UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
STARKIST CARIBE, INC.,	)	**Docket No. CWA-02-2001-3404**
	)	
Respondent	)	

ORDER ON DEFAULT

I. Background

This proceeding was initiated by a Complaint filed on March 20, 2001, by the Director, Division of Enforcement and Compliance Assistance, United States Environmental Protection Agency, Region 2. The Complaint alleges that Respondent failed to seek coverage under a National Pollutant Discharge Elimination System (NPDES) Multi-Sector General Permit for its facility's storm water discharges associated with industrial activity, and for its storm water discharges associated with industrial activity without an NPDES permit from December 30, 1998 to August 18, 2000, in violation of Sections 301(a) and 308(a) of the Clean Water Act. The penalty proposed in the Complaint for these violations is $ 85,085.

Respondent filed an Answer to the Complaint on April 16, 2001, admitting all of the allegations in the Complaint, providing explanations, and setting forth defenses to the proposed penalty. A Prehearing Order was issued, requiring Complainant to file its Prehearing Exchange on July 6, 2001, and requiring Respondent to file its Prehearing Exchange on July 27, 2001. Complainant timely filed its Prehearing Exchange and served it on Respondent. Respondent did not file a prehearing exchange by the due date.

Consequently, on July 31, 2001, an Order to Show Cause was issued, requiring Respondent to show good cause on or before August 15, 2001, why it failed to submit its prehearing exchange and why a default order should not be issued against it.

On August 8, 2001, Respondent submitted a Response to Order to Show Cause (Response). Respondent asserts therein that the filing of the Prehearing exchange "would not serve the interests that this administrative process is seeking to achieve," because "[a]ll of the data necessary to submit a full and complete Pre-Hearing Exchange has not yet been compiled." Respondent explains that the closure of Respondent's facility in June 2001, and the resultant attrition of managers and employees of

Respondent, resulted in difficulty in compiling information and identifying necessary witnesses. Respondent asserts further that a contributing factor was its counsel's good-faith misunderstanding of a statement made by Complainant's counsel. Respondent adds that Complainant has not been unduly deprived of any information, that it strove to uphold a high quality, and that "a default judgment could severely and unnecessarily impact [its] corporate persona . . . ." In its Response, Respondent requests an extension until August 22, 2001, to file its prehearing exchange. On August 22, Respondent submitted its Prehearing Exchange.

Complainant filed a Reply to the Response, dated August 22, 2001, addressing Respondent's reference to a "statement made by Complainant's counsel" and progress of settlement negotiations. Complainant 's counsel asserts that he received a phone message from Respondent's counsel expressing confusion about the Order to Show Cause because he thought the EPA's Prehearing Exchange was submitted on behalf of both parties. Complainant's counsel asserts that he left a return message stating that each party was responsible for submitting its own prehearing exchange.

II. Discussion

The Order of July 31, 2001 ordered Respondent to show cause why a default should not be entered against it. With regard to default, Rule 22.17(a) of the Consolidated Rules of Practice, 40 C.F.R. part 22 (Rules), provides in pertinent part:

> A party may be found to be in default . . . upon failure to comply with the information exchange requirements of § 22.19(a) or an order of the Presiding Officer . . . . 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.

Respondent was served with a copy of the Rules along with service of the Complaint. Respondent was warned of the consequences of failure to file a timely prehearing exchange in the Prehearing Order, which stated:

> <u>If the Respondent elects only to conduct cross-examination of Complainant's witnesses and to forgo the presentation of direct and/or rebuttal evidence, the Respondent shall serve a statement to that effect on or before the date for filing its prehearing exchange.</u> **The Respondent is hereby notified that its failure to either comply with the prehearing exchange requirements set forth herein or to state that it is electing only to conduct cross-examination of the Complainant's Witnesses, can result in the entry of a default judgment against it.** . . . **<u>THE MERE PENDENCY OF SETTLEMENT NEGOTIATIONS OR EVEN THE EXISTENCE OF A SETTLEMENT IN PRINCIPLE DOES NOT CONSTITUTE A BASIS FOR</u>**

FAILING TO STRICTLY COMPLY WITH THE PREHEARING EXCHANGE REQUIREMENTS. ONLY THE FILING WITH THE HEARING CLERK OF A FULLY EXECUTED CONSENT AGREEMENT AND FINAL ORDER, OR AN ORDER OF THE JUDGE, EXCUSES NONCOMPLIANCE WITH FILING DEADLINES.

Despite such warning, Respondent has failed to comply with the information exchange requirements (prehearing exchange) set forth in the Prehearing Order, and failed to seek in a timely fashion an order from the Presiding Judge granting an extension of time in which to file its prehearing exchange. *See,* 40 C.F.R. §§ 22.7(b)("Any motion for an extension of time shall be filed sufficiently in advance of the due date . . . ."); 22.19(a). Respondent filed its Prehearing Exchange over three weeks late. Respondent's assertion that the information was difficult to compile due to the facility having been closed does not explain its failure to file a timely motion for extension of time to file the prehearing exchange. Respondent therefore has not shown good cause for its failure to comply with the prehearing exchange requirements.

It is observed that, in view of their harshness, default orders are not favored by the law and as a general rule cases should be decided on their merits whenever possible. *Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986). Complainant did not move for default, and a sizable penalty is proposed, so a default order which assesses the proposed penalty is not warranted.

A default order under the Rules, however, does not require the assessment of a penalty. The Rules provide at 40 C.F.R. § 22.17(c) as follows, in pertinent part:

> When the Presiding Officer finds that a 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.

Thus, a default order may be issued as to Respondent's liability only. Especially where, as here, Respondent admitted the allegations in the Complaint, it is appropriate to deem the facts alleged in the Complaint as admitted under Rule 22.17(a), and hold Respondent in default.

Accordingly, it is concluded that Respondent is hereby found in default, under 40 C.F.R. § 22.17(a). It is further concluded that Respondent is liable for violating Sections 301(a) and 308(a) of the Clean Water Act, 33 U.S.C. §§ 1311(a) and 1318(a), by Respondent's failure to seek NPDES permit coverage for its facility's storm water discharges associated with industrial activity, and for its storm water discharges associated with industrial activity without an NPDES permit from December 30, 1998 to August 18, 2000. The issue of a penalty to assess for these violations remains in controversy.

ORDER

1. Respondent, Starkist Caribe, Inc., is liable for violating Sections 301(a) and 308(a) of the Clean Water Act, 33 U.S.C. §§ 1311(a) and 1318(a), as alleged in the Complaint, by Respondent's failure to seek NPDES permit coverage for its facility's storm water discharges associated with industrial activity, and for its storm water discharges associated with industrial activity without an NPDES permit from December 30, 1998 to August 18, 2000.

2. Complainant shall have until **Friday, September 28, 2001** to file its Rebuttal Prehearing Exchange.

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Susan L. Biro
Chief Administrative Law Judge

Dated: September 17, 2001
Washington, D.C.