UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
	)	
LYON COUNTY LANDFILL,	)	**DOCKET NO. 5-CAA-96-011**
	)	
	)	
RESPONDENT	)	

ORDER DENYING COMPLAINANT'S MOTION TO STRIKE

ANSWER AND FOR DEFAULT ORDER

This case arises under Section 113(d)(1) of the Clean Air Act (hereinafter "CAA"), 42 U.S.C. § 7413(d)(1). The United States Environmental Protection Agency (hereinafter "Complainant" or "EPA"), by motion filed July 31, 1997, moves to strike the Answer of Respondent Lyon County Landfill (hereinafter "Respondent") and for default order. For the reasons expressed herein, the motion will be denied as to both elements.

Procedural History

The director of the Air and Radiation Division of the EPA for Region V commenced this proceeding by filing and serving an administrative Complaint and Notice of Opportunity for Hearing, dated August 13, 1996, against the Respondent. The Complaint alleges that the Respondent is the owner and operator of the Lyon County Landfill, located at Rural Route #1, Lynd, Minnesota. The Complaint charges the Respondent with six (6) violations of the CAA's emission standards for hazardous air pollutants and the implementing regulation's emission standards for asbestos ("National Emission Standard for Asbestos," known as "NESHAP"). These alleged violations arise under Section 112 of the CAA, 42 U.S.C. § 7412, and the regulations promulgated thereunder at 40 C.F.R. Part 61, Subpart M. Pursuant to the

provisions at Section 113(d) of the CAA, the Complaint seeks the assessment of a civil administrative penalty in the amount of $58,000 against the Respondent for the alleged violations.

The Complaint informed the Respondent of its right to request a hearing and/or a settlement conference and states that a copy of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits (hereinafter "Rules of Practice"), 40 C.F.R. §§ 22.01 et seq. was enclosed with the transmittal of the Complaint.

The file reflects that the aforementioned Complaint dated August 13, 1996, was filed with the Regional Hearing Clerk on August 14, 1996, and was sent to the Respondent by certified mail on August 14, 1996.(1) See Sections 22.05(b), 22.07(c) of the Rules of Practice (service of the Complaint is complete when the return receipt is signed). On September 17, 1996, the Regional Judicial Officer, Regina M. Kossek, entered an order granting the Respondent's request for an extension of time to file an Answer to the Complaint. Respondent's Opposition to Motion to Strike Answer and For Default Order at Exhibit 1. See Section 22.15(c) of the Rules of Practice. The order granted the Respondent until October 25, 1996, to file its Answer.

According to counsel for the Complainant, the Respondent served an Answer, Request for Hearing, and Request for Independent Testing (hereinafter "Answer") dated October 24, 1996, on the Complainant by first class mail and the Answer was received by the Respondent on October 29, 1996.(2) Motion to Strike Answer and for Default Order at ¶ 5. See Sections 22.05(b)(2), 22.07(c) of the Rules of Practice (service is complete upon mailing). According to the records of the Regional Hearing Clerk, an Answer in this matter was first received by the Clerk when the Respondent faxed (3) an Answer to the Clerk on April 29, 1997.(4)

On February 5, 1997, the Respondent filed a Motion to Compel Discovery and served a copy of this motion on the Complainant. The Motion to Compel Discovery is addressed to "Regina Kossek, Regional Presiding Officer, Office of Regional Counsel, (C29A)" and the cover letter accompanying the Motion is addressed to the Regional Hearing Clerk.(5) There is no certificate of service as to the Regional Hearing Clerk in the file before me but the motion was date stamped as filed with the Regional Hearing Clerk on February 5, 1997. In support of this motion, Respondent's counsel submitted her own affidavit in which she declares that the Respondent's Answer in this matter was filed on or about October 23, 1996. Motion to Compel Discovery at ¶ 8.

In response to the Motion to Compel Discovery, the Complainant filed and served an Opposition to Motion to Compel Discovery on February 13, 1997. The certificate of service accompanying the Complainant's Opposition states that the Opposition "was filed with the Regional Hearing Clerk, and that a true and accurate copies were caused to be hand delivered to: Regina Kossek Regional Presiding Officer."[(6)] Neither the filed Motion to Compel Discovery nor the filed Opposition was received by the undersigned until July 17, 1997, and after the undersigned requested the documents to be forwarded by the Regional Hearing Clerk. See Sections 22.05(a) (2) and (3) of the Rules of Practice.

As noted above, on April 29, 1997, the Respondent faxed an Answer, Request for Hearing, and Request for Independent Testing dated October 24, 1996, to the Regional Hearing Clerk.[(7)] This Answer included a certificate of service and was accompanied by an affidavit of service both dated October 24, 1996, and signed by the Respondent's attorney, which state that the Answer was served on the Regional Hearing Clerk and the Complainant, respectively, on that date by first class mail.

On May 28, 1997, the Chief Administrative Law Judge designated the undersigned to preside in this matter. On June 4, 1997, the undersigned entered a Prehearing Order that directed the filing of the prehearing exchange by the parties.

In a letter dated July 1, 1997, the Respondent inquired with the undersigned as to the status of its request for independent testing contained in its filed Answer and its Motion to Compel Discovery. A copy of the July 1, 1997, letter was sent to the Complainant. As noted above, the Respondent's Motion to Compel Discovery filed with the Regional Hearing Clerk on February 5, 1997, and the Complainant's Opposition filed with the Regional Hearing Clerk on February 13, 1997, were not received by the undersigned until July 17, 1997, after the undersigned requested the Regional Hearing Clerk to forward these documents.

In an order entered on July 18, 1997, the undersigned denied the Respondent's Motion to Compel Discovery. In this order, the undersigned noted that the Answer in the file is dated October 24, 1996, but it was not date stamped as filed with the Regional Hearing Clerk until April 29, 1997. Order Denying Respondent's Motion to Compel Discovery at fn. 1.

Subsequent to the entry of the undersigned's Order Denying Respondent's Motion to Compel Discovery on July 18, 1997, the

undersigned received from the Respondent on July 22, 1997, a photocopy of the Respondent's Response to the Complainant's Opposition to the Motion to Compel Discovery. The Respondent explained that this Response was being submitted in order to ensure that the undersigned's file was complete. The Respondent's Response was dated February 27, 1997, and the certificate of service accompanying the Response, which was not completed or signed, showed service only on the Complainant. A cover letter accompanying the Response was addressed to "Regina Kossek Regional Presiding Officer."[(8)] There is no proof in the file before me that the Respondent's Response was filed with the Regional Hearing Clerk.

On July 31, 1997, the Complainant concomitantly filed a Motion for Extension of Prehearing Exchange and a Motion to Strike Answer and for Default Order with a proposed Default Order. The later motion moves to strike the Answer and for the entry of a default order against the Respondent, leaving the issue of damages to be briefed by the parties and determined after review of the briefs. This motion is sought on the basis that the Respondent allegedly violated the Rules of Practice by filing an Answer with the Regional Hearing Clerk in an untimely manner, without serving a copy of the "Late Answer"[(9)] on the Complainant, and improperly faxing the "Late Answer" to the Regional Hearing Clerk. The motion also is based on claims of prejudice to the Complainant due to the late filing of the Answer, and on allegations that the Respondent has failed to cooperate in settlement negotiations. The specific examples of prejudice cited by the Complainant are "1) losing approximately six or more months of time in proceeding with this case toward eventual final assessment of a civil penalty against Respondent for the violations at issue; 2) not being afforded an opportunity to timely review the Late Answer; and 3) not being afforded an opportunity to be aware of and respond to the late filing."

On August 28, 1997, the undersigned received the Respondent's Opposition to Motion to Strike Answer and for Default Order (hereinafter "Respondent's Opposition") with a supporting Memorandum dated August 25, 1997.[(10)] The Respondent's Opposition relies primarily on three arguments. First, the Respondent alleges that it mailed its Answer to the Regional Hearing Clerk on October 24, 1996, the same time at which it mailed its Answer to the Complainant. Based on this assertion, the Respondent argues that the Rules of Practice state that service of all documents other than the complaint is complete upon mailing and that federal case law suggests that non-receipt of an answer is

a most inappropriate ground for default. Second, the Respondent states that the Complainant's allegation that the Respondent attempted to file a late Answer and then also failed to serve this late Answer on the Complainant is "blatantly false." In this regard, the Respondent maintains that it faxed a copy of its original Answer, Request for Hearing, and Request for Independent Testing to the Regional Hearing Clerk on April 29, 1997, upon the request of the Regional Hearing Clerk. Third, the Respondent disputes the Complainant's claim of material prejudice by arguing that the Complainant received all pleadings in a timely manner and that both parties have steadily progressed toward resolution of the dispute, whether by settlement or hearing. The Respondent therefore argues that the Complainant's Motion to Strike Answer and for Default Order has no basis in fact or law.

Discussion

The issues before me are whether the Respondent's Answer should be stricken as an untimely filed Answer resulting in the finding of default by the Respondent and the entry of a default order against the Respondent with a later penalty assessment. As noted above, the Complainant has set forth three arguments in support of its Motion to Strike Answer and for Default Order; violation of the Rules of Practice, material prejudice, and settlement intransigence. These arguments will be discussed in seriatim.

First, the Complainant asserts that the Respondent failed to timely file an Answer to the Complaint and that the Late Answer was improperly submitted to the Regional Hearing Clerk by fax and without service on the Complainant in violation of Sections 22.05 (a) and 22.15 of the Rules of Practice.[(11)] The Complainant further asserts that a default has occurred because the Respondent has failed to timely file an Answer to the Complaint and the undersigned, therefore, shall issue a default order against the Respondent pursuant to Section 22.17(b) of the Rules of Practice.

As a preliminary matter, I point out that although Section 22.15(a) of the Rules of Practice imposes a mandatory jurisdictional requirement concerning the timeliness of the Answer (stating that the answer "must be filed"), such language does not limit the default discretion placed on the Presiding Officer by Section 22.17(a) of the Rules of Practice, which states, in pertinent part, that "[a] party may be found in default . . . upon failure to file a timely answer to the complaint" (emphasis added).[(12)] As such, my discretion to find a

party in default remains unfettered and should be informed both by the type and extent of any violations and by the degree of actual prejudice to the Complainant.

The Respondent, in its Opposition, argues that in fact and law no violation of the Rules of Practice occurred. The Respondent argues that it properly served its Answer on the Regional Hearing Clerk and the Complainant within the allowed time frame as is evidenced by the certificate of service included in the Answer and the affidavit of service accompanying the Answer, respectively. Respondent's Opposition at II. I find no persuasive reason in the file before me not to believe the Respondent's assertion that it did mail the Answer to the Regional Hearing Clerk on October 24, 1996. In particular, I note that the Complainant acknowledges that it received its copy of the Answer on October 29, 1996, and the Answer in the file before me contains a certificate of service reflecting that the Respondent mailed the original of the Answer to the Hearing Clerk on the same date it mailed the copy of the Answer to the Complainant.

Next, I turn to the question of whether the mailing of the Answer to the Regional Hearing Clerk, by first class mail, on October 24, 1996, meets the filing requirements under the governing Rules of Practice.[(13)] In support of its argument that the filing requirements under the Rules of Practice were satisfied, the Respondent specifically relies on Section 22.07(c) of the Rules of Practice which states, in pertinent part, that "[s]ervice of all other pleadings [other than the complaint] and documents is complete upon mailing" and "[w]here a pleading or document is served by mail, five (5) days shall be added to the time allowed by these rules for filing a responsive pleading or document." The Respondent also relies on federal court decisions to bolster its argument that, under Rule 5(b) of the Federal Rules of Civil Procedure (hereinafter "Fed. R. Civ. P."), service by mail is complete upon mailing.[(14)] Respondent's Opposition at III; see Madden v. Cleland, 105 F.R.D. 520 (Ga. Mar. 29, 1985). The Respondent concedes that service and filing are not necessarily one in the same, but argues that the Rules' of Practice failure to provide for a different filing procedure impliedly adopts service requirements for filing requirements.

Although the Respondent is correct in its claim that the Rules of Practice do not articulate separate procedures for filing as opposed to service, federal courts and commentators have held filing requirements to be more stringent than service requirements. Rule 5(d) of the Fed. R. Civ. P. states that

"[a]ll papers after the complaint required to be served upon a party, together with a certificate of service, shall be filed with the court within a reasonable time after service." Various federal circuit courts have held that filing of documents by mail is only complete upon receipt by the clerk, not upon mailing,[(15)] and commentators have agreed. As stated in Moore's Federal Practice, "[u]nlike service, filing is not deemed complete upon mailing." **Moore's Federal Practice 3D** § 5.30[1][a] (Matthew Bender & Co., 1997). Service and filing may serve primarily the same function, as argued by the Respondent, but federal law views the two as having different requirements. While I am not without sympathy for the Respondent's frustration over the failure of the Rules of Practice to articulate separate filing procedures, the Fed. R. Civ. P. provide well established guidance for the Rules of Practice and even a cursory perusal of them indicates the distinction between filing and service requirements. Nevertheless, it is also well established that failure to file a timely answer is far less severe than failure to serve one's answer on the complainant.[(16)]

However, in the instant case I need not resolve ultimately the question of whether the service requirements meet the filing requirements under the Rules of Practice as I otherwise am able to dispose of the Complainant's Motion to Strike Answer and for Default Order. Even if I were to find that the Respondent's mailing of its Answer within the allotted time frame did not meet the filing requirement and, thus, the Respondent failed to file a timely Answer, such failure under the instant circumstances would be a *de minimis* violation of the Rules of Practice that would not support a discretionary finding of default, and a default order, particularly when weighed against the degree of actual prejudice to the Complainant. As discussed below, I find no prejudice has been demonstrated by the Complainant. Thus, there would be no basis for granting the Motion to Strike Answer and for Default Order.

The Complainant also claims that the Respondent violated the Rules of Practice by faxing its late Answer to the Regional Hearing Clerk rather than using a method allowed by the Rules of Practice. The Rules of Practice limit the allowable methods of service of an answer, stating that such documents "may be served personally or by certified or first class mail." Section 22.05(b)(2) of the Rules of Practice. Clearly, faxing one's answer to the Regional Hearing Clerk is in violation of the Rules of Practice. In response, the Respondent claims that when it faxed a copy of its original Answer to the Regional Hearing Clerk, it was merely complying with a request by the Clerk to

complete its files. The Respondent maintains that such action should not be held to the requirements of the Rules of Practice.

Although no information in the file before me establishes that "Lyon County was asked to fax an additional copy of its answer to the Regional Hearing Clerk for its files," Respondent's Opposition at V, and the Complainant disputes this account of events, Complainant's Motion to Seek Clarification, I deem the reason for the faxing to be irrelevant to the issues before me. As discussed above, I find the Respondent's statements that it mailed the Answer to the Regional Hearing Clerk on October 24, 1996, to be credible. Any alleged failure to meet the filing requirements was a *de minimis* violation, and the faxing of the Answer six months later was merely a ministerial act to correct or supplement the Regional Hearing Clerk's file. Also, I note in this regard that the Fed. R. Civ. P. allow facsimile filing in certain situations and state that "[t]he clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or any local rules or practices." Rule 5(e) of the Fed. R. Civ. P.

Assuming *arguendo* that there was a failure to timely file the Answer in this proceeding, the remaining issue for discussion is whether any such failure prejudiced the Complainant in any material way. The Complainant argues that it was prejudiced in three ways; 1) loss of six or more months of time in proceeding toward resolution of the conflict, 2) the inability to timely review the "late answer", and 3) the lack of opportunity "to be aware of and respond to the late filing." Motion to Strike Answer and for Default Order at ¶ 14.

Regarding the first element of alleged prejudice, the Complainant seems to argue that it lost six months of time working on this case when the matter simply could have been disposed of by the entry of an order granting a motion to strike the answer and for default order based on a finding that no timely answer was filed. Any such suggestion incorrectly assumes that a default order would be granted automatically on the finding that there is no timely filed Answer in the file of the Regional Hearing Clerk as defined by the Complainant and that consideration would not be given to any other factors. The fact that the Complainant has spent six months working on this case does not constitute prejudice.

Otherwise regarding the first element of alleged prejudice, the Complainant has offered no proof in support of its assertion of

lost time, and the numerous exchanges in the case file belie the Complainant's claim. The only delay that might have arisen from the Clerk's late receipt of the Answer pertains to my designation as the presiding Administrative Law Judge and my issuance of the Prehearing Order. Such a delay is wholly inadequate to support so harsh a penalty as a default finding.

As to the Complainant's other two purported types of prejudice, the only circumstance under which an inability to review or respond to the faxed answer might be prejudicial would be if the Answer served on the Complainant differed from that faxed to the Regional Hearing Clerk. If the two documents are the same, no prejudice could have occurred. Nevertheless, at various points in its Motion to Strike Answer and for Default Order, the Complainant insinuates that the two documents may indeed be different.[(17)] For a respondent to serve its answer on the complainant and then later to file a materially different answer with the Regional Hearing Clerk would be an unprofessional and unethical manipulation of the hearing process and would ordinarily merit a default order, and perhaps a letter to relevant bar associations. Considering the ramifications just mentioned, to accuse an opposing party of such an action is by itself a grave matter. If the Complainant had proof that the two Answers were not identical, it was under an obligation to include such proof in its Motion to Strike Answer and for Default Order. If not, it is entirely inappropriate to insinuate that the two documents may be different, particularly when I have not been furnished a copy of the Answer served on the Complainant. As a result, there being no proof that the two documents were different and no demonstration of material delay to the Complainant from the late receipt of the Answer, I find no prejudice on the part of the Complainant.

Finally, the Complainant implies that a default order should ensue due, at least in part, to the Respondent's refusal to cooperate in settlement negotiations. Specifically, the Complainant states that "[s]ubsequent to the service of the Unfiled Answer the parties engaged in settlement negotiations. Respondent has not been co-operative [sic] in the negotiations, and has not provided settlement information as it has agreed to." Motion to Strike Answer and for Default Order at ¶ 13. A respondent's attitude toward settlement or its degree of cooperation in pursuit of such is not listed in the Rules of Practice as a ground for default. Section 22.17(a) of the Rules of Practice. Moreover, I specifically reject any notion that cooperation in settlement negotiations, or the lack thereof, is an appropriate factor to consider in making a default

determination. Basing a default order on settlement activities would constrain a respondent's opportunity to proceed to a hearing on disputed issues and would undermine the due process considerations so central to administrative hearings.

In sum, I find no adequate grounds that might support a default order. Any alleged violations of the Rules of Practice were *de minimis* and the Complainant suffered no prejudice as a result. A default order is a harsh sanction, reserved only for the most egregious behavior,[(18)] and to impose such a penalty in this situation would be most inappropriate. Moreover, even if the Complainant should come forth at some future date with proof that the two Answers are indeed different, the Complainant may not move for default on this basis. It has had its opportunity to do so and has squandered it with insinuations and half-formed arguments. As discussed above, it was incumbent upon the Complainant to have submitted any proof of the filing or attempted filing of two different Answers by the Respondent when it filed its Motion to Strike Answer and for Default Order and I will not entertain a motion on this basis in the future. However, if the Complainant were to establish that there are two different Answers in this matter, I will grant an extension of time to allow the Complainant to prepare its case.

Finally, I have been less than pleased with the approach both parties have taken in this case. Both parties' assertions are particularly contentious. The Complainant's approach to its Motion to Strike Answer and for Default Order has been less than forthright and borders on unprofessional. The Respondent has filed documents incorrectly and has offered an incomplete and unsigned certificate of service as proof of a filing date. While the Respondent continues to stand by its position that service of all documents for filing purposes is complete upon mailing, the documents submitted to the undersigned, including its Opposition, do not reflect the Regional Hearing Clerk's receipt as evidenced by the Clerk's date stamp. Both parties are instructed to proceed in a more professional manner for the remainder of this case.

ORDER

The Complainant's Motion to Strike Answer and for Default Order against Respondent Lyon County is denied.

original signed by undersigned

_____

Barbara A. Gunning

Administrative Law Judge

Dated: 9-11-97

Washington, DC

1. Henceforth, the term "filed" means filed with the Regional Hearing Clerk.

2. The Complainant has not provided the Administrative Law Judge a photocopy of the Answer received by it on October 29, 1996.

3. The term "fax" refers to a facsimile.

4. The circumstances behind the non-filing or non-receipt of the Answer by the Regional Hearing Clerk remain a mystery to the undersigned. The information in the file before me does not establish factually whether the Answer was received in an untimely manner because of the Respondent's error, United States Postal Service error, or because of an oversight at the Regional Hearing Clerk's office.

5. The Regional Hearing Clerk serves as the clerk for both the Regional Presiding Officer and the Administrative Law Judge. However, the Motion to Compel Discovery was incorrectly addressed to the Regional Presiding Officer rather than the Administrative Law Judge if the Respondent had in fact filed its Answer or believed that it had done so. See Sections 22.05(a)(2) and (3) of the Rules of Practice.

6. The Complainant states that at the time of the filing of its Opposition to the Motion to Compel Discovery it was aware that no Presiding Officer had been designated but it was unaware that no Answer had been filed. Complainant's Motion to Strike Answer and for Default Order, at ¶ 7. Nonetheless, the Complainant incorrectly delivered a copy of its Opposition to the Regional Judicial Officer rather than the Office of Administrative Law Judges. See Sections 22.05(a)(2) and (3) of the Rules of Practice.

7. In the Respondent's Opposition to the Motion to Strike Answer and for Default Order, the Respondent states that it faxed the original Answer, Request for Hearing, and Request for Independent Testing to the Regional Hearing Clerk at the Clerk's request. In the Complainant's Motion to Seek Clarification dated

September 5, 1997, the Complainant disputes the Respondent's statement that the Regional Hearing Clerk requested the Respondent to fax its Answer. There is no factual proof in the file before me to establish why this fax was sent on that date.

8. Again, the Respondent's Response was incorrectly sent to the Regional Presiding Officer rather than the Administrative Law Judge if the Answer, in fact, had been sent to the Regional Hearing Clerk for filing or the Respondent believed it had done so. See Sections 22.05(a)(2) and (3) of the Rules of Practice.

9. The Complainant characterizes the two Answers served on it by the Respondent as the "unfiled Answer" and the "late Answer." This characterization implies that the two documents are not copies of one another, but are distinct and different. Such a characterization will be discussed later in greater detail.

10. There is no proof in the file before me of the date the Respondent's Opposition was received by the Regional Hearing Clerk.

11. Section 22.15(a) of the Rules of Practice states, in pertinent part, that "[a]ny such answer to the complaint must be filed with the Regional Hearing Clerk within twenty (20) days after service of the complaint." Section 22.05(b)(2) provides that service of "[a]ll documents other than the complaint, rulings, orders, and decisions, may be served personally or by certified or first class mail."

12. The term "Presiding Officer" means the Administrative Law Judge designated by the Chief Administrative Law Judge to serve as the presiding officer. Section 22.03(a) of the Rules of Practice.

13. There is no dispute that the filing deadline for the Answer was October 25, 1996, pursuant to the Presiding Judicial Officer's Order entered on September 17, 1996.

14. The Fed. R. Civ. P. are not binding on administrative agencies but many times these rules provide useful and instructive guidance in applying the Rules of Practice. See Oak Tree Farm Dairy, Inc. v. Block, 544 F. Supp. 1351, 1356 n. 3 (E.D.N.Y. 1982); In re Wego Chemical & Mineral Corporation, TSCA Appeal No. 92-4, at 13 n. 10 (EAB, Feb. 24, 1993).

15. See Cooper v. City of Ashland, 871 F.2d 104, 105 (9th Cir. 1989), United States v. Doyle, 854 F.2d 771, 773 (5th Cir. 1988).

16. See Moore's Federal Practice: 1997 Rules Pamphlet, ¶ 5.3 (Matthew Bender & Co. 1996).

17. The undersigned notes that the Respondent could have refuted this insinuation more directly and clearly in its Opposition by simply stating that the two Answers sent by it to the Regional Hearing Clerk are identical documents.

18. Scenarios that typically warrant default orders include the failure of respondents to file any answer at all and failure to offer any response to Administrative Law Judge orders. This restraint also has been championed by the federal courts. See e.g. Davis v. Parkhill-Goodloe Co., 302 F.2d 489, 495-96 (5th Cir. 1962).