UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
J.M. INCHAUSTEGUI,	)	**DOCKET NO. RCRA-6-2000-007**[1]
formerly d.b.a. UNI-KEM	)	
INTERNATIONAL, INC.,	)	
	)	
Respondent	)	

ORDER DENYING COMPLAINANT'S MOTION FOR DEFAULT ORDER AND ASSESSMENT OF CIVIL PENALTY

ORDER SCHEDULING HEARING

This case arises under Section 3008 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6928, and is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits("Rules of Practice"), 40 C.F.R. Part 22 (2000). By motion dated August 14, 2001, the United States Environmental Protection Agency ("Complainant" or "EPA") seeks a default order against Respondent, J.M. Inchaustegui ("Respondent") and the assessment of a civil penalty in the amount of $28,765. For the reasons set forth below, Complainant's motion will be denied.

INTRODUCTION

The EPA filed a three count First Amended Complaint, Compliance Order, and Notice of Opportunity for Hearing ("Complaint") against Respondent on August 14, 2000, alleging violations of RCRA and its implementing regulations codified at 40 C.F.R. Part 262 (1997) for generators of hazardous waste.

[1] The docket number for this case has been changed to conform to the United States Environmental Protection Agency's standard numbering system. The revised docket number should be used on all further filings in this case.

Respondent, who was alleged to be a generator of hazardous waste, was charged with: 1) failing to make a hazardous waste determination; 2) failing to meet permit exemption requirements for generators who store hazardous waste for ninety days or less; and 3) failing to obtain a hazardous waste identification number.

On October 27, 2000, Respondent filed an Answer to the Complaint denying that he is a generator of hazardous waste. On October 27, 2001, Respondent also filed with the Regional Hearing Clerk a Cross-Claim/Third Party Demand against Rodney and Kathleen Davis and Great Solutions Incorporated, who Respondent named as the operators of the facility where the alleged violations occurred. According to Respondent, these named third parties are responsible for the violations charged in the Complaint.

On December 11, 2000, the undersigned was designated as the presiding Administrative Law Judge in this proceeding. The Prehearing Order, issued January 30, 2001, directed the parties to hold a settlement conference on or before March 8, 2001, and required the EPA to file a status report regarding the settlement conference by March 22, 2001. The Prehearing Order also established the prehearing schedule in the event that settlement discussions proved unsuccessful.

On March 22, 2001, the EPA submitted a status report documenting the parties' failed settlement negotiations. Consequently, the EPA filed its Prehearing Exchange on May 3, 2001, thereby meeting the filing deadline established in the Prehearing Order. That Order directed Respondent to file either a Prehearing Exchange or a statement of election only to conduct cross-examination of the EPA's witnesses by June 3, 2001. However, Respondent failed to meet this deadline. When Respondent still had not filed his Prehearing Exchange by June 25, 2001, he was ordered to show cause, on or before July 6, 2001, why he failed to meet the filing deadline and why a default order should not be entered.

By letter dated July 6, 2001, Respondent explained that his Prehearing Exchange had not been filed because he was waiting for the undersigned to issue a new Prehearing Order which included the Davis', the alleged "operators" of the facility, as parties to this proceeding. In this regard, Respondent noted that it was his understanding that once service of Respondent's Cross-Claim/Third Party Demand was served on the Davis' and all parties

were joined, a new Order would be issued.[2] (*See* Letter from Respondent to Whiting-Beale of 7/6/01, at 1.) Additionally, Respondent admitted that he had not filed his Prehearing Exchange because of "a heavy docket."

Respondent's July 6, 2001, letter was filed with the Regional Hearing Clerk on July 11, 2001, but a copy was not sent to the undersigned.[3] Once the Order to Show Cause deadline had passed with no response from Respondent received in my office, an assistant to the undersigned conducted a prehearing teleconference with both parties on July 31, 2001, to ascertain the status of the proceeding. During the teleconference, Respondent agreed to send a copy of the July 6th letter to the undersigned, and informed both the undersigned and Complainant that Respondent's Prehearing Exchange would be submitted prior to August 10, 2001, the date on which the EPA had stated that it would file a Motion for Default Order. Respondent mailed his Prehearing Exchange, via Federal Express, to the Regional Hearing Clerk who received Respondent's package on Friday, August 10, 2001. The EPA reviewed Respondent's Prehearing Exchange and on the following Monday, August 14, 2001, filed its Motion for Default Order and Assessment of Civil Penalty. Complainant's Motion for Default and Assessment of Civil Penalty ("Motion for Default") at 3.

DISCUSSION

The EPA has requested that a default order be issued against Respondent for failure to comply with the January 30, 2001, Prehearing Order and the June 25, 2001, Order to Show Cause. The federal regulations governing default in EPA administrative proceedings are found at Section 22.17 of the Rules of Practice and are codified at 40 C.F.R. § 22.17. Section 22.17(a)

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[2] Section 3008 of RCRA does not authorize private parties to bring administrative enforcement actions before this tribunal. Nor do Administrative Law Judges have jurisdiction to hear private, third-party claims. *See* 40 C.F.R. § 22.1 (Scope of Part 22). Respondent, however, is not precluded from arguing as a defense to liability that he is not a generator of hazardous waste.

[3] Section 22.5(b) of the Rules of Practice, 40 C.F.R. § 22.5(b), provides that a "copy of each document filed in the proceeding shall be served on the Presiding Officer." Additionally, Respondent was advised of this requirement in the Prehearing Order issued January 30, 2001.

concerning default states, in pertinent part:

> A party may be found to be in default: after motion, upon failure to file a timely answer to the complaint; upon failure to comply with the information exchange requirements of § 22.19(a) or an order of the Presiding Officer[4]; or upon failure to appear at a conference or hearing. Default by respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations.

40 C.F.R. § 22.17(a).

Section 22.17(c) concerning default orders states, in pertinent part:

> When the Presiding Officer finds that default has occurred, he shall issue a default order against the defaulting party as to any or all parts of the proceeding unless the record shows good cause why a default order should not be issued. If the order resolves all outstanding issues and claims in the proceeding, it shall constitute the initial decision under these Consolidated Rules of Practice. The relief proposed in the complaint or in the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act. For good cause shown, the Presiding Officer may set aside a default order.

40 C.F.R. § 22.17(c).

The above-cited regulatory language of 40 C.F.R. § 22.17(a) concerning a finding of default for failing to comply with the information exchange requirements of 40 C.F.R. § 22.19(a) or an order of the Administrative Law Judge is couched in discretionary terms. If a party is found to be in default, the Rules of

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[4] The term "Presiding Officer" means the Administrative Law Judge designated by the Chief Administrative Law Judge to serve as the Presiding Officer. 40 C.F.R. § 22.3(a).

Practice seemingly place a mandatory obligation on the Administrative Law Judge to issue a default order against the defaulting party unless the record shows good cause why a default order should not be issued. 40 C.F.R. § 22.17(c). Thus, pursuant to the Rules of Practice, the Administrative Law Judge has discretion in applying § 22.17(a), and even upon a finding of default, need not issue the order if the record shows good cause. As discussed below, under the circumstances of this case, a default order is unwarranted.

A default judgment is a harsh and disfavored sanction, reserved only for the most egregious behavior. *See Malter, International*, EPA Docket No. EPCRA-3-2000-0010, EPCRA-3-2000-0011 (ALJ, August 14, 2001); *Gard Products, Inc.*, EPA Docket No. FIFRA-98-005 (ALJ, July 2, 1999); *Lacy v. Sitel Corp.*, 227 F. 3d 290 (5th Cir. 2000). "A default judgment is appropriate where the party against whom the judgment is sought has engaged in 'willful violations of court rules, contumacious conduct, or intentional delays.'" *Forsythe v. Hales*, 255 F.3d 487, 490 (8th Cir. 2001) (quoting *Ackra Direct Mktg. Corp. v. Fingerhut Corp.*, 86 F.3d 852, 856 (8th Cir. 1996)). However, "default judgment is not an appropriate sanction for a 'marginal failure to comply with time requirements.'" *Ackra Direct Mktg. Corp. v. Fingerhut Corp.*, *supra*, at 856 (quoting *United States v. Harre*, 983 F.2d 128, 130 (8th Cir. 1993)). *See also Forsythe v. Hales*, *supra*, at 490.

Administrative Law Judges have broad discretion in ruling upon motions for default. *See Gard Products, Inc.*, *supra*. Issuance of such an order is not a matter of right, even where a party is technically in default. *See Donald L. Lee and Pied Piper Pest Control, Inc.*, EPA Docket No. FIFRA 09-0796-92-13 (ALJ, November 9, 1992); *Lewis v. Lynn*, 236 F.3d 766 (5th Cir. 2001). This broad discretion is informed by "the type and the extent of any violations and by the degree of actual prejudice to the [party seeking default]." *Lyon County Landfill*, EPA Docket No. 5-CAA-96-011 (ALJ, September 11, 1997).

The EPA argues that a finding of default is warranted on two grounds: first, for Respondent's untimely Prehearing Exchange filing;[5] and second, for Respondent's failure to respond to the

[5] The EPA also requests that Respondent's entire Prehearing Exchange be stricken from the record. *See* Complainant's Reply to Respondent's Opposition to Motion for Default on Liability and Penalties ("Complainant's Reply") at 5. From Complainant's memorandum, it is unclear whether this request is in the

Order to Show Cause. There is no dispute that Respondent filed his Prehearing Exchange more than two months after the filing deadline of June 3, 2001. Moreover, the EPA points out that Respondent's July 6th letter did not provide an exculpatory explanation for Respondent's failure to file the Prehearing Exchange.

After setting forth these potential grounds for a finding of default, the EPA reasons that a default order is otherwise appropriate because Respondent has not shown "good cause why a default order should not be issued." 40 C.F.R. § 22.17(c). In support of this proposition, the EPA cites an administrative case in which good cause was not found. *See* Memorandum in Support of Complainant's Motion for Default Order at 6-7 citing *Jack Golden*, EPA Docket No. CWA-10-99-0188 (ALJ, October 6, 2000)("*Jack Golden*"). However, the facts in the case at bar are distinguishable from those at issue in *Jack Golden*.

The Respondent in *Jack Golden*, after missing the filing deadline for the Prehearing Exchange, received an Order to Show Cause. In response to the Order, Respondent's attorney submitted an affidavit explaining that Respondent had been unable to assist in his defense because his wife was seriously ill. Though the Administrative Law Judge expressed a certain dissatisfaction with this "vague" explanation, Respondent's Prehearing Exchange which had been incorporated into the Respondent's response to the Order to Show Cause, consisted of a single sentence which "did not require significant preparation and could easily have been submitted at an earlier date." *Jack Golden*, *supra*. In the instant case, Respondent timely responded to the Order to Show Cause, explaining that his failure to comply with the Prehearing Exchange Order was based on the belief that a new Prehearing Order was forthcoming. Additionally, Respondent's Prehearing exchange consisted of far more than "a single sentence" and cannot be characterized as a "willful violation of court rules." *Forsythe*, supra, at 490.

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alternative to a default order or in conjunction with a default order so that Respondent's records could not be relied upon to determine the appropriate penalty if a default order was issued. Although a Presiding Officer has authority under 40 C.F.R. §§ 22.4(c)(6), 22.4(c)(10), 22.5(c)(5) and 22.22(a) to exclude documents from the record that are untimely filed, to exclude all Respondent's evidentiary materials yet subject him to a hearing would be a harsh and debilitating sanction, especially in the context of an administrative enforcement proceeding.

Assuming *arguendo* that Respondent is in default because of the delinquent Prehearing Exchange filing, a default order is inappropriate for the following reasons. First, the record neither evinces bad faith nor continued dilatory conduct. Respondent filed an Answer to the Complaint, timely responded to the Order To Show Cause, did eventually submit the Prehearing Exchange information, and timely opposed Complainant's Motion for Default Order. Moreover, the EPA neither alleged any prejudice resulting from Respondent's failure to timely file the Prehearing Exchange, nor does it appear from the record that the EPA suffered prejudice by Respondent's late filing.

To bolster his argument that the EPA has not suffered any prejudice, Respondent notes that the EPA already had received substantially similar information in Respondent's response to a related RCRA Section 3007 Information Request and thus, was not prejudiced by Respondent's late filing. Additionally, Respondent claims that it was "disingenuous for [the] EPA to assert to this Court that no Pre-Hearing Exchange had been done when the evidence intended to be relied upon by respondent had already been provided." *See* Respondent's Memorandum in Opposition to the Motion for Default Order and Assessment of Civil Penalty at 5. Regardless of the information Respondent provided in his response to the RCRA Information Request, Respondent was directed in the Prehearing Exchange Order to file either a Prehearing Exchange or a statement of election only to conduct cross-examination of the EPA's witnesses. Respondent cannot substitute his response to the RCRA Information Request for his Prehearing Exchange because such an approach would be grossly unfair to Complainant, inconsistent with the Rules of Practice § 22.19, and violative of the Prehearing Exchange Order. The EPA was correct to vociferously object to such a misconstruction. *See* Complainant's Reply at 4-5 (enunciating several persuasive arguments).

In the context of this proceeding, Respondent's delinquent Prehearing Exchange filing is insufficient to justify the harsh and disfavored sanction of a default order, especially where it does not appear that Complainant has suffered actual prejudice. This approach is consistent with other instances in which Administrative Law Judges have denied motions for default. *See Malter, International*, *supra* (no finding of default despite Respondent's delinquent Prehearing Exchange filing); *Gard Products, Inc.*, *supra* (no finding of default because the EPA did not demonstrate that it suffered prejudice and the record did not denote bad faith or continued dilatory conduct); *Lyon County Landfill*, *supra* (Respondent's *de minimis* default was mitigated by the lack of any actual prejudice to the EPA).

As a final matter, I emphasize to Respondent that he would be well advised to strictly comply with any future administrative orders as well as the Rules of Practice for the duration of this proceeding, lest he run the very tangible risk of sanction for even the slightest divergence, barring a cogent justification for such noncompliance.[6] Respondent's conduct in this proceeding is of a cumulative nature. Although I was disinclined to find bad faith to support this default motion, any additional misconduct will be conjoined with Respondent's pre-existing conduct and addressed accordingly.

In view of this Order denying Complainant's Motion for Default Order, Complainant will be afforded the opportunity to submit a Rebuttal Prehearing Exchange, if any, on or before **March 29, 2002**.

As the parties have submitted their prehearing exchange in this matter and there are no remaining motions for adjudication, the parties should prepare for hearing. Both parties are reminded that under Sections 22.19(a) and 22.22(a) of the Rules of Practice, 40 C.F.R. §§ 22.19(a), 22.22(a), documents or exhibits that have not been exchanged and witnesses whose names have not been exchanged at least fifteen (15) days before the hearing date shall not be admitted into evidence or allowed to testify unless good cause is shown for failing to exchange the required information.

Further, the parties are advised that every motion filed in this proceeding must be served in sufficient time to permit the filing of a response by the other party and to permit the issuance of an order on the motion before the deadlines set by this order or any subsequent order. Section 22.16(b) of the Rules of Practice, 40 C.F.R. § 22.16(b), allows a fifteen-day (15) period for responses to motions and Section 22.7(c), 40 C.F.R. § 22.7(c), provides for an additional five (5) days to be added thereto when the motion is served by mail. The parties are hereby notified that the undersigned will not entertain last minute motions to amend or supplement the prehearing exchange absent extraordinary circumstances.

On or before **May 24, 2002**, the parties shall file a joint set of stipulated facts, exhibits, and testimony. *See* Section 22.19(b)(2) of the Rules of Practice, 40 C.F.R. § 22.19(b)(2).

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[6] The Rules of Practice were provided to Respondent when the Complaint and Amended Complaint were mailed to him and again on July 31, 2001.

The time allotted for the hearing is limited. Therefore, the parties must make a good faith effort to stipulate, as much as possible, to matters which cannot reasonably be contested so that the hearing can be concise and focused solely on those matters which can only be resolved after a hearing.

ORDER

Complainant's Motion for Default Order and Assessment of Civil Penalty is **Denied**.

Complainant's Rebuttal Prehearing Exchange, if any, shall be filed on or before **March 29, 2002**.

The Hearing in this matter will be held beginning at 9:30 a.m. on **Tuesday, June 11, 2002**, in New Orleans, Louisiana, continuing if necessary on **June 12,** and **13, 2002**. The Regional Hearing Clerk will make appropriate arrangements for a courtroom and retain a stenographic reporter. The parties will be notified of the exact location and of other procedures pertinent to the hearing when those arrangements are complete. Individuals requiring special accommodation at this hearing, including wheelchair access, should contact the Regional Hearing Clerk at least five business days prior to the hearing so that appropriate arrangements can be made.

IF EITHER PARTY DOES NOT INTEND TO ATTEND THE HEARING OR HAS GOOD CAUSE FOR NOT BEING ABLE TO ATTEND THE HEARING AS SCHEDULED, IT SHALL NOTIFY THE UNDERSIGNED AT THE EARLIEST POSSIBLE MOMENT.

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Barbara A. Gunning
Administrative Law Judge

Dated: February 28, 2002
Washington, DC

In the Matter of J.M. Inchaustegui, formerly d.b.a. UNI-KEM International, Inc., Respondent
Docket No. RCRA-6-2000-007

CERTIFICATE OF SERVICE

I hereby certify that the original and one copy of this **ORDER DENYING COMPLAINANT'S MOTION FOR DEFAULT ORDER AND AND ASSESSMENT OF CIVIL PENALTY AND ORDER SCHEDULING HEARING**, February 28, 2002 **IN RE: J.M. Inchaustegui, d.b.a. Uni-Kem International, Inc., RCRA-6-2000-007**, were mailed to the Regional Hearing Clerk, and a copy was mailed, certified mail, return receipt requested, to Respondent and Complainant (see list of addressees).

_____
Maria Whiting-Beale
Legal Staff Assistant

Dated: February 28, 2002

ADDRESSEES:

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

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