



UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
CHIE PING WU)
)
AND) DOCKET NO. RCRA-3-99-003
PING AUTO CENTER,)
)
RESPONDENTS)

ORDER DENYING MOTION TO SET ASIDE
PARTIAL DEFAULT JUDGMENT

By an order, dated October 23, 2000, Complainant's Motion for a Partial Default Judgment as to Counts I through IV of the complaint in this proceeding under Section 9006 of the Solid Waste Disposal Act, as amended (42 U.S.C. § 6991e) was granted. The motion and order were based on Respondents' failure to comply with an order of the ALJ, dated March 7, 2000, directing that the parties exchange specified prehearing information on or before April 21, 2000. Information Respondents were directed to furnish primarily included records and documents to support the denial of allegations in the complaint to the effect that Respondents had violated federal regulations at 40 C.F.R. Part 280 and District of Columbia Underground Storage Tank Regulations ("DCMR"), Title 20, Chapters 55-68, by failing to perform release detection monitoring

on USTs in accordance with cited regulations and, failing to apply release detection as required, to effect closure, which, inter alia, required removal of the tanks from service. Complainant filed its prehearing exchange in a timely manner, while Respondents did not file a prehearing exchange or make any response to the ALJ's order, even though they were represented by counsel at the time. Complainant filed a motion for partial default judgment as to liability only concerning Counts I through IV of the complaint on August 11, 2000. Respondents did not respond to the motion and on August 21, 2000, their then counsel filed a notice of withdrawal of appearance, citing a lack of cooperation and agreement with Respondents. As indicated above, Complainant's motion for partial default judgment was granted by an order, dated October 23, 2000.

Respondents have retained new counsel who, under date of October 27, 2000, has filed a Motion for Reconsideration of Order Granting Partial Default. This motion will be treated as motion under Rule 22.17(c) of the Consolidated Rules of Practice (40 C.F.R. Part 22), which provides that for good cause shown, the presiding officer [ALJ] may set aside a default order.^{1/} Stated grounds for the motion are as follows:

^{1/} Because the order granting the motion for partial default did not concern penalty issues and thus did not resolve all issues as to the Counts I through IV, it was not an initial decision as to any part of the proceeding. Hence, a motion for reconsideration is proper.

1. The Order for Partial Default arose out of failures on the part of Respondents' prior counsel of record to take steps to avoid the entry of a partial default.
2. The undersigned counsel has been retained to handle this matter properly.
3. The Respondents have already expended \$40,133.54 to bring their fuel tanks into compliance, including removal of tanks that were on the property before Respondents took possession. See, attached photos and invoices.

Complainant filed a response on November 2, 2000, opposing the motion. Complainant argues that Respondents' motion does not meet the "good cause" standard for setting aside a default order, pointing out that Respondents' [implicit] contention that they should not be punished for the failure of prior counsel to comply with the prehearing order overlooks or ignores counsel's stated reason for withdrawal, i.e., "the lack of cooperation and agreement between those parties and their counsel, such that it has become impossible for counsel to represent them in this matter." (Notice of Withdrawal of Appearance of Counsel, by John R. Tjaden, Esq., dated 8/21/00). Complainant emphasizes that, at least in the view of prior counsel, the failure to properly represent them was the fault of Respondents and that, although the Notice was mailed

to Respondents, this position has not been refuted. Moreover, Complainant asserts that Respondents have an independent obligation to comply with procedural deadlines in matters such as the instant proceeding, pointing out that the Environmental Appeals Board has refused to set aside default orders where the default was allegedly attributable to the fact respondent was not represented by counsel.^{2/} Even if Respondents' failure to submit a prehearing exchange by the April 21 deadline established by the prehearing order was solely the fault of prior counsel and even if Respondents were totally ignorant of the failure of prior counsel's failure to comply with the deadline, Complainant argues that Respondents would still need to explain why they took no action between the time prior counsel resigned and they employed new counsel in late October.

According to Complainant, reason 2 advanced for reconsidering or setting aside the default order is merely a promise by present counsel that he will ensure that Respondents comply with future deadlines and procedural rules in this case. Complainant says that reason 3 does not address the issue of why Respondents failed to comply with the prehearing order and is relevant, if at all, only to the penalty phase of the proceeding which is not at issue in the present motion. Additionally,

^{2/} Complainant cites, among others: Rybond, Inc., RCRA (3008) Appeal No. 95-3, 6 E.A.D. 614 (EAB, November 8, 1996) and House Analysis & Associates & Fred Powell, CAA Appeal No. 93-1, 4 E.A.D. 501 (EAB, February 2, 1993).

Complainant says that information submitted by Respondents documents their attempt to comply with certain of their UST obligations, but does not suggest that Respondents did not commit the violations alleged in the complaint during the periods alleged therein.

Discussion

The basic showing necessary for setting aside a default order is that a different result is likely if the order were set aside. Midwest Bank & Trust Company, Inc., et al., RCRA (3008) Appeal No. 90-4, 3 E.A.D. 696, 1991 EPA App. Lexis 29, *7 (CJO, October 23, 1991). See also Corner Stone Baptist Church, Docket No. TSCA-V-C-55-90, 1999 WL 637420 (EPA August 10, 1999). Here that standard has not been met as there is no showing that Respondents did not commit the violations alleged in the complaint during the periods set forth therein. Moreover, it is not clear that Respondents' have cured their default even at this late date and because the order does not encompass the amount of any penalty, Respondents will have a further opportunity to oppose Complainant's proposals in this regard. It follows that Respondents' Motion to Set Aside the Order Granting Motion for Partial Default will be denied.

Order

Respondents' Motion to Set Aside the Order Granting Motion for Partial Default is denied. A ruling on Complainant's Second Motion for Partial Default Judgment as to Count V of the complaint will be forthcoming.

Dated this 20th day of November 2000.

Original signed by undersigned

Spencer T. Nissen
Administrative Law Judge