UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
CITY OF ORLANDO, FLORIDA,	)	Docket No. CWA-04-501-99
	)	
	)	
Respondents	)	

ORDER DENYING MOTION FOR DEFAULT

The complaint in this proceeding under Section 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g), issued and filed on March 12, 1999, charged the City of Orlando with the unlawful use or disposal of sewage sludge in violation of Section 405(e) of the Act. Specifically, the complaint alleged that the City's "annual sludge report", submitted pursuant to 40 C.F.R. § 503.18(a), indicated that 136.44 metric tons of sewage sludge were disposed of on the land in violation of 40 C.F.R. § 503.13(a)(1) in that molybdenum concentrations in samples of the sludge exceeded those in the table at 40 C.F.R. § 503.13. For these alleged violations, it was proposed to assess the City a penalty of $60,000.

The City's answer, filed on April 12, 1999, set forth certain affirmative defenses, including that the Complainant failed to consider an appropriate margin of error as to test results, contested the proposed penalty as arbitrary and excessive, and requested a hearing.

On May 26, 1999, Complainant filed a motion for a default order, pointing out that Rule 22.15(a) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties (40 C.F.R. Part 22) provides that an answer to the complaint must be filed with the Regional Hearing Clerk within 20 days after

service, that Rule 22.07(c) provides that service of the complaint is complete when the return receipt is signed, that in this instance the return receipt was signed by the City's agent on March 16, 1999, and thus, the City's answer was required to be filed with the Regional Hearing Clerk on or before April 5, 1999. Inasmuch as the answer was not filed until April 12, 1999, Complainant contends that the answer was not timely filed and that its motion for a default order should be granted.

The City filed a "Reply", opposing the motion for a default order on June 21, 1999. Firstly, the City asserts that Complainant has not shown that it has met all of the requirements for a default order, pointing out that Rules 22.05(b)(1)(iv) and (b)(1)(iv)(A) provide for two methods of serving process upon a local unit of government: (1) by serving a copy of the complaint in the manner provided by the law of the State for the service of process on any such persons; and (2) by delivering a copy of the complaint to the chief executive officer of the State or local unit of government. The City apparently regards Rule 22.05(b)(1)(iv)(B) "(i)f [service of process is] upon a State or local officer by delivering a copy to such officer" as not differing in substance from Rule 22.05(b)(1)(iv)(A). The City notes that the complaint in this instance was addressed to Mr. Thomas L. Lothrop, Director of the Environmental Services Department, who is not an official named in the Florida statute governing service of process upon municipal corporations.[(1)] Moreover, the City emphasizes that the return receipt, although addressed to Mr. Lothrop, was in fact signed by Ms. Beatrice Kennon, office assistant, and that the City's chief administrative or executive officer at the time was Mr. Howard W. Tipton, Sr. (Reply at 2).

Secondly, the City asserts that its answer and affirmative defenses were, in fact, timely filed (Reply at 3). Although acknowledging that the initial 20-day period for filing an answer provided by Rule 22.15(a) expired on April 5, 1999, and that its answer was not filed until April 12, 1999, the City contends that its answer was nevertheless timely filed because of the additional five days allowed by Rule 22.07(c) for filing a responsive pleading or document where service is by mail.[(2)] April 5, 1999, was a Monday and the five-day additional period specified by Rule 22.07(c) expired on Saturday, April 10. Rule 22.07(a), however, provides that when a stated time expires on a Saturday, Sunday, or a legal holiday, the stated time period is extended to include the next business day.[(3)] The next business day in this instance was Monday, April 12, 1999, the day the answer was filed.

Attached to the City's reply is an affidavit by Barbara C. Jones, who states that on April 1, 1999, she was employed by the City of Orlando as a Legal Secretary III to Richard D. Oldham III, Esq., [counsel of record for the City in this matter]. Ms. Jones further states that on April 1, 1999, she had a telephone conversation with Ms. Patricia Bullock, Regional Hearing Clerk for EPA in Atlanta, Georgia, and that the objective of the conversation was to determine the due date for the City's answer. Specifically, the fact that the complaint had been served by certified mail, return receipt requested [on March 16, 1999] was mentioned and, in view thereof, the issue of whether the additional five days [provided by Rule 22.07(c)] should be added to the 20-day period [provided by Rule 22.15(a)] for answering the complaint was discussed. Additionally, the question of whether the answer had to be actually received on the particular date or merely mailed on that date was raised. Ms. Bullock informed Ms. Jones that the five-day rule [for serving or filing a response where service of the initial pleading was by mail] did apply, that because that date fell on a weekend-day, the answer was due on Monday, April 12, 1999. Ms. Bullock insisted, however, that the answer must be received or filed on that date and that mailing on that date would not suffice.

Discussion

Because it is concluded that the City's answer was timely, the motion for a default order is lacking in merit. Moreover, the motion was improvidently filed even if the City were technically in default, because it is well settled that default, being a drastic remedy, is not favored and that cases should be decided on their merits whenever possible.

While the City's contention that the complaint was not served on officials prescribed by the Rules of Practice appears well founded, the fact that the complaint was brought to the attention of responsible City officials, which after all is the purpose of the rules concerning service on States and local units of government, is established by the answer filed by the City. Complainant is attempting to hold the City to the letter of the Rules of Practice regarding the filing of an answer and there is no injustice in holding Complainant to strict compliance with the rules prescribing the manner of serving complaints. It is unnecessary to address this issue, however, because it is concluded that the City was correctly advised by the Regional Hearing Clerk as to the due date for filing an answer and that the answer was timely filed.

It is established that the complaint in this instance was served on the City by certified mail, return receipt requested and that the receipt for certified mail representing receipt of the complaint was signed by Ms. Kenon, office assistant, on March 16, 1999. In accordance with Rule 22.07(c), service of the complaint was complete when the return receipt was signed.[(4)]

The day of service, March 16, 1999, is excluded by Rule 22.07(a) in computing the 20-day period specified by Rule 22.15(a) for the filing of an answer to the complaint and it is clear that the 20-day period expired on April 5, 1999. The only question then is whether the five-day period, which Rule 22.07(c) provides should be added to the time otherwise provided by the rules for filing a responsive pleading or document where service is by mail, applies to answers to complaints. The initial sentence of Rule 22.07(c) states that service of the complaint is complete when the return receipt is signed, thus clearly indicating that service of complaints is within the contemplation of the rule. Moreover, no exception to the additional five days allowed by Rule 22.07(c) for filing a responsive pleading where service of the complaint is by mail is stated and none can be implied.

While CWA § 309(g)(2)(A) provides that the person to be assessed a Class I penalty shall be given the opportunity to request, within 30 days of the receipt of a proposed order assessing such a penalty, a hearing on the proposed order, no comparable provision applies to Class II penalties under the CWA such as the one at issue here.[(5)] As indicated previously, service of the complaint herein was by mail and, in accordance with Rule 22.07(c), was completed when the return receipt was signed on March 16, 1999. The 20-day period for filing an answer thus expired on Monday, April 5, 1999. Because the five additional days provided by Rule 22.07(c) for filing a responsive pleading where service was by mail expired on Saturday, April 10, 1999, filing the answer on the next business day, Monday, April 12, 1999, was in accordance with Rule 22.07(a). The answer was clearly timely filed.

As noted above, the motion for a default order was improvidently filed, even if the City were technically in default. This is because it is well settled both in federal courts and administratively that default judgments are not favored, that cases should be decided on their merits whenever possible, and that a minimal failure to comply with time requirements does not justify a finding of default.[(6)] See, e.g., Eitel v. McCool, 782 F.2d 1470 (9th Cir. 1986). See also Fingerhut Corporation v. Ackra Direct Marketing Corp and Michael Ackerman, 86 F.3d 852, 1996 U.S. App. LEXIS 15289 (8th Cir. 1996) (default judgment is not an appropriate sanction for a marginal failure to comply with time requirements); and Jones Truck Lines, Inc v. Foster's Truck and Equipment Sales, Inc., 63 F.3d 685, 1995 U.S. App. LEXIS 20684 (8th Cir. 1995) (a court abuses its discretion if it renders default judgment for marginal failure to comply with time requirements); Donald L. Lee and Pied Piper Pest Control, Inc., Docket No. FIFRA 09-0796-92-13, Order Denying Motion for Default and Directing Further Procedures, 1992 EPA ALJ LEXIS 824 (November 9, 1992) (a default judgment should generally be refused where a defendant's failure to plead is merely technical or where the default is de minimis); Environmental Control Systems, Inc., Docket No. I.F.& R.-III-432-C, Order Denying Complainant's Motion for Default Order and Rendering Sua Sponte Partial Accelerated Decision As To Liability, 1992 EPA ALJ LEXIS 465 (July 13, 1993) (motion for a default order denied for the reason among others that the default had been substantially cured); and Jay Harcrow, Docket No. UST6-91-031-AO-1, Ruling on Default Motion and Order Scheduling Hearing, 1995 EPA ALJ LEXIS 53 (September 20, 1995) (fact that the passage of time had removed any possibility of prejudice to Complainant in prosecuting the case was an additional reason for denying motion for default).

Order

Complainant's motion for a default order is denied. In accordance with the order granting an extension of time, dated June 10, 1999, the statement as to settlement will be filed within ten days of the date of service of this order, which is July 7, 1999, and failing settlement, the parties' prehearing exchanges will be filed within 20 days from the mentioned date. It is recognized that this schedule may need to be extended, if Complainant perfects its motion to amend the complaint.[(7)]

Dated this 7th day of July 1999.

Original signed by undersigned

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Spencer T. Nissen
Administrative Law Judge

1. Attached to the City's reply is a copy of Florida Statute § 48.11 which reflects that service of process against any municipal corporation is to be made upon the president, mayor, chair, or other head thereof; and in his or her absence; on the vice president, vice mayor, or vice chair, or in the absence of all of the above; on any member of the governing board, council, or commission.

2. Rule 22.07(c) provides: Service by Mail. Service of the complaint is complete when the return receipt is signed. Service of all other pleadings or documents is complete upon mailing. Where a pleading or document is served by mail, five (5) days shall be added to the time allowed by these rules for the filing of a responsive pleading or document.

3. Rule 22.07 is entitled "Computation and extension of time" and Rule 22.07(a) provides:(a) Computation. In computing any period of time prescribed or allowed in these rules of practice, except as otherwise provided, the day of the event from which the designated period begins to run shall not be included. Saturdays, Sundays, and Federal legal holidays shall be included. When a stated time period expires on a Saturday, Sunday or legal holiday, the stated time period shall be extended to include the next business day.

4. While the City's argument that an office assistant is not an official named in the Florida statute (note 1, supra) or in the Rules of Practice for the service of process upon municipalities or other local units of government is recognized, such officials of necessity operate through assistants and the clerical act of signing a return receipt would commonly, if not universally, be delegated to subordinate employees.

5. CWA § 309(g)(2)(B) provides that a Class II civil penalty shall be assessed and collected in the same manner, and subject to the same provisions, as civil penalties assessed and collected after notice and opportunity for hearing on the record in accordance with section 554 of Title 5 (Administrative Procedure Act), but does not specify a time for requesting a hearing. Section 309(g)(4)(A) provides that before issuing an order assessing a penalty under this subsection, the Administrator shall provide public notice and a reasonable opportunity to comment upon the proposed order; Section 309(g)(4)(B) provides that any person who comments on a proposed order assessing a penalty under this subsection shall be given notice of any hearing on a proposed assessment of a penalty and a reasonable opportunity to be heard and to present evidence; and Section 309(g)(4) provides that, if no hearing is held under this subsection, any person who commented on the proposed order assessing a penalty, may within 30 days after issuance of such order, petition the Administrator to set aside such order and to hold a hearing on the penalty.

6. The result might be different, if the statute required that an answer be filed by a particular time. As we have seen, this is not the case here.

7. Complainant's motion to amend the complaint, dated June 18, 1999, was not accompanied by a copy of the proposed amended complaint. Under date of July 1, 1999, the City filed a reply stating that it did not object to the proposed amended complaint insofar as it will provide a further explanation of the penalty calculation. The City's time for filing an answer to the amended complaint does not, of course, commence to run until it has been served a copy thereof and of the ALJ's order approving its issuance. Complainant is directed to file the proposed amended complaint forthwith and, in no event later than ten days from July 7, 1999.

Last updated on March 24, 2014