time to Respondent's response, dated May 29, 1992, counsel has effectively eliminated any possible uncertainty about the untimeliness of that response while suggesting that the record was unclear.

I have much greater concern with the possibility that EPA personnel may have in any way misled Respondent with regard to the critical nature of the response to the administrative complaint. If the record showed any support for this possibility,

I would be inclined to require a full explanation of the matter on the record. However, the mere suggestion of such a possibility set forth in the Motion is not, in my view, sufficient cause to develop the record of this proceeding with evidence regarding discussions between Respondent and EPA personnel about a separate enforcement action. While the administrative compliance order discussed in counsel for Complainant's Answer to this Motion may relate factually to the sites involved in this proceeding, there are very different procedures that govern the two actions, as counsel for Complainant correctly observed. The contact persons on the two actions were different, counsel for Complainant being the contact person for this case. Bill Hoffman, Region III's Wetlands Enforcement Coordinator, was the contact person for the administrative compliance order, but his name is not mentioned in the administrative complaint or in the text of the transmittal letter. (His name is included in the list of copy recipients).

Most importantly, Respondent's deadline for responding to the administrative compliance order passed well before the thirty day deadline for response to the administrative complaint, and apparently, before Respondent began preparing the response to that complaint (Respondent's May 5, 1992 letter to the regional Hearing Clerk being the earliest indication in the record of Respondent's action on the administrative complaint). Thus, I am satisfied that the record provides no support for the suggestion that Complainant may have misled Respondent regarding the critical nature of the response to the administrative complaint.

Counsel for Respondent concluded his Motion for Reconsideration with an assertion that Respondent has good faith objections to raise to the penalty assessment, and that it would be unjust to deny Respondent an opportunity to raise those objections under circumstances that involve substantial uncertainties with respect to whether or not the Consolidated Rules have been followed in all respects. (Motion, paragraph 5). While I might agree that it could be manifestly unjust for EPA to deny Respondent a reasonable opportunity to be heard and to present evidence before assessing a penalty, I find that there are here no "substantial uncertainties" regarding compliance with the Consolidated Rules. In accordance with the Consolidated Rules, Complainant has afforded Respondent with its reasonable opportunity to be heard and to present evidence, and Respondent has waived that opportunity.

The Consolidated Rules § 28.20(e) very clearly states that Respondent's failure to make a timely response means that Respondent has waived its opportunity to appear in the action for any purpose. In the preamble to Proposed 40 C.F.R. § 28.20(e), EPA explained that this waiver included receiving notice of further proceedings or opposing the arguments of Agency counsel in any default penalty proceeding under § 28.21. See 56 Fed. Reg.

30,012 (July 1, 1991). The fact that counsel for Complainant has chosen to provide Respondent with a copy of her written penalty argument, and Complainant's commitment to submitting Respondent's submissions through June 25, 1992 as an attachment to additional written penalty argument are truly commendable profession courtesies, but I do not regard them either as a form of concession that Complainant has somehow cut Respondent's rights off or as an oblique commentary on the rigor of the Consolidated Rules. Respondent's failure to respond in accordance with the Consolidated Rules, not EPA action of any sort, is what now precludes Respondent's further participation in this action.

MOTION DENIED.

Date: 6/30/92 _____/s/_____
BENJAMIN KALKSTEIN Presiding Officer