

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:)
)
PHOENIX DEMOLITION COMPANY, INC.,) Docket No. CAA-09-98-14
)
Respondent)

**ORDER ON RESPONDENT'S MOTION FOR EXTENSION
OF TIME TO FILE PREHEARING EXCHANGE
AND ON COMPLAINANT'S REQUEST FOR DEFAULT OR SANCTIONS**

The Complaint initiating this proceeding was filed on September 30, 1998, and subsequently an Amended Complaint was filed on November 9, 1998. An Initial Prehearing Order was issued on March 23, 1999, requiring Complainant to file its Initial Prehearing Exchange by May 7, 1999, and Respondent to file its Prehearing Exchange by May 28, 1999. Complainant timely filed its Prehearing Exchange. Respondent has not filed a Prehearing Exchange to date.

On June 8, 1999, an Order to Show Cause was issued, requiring Respondent to show by June 25, 1999 good cause as to why it failed to file its Prehearing Exchange as required and why a default should not be entered against it. On June 21, 1999, Respondent submitted a Response to the Order to Show Cause. Therein, Respondent explained that, under its new name, "Trucking Specialists, Inc.,"¹ it had commenced a bankruptcy case on April 9, 1999, and filed with EPA's Regional Hearing Clerk on April 15, 1999 a Notice of Bankruptcy. Respondent did not file a Prehearing Exchange in reliance on Respondent's belief that a civil administrative penalty proceeding is subject to the automatic stay of bankruptcy law, 11 U.S.C. § 362(a). Respondent argued that the "police or regulatory power" exception of 11 U.S.C. § 362(b)(4) contemplates an equitable action to prevent future harm and does not encompass an action for money judgment only.

¹It is anticipated that Complainant will confirm with the State Corporations Commissioner that the name was lawfully changed after commencement of this action, and then will file a motion to amend the Amended Complaint to reflect the Respondent's new name, indicating Respondent's concurrence therewith.

On June 25, 1999, Respondent filed a Motion for Extension of Time to File Prehearing Exchange, stating that the U.S. Bankruptcy Court ruled on June 24, 1999 that the automatic stay did not apply to this administrative proceeding. Respondent stated that it would be able to file its Prehearing Exchange on July 9, 1999.

Complainant replied to Respondent's submittals, requesting that Respondent be held in default, or in the alternative, that Respondent be sanctioned by a penalty based on the number of hours the government had to expend opposing the Respondent's Response and motion in Bankruptcy Court. Complainant argued that there was no basis for Respondent's belief that this action was stayed, and that it should have obtained relief from the Prehearing Order prior to violating it, particularly where Complainant had informed Respondent's counsel, as reflected in Status Reports, that the Bankruptcy Code provided that this administrative proceeding was not stayed. Complainant argued that it has been prejudiced by the resultant delays, and that one of its witnesses, an EPA inspector, will be unavailable for any hearing in this matter due to a six-month maternity leave expected to begin in early August.

Complainant's position is well taken, except for its request for monetary sanctions against Respondent, which is not authorized under applicable statutes or regulations. It is noted that this proceeding has been pending for nine months, which is approaching the twelve month time line within which the Office of Administrative Law Judges expects, as a matter of policy, to achieve final disposition of administrative enforcement cases. *See*, 5 U.S.C. § 555(b) ("With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it"). Thus, an expedited treatment of this proceeding is appropriate.

The entry of a default, however, is a drastic remedy and the determination of whether to enter a default is within the discretion of the Presiding Judge. *See*, 40 C.F.R. § 22.17(a) ("A party may be found to be in default . . .").

Accordingly, and because Respondent timely responded to the Order to Show Cause, the Respondent's Motion for Extension is **GRANTED**. Respondent shall have until July 9, 1999 to file its Prehearing Exchange. Complainant shall have until July 19, 1999 to file its Rebuttal Prehearing Exchange. Complainant's request for default, or alternatively sanctions, is **DENIED**.



Susan L. Biro
Chief Administrative Law Judge

Dated: July 2, 1999
Washington, D.C.

In the Matter of Phoenix Demolition Company, Inc., Respondent
Docket No. CAA-09-98-14

Certificate of Service

I certify that the foregoing **Order On Respondent's Motion For Extension Of Time To File Prehearing Exchange And On Complainant's Request For Default Or Sanctions**, dated July 2, 1999, was sent this day in the following manner to the addressees listed below.

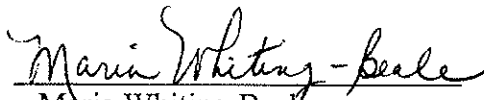
Original by Regular Mail to: Danielle E. Carr
Regional Hearing Clerk
U.S. EPA
75 Hawthorne Street
San Francisco, CA 94105

Copy by Regular Mail to:

Attorney for Complainant: Robert R. Klotz, Esquire
Marie Rongone, Esquire
Assistant Regional Counsel
U.S. EPA
75 Hawthorne Street , ORC-2
San Francisco, CA 95105

Copy by Regular Mail and Fax:

Attorney for Respondent: Thomas G. Luikens, Esquire
Ayers & Brown
4227 N. 32nd Street, 1st Floor
Phoenix, AZ 85201



Maria Whiting-Beale
Legal Assistant

Dated: July 2, 1999