



UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF )  
 )  
FARMERS UNION OIL COMPANY, ) DOCKET NO. FIFRA-8-99-46  
NAPOLEON, )  
 )  
 )  
RESPONDENT )

ORDER DENYING MOTION TO FILE OUT OF TIME

By a letter-order, dated June 21, 2000, the parties in this proceeding under Section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act, as amended (7 U.S.C. § 1361(a)) were directed, absent a settlement, to exchange specified prehearing information on or before August 11, 2000. A receipt for certified mail indicates that counsel for the Complainant or his office received the order on June 26, 2000. Respondent, Farmers Union Oil Company, Napoleon (N.D.), which is charged with violating FIFRA § 12(a)(2)(L) by failing to file a pesticide production report (EPA Form 3540-16) for the calendar year 1998 by March 1, 1999, as required by FIFRA § 7(c) and 40 C.F.R. § 167.85(d), complied with the order by submitting a letter, dated July 20, 2000, which was received by the ALJ's office on July 27, 2000. This letter was not accompanied by a certificate of service indicating service on the

Regional Hearing Clerk (RHC) and that a copy was served on counsel for Complainant. Because of this omission, the ALJ's legal staff assistant forwarded Respondent's letter to the RHC by a memorandum, dated August 28, 2000, which requested that a copy of the letter be provided to Complainant's counsel.

Complainant's prehearing exchange, a document, dated September 26, 2000, bearing a RHC's date stamp of even date, was received in the ALJ's office on October 10, 2000. Complainant's submission was not accompanied by a motion to file out of time nor was any explanation offered for the failure to comply with the August 11 due date. Therefore, on October 11, 2000, the ALJ issued an order directing that Complainant show cause, if any there be, on or before October 20, 2000, why it should not be found to be in default and the complaint dismissed with prejudice. Complainant did not respond to the order to show cause by October 20, 2000, nor did it by that date move for an extension of time in which to do so. By a motion, dated October 26, 2000, Complainant moved for an extension of three weeks in which to respond to the order to show cause, citing as a reason that its attorney suffered an incapacitating injury on October 14, 2000, which necessitated surgery on October 20, 2000. The motion which was signed by attorney Richard H. Baird, rather than Complainant's attorney of record, represented that Complainant's attorney remains physically

incapacitated and asserted that this circumstance established good cause for granting the requested extension.<sup>1/</sup>

Complainant's motion for an extension was denied, by an order, dated November 3, 2000, principally for the reason that revisions to the Consolidated Rules of Practice, 64 F.R. 40176 (July 23, 1999), codified 40 C.F.R. Part 22, and the preamble thereto, made it clear that the requirement of Rule 22.7(b) that motions for extension of time be filed prior to the due date for the filing of the document in question was to be strictly enforced.<sup>2/</sup> Moreover, the motion could not be considered a motion to file out of time because it was not accompanied by the document sought to be filed, that is, a response to the order to show cause.

On November 9, 2000, Complainant filed a motion to file out of time. The motion reiterated assertions that its attorney had suffered a physically incapacitating injury on October 14,

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<sup>1/</sup> On October 25, 2000, counsel for Complainant called the ALJ's legal staff assistant and informed her that he had undergone emergency surgery to repair an Achilles tendon and that he, or someone on his behalf, would be requesting an extension of time not only to respond to the order to show cause, but also to an order issued in similar but unrelated FIFRA proceedings. No dates for the injury or the emergency surgery were provided.

<sup>2/</sup> Because it was favorable to Respondent, the order was issued prior to the expiration of the 15-day period for responses to motions (Rule 22.16(b)). Respondent has retained counsel, who under date of October 31, 2000, served an objection to the motion, pointing out that the injury occurred long after the August 11, 2000, due date and that it is certain that Complainant has more than one attorney who might handle this matter. This objection was received after the order was issued.

2000, which necessitated surgery on October 20, 2000. The motion stated that Complainant's attorney remains physically incapacitated, and of this date is confined to his home. Complainant contends that this circumstance (1) establishes good cause for accepting Complainant's response to the order to show cause and (2) that the short delay in submitting its response has not resulted in any prejudice to the Respondent. Accompanying the motion was Complainant's response to the order to show cause signed by Richard H. Baird for Complainant's attorney of record. The facts of the injury to Complainant's attorney and the resulting surgery were repeated and as justification for the late filing of its prehearing exchange, Complainant stated that, as more fully described in an attached affidavit, about the time the prehearing exchange was due Complainant's attorney learned of the tragic death of Mr. Tim Osag's son, Chris. Circumstances surrounding this event were alleged to be extremely difficult for many in the Regional Office, including Complainant's attorney.

The affidavit referred to above is by Mr. David J. Janik, who states that he is the Supervisory Enforcement Attorney in the Legal Enforcement Program, U.S. EPA, Region 8 and that along with the director of the program, he supervises 31 enforcement attorneys and oversees the legal aspects of the FIFRA enforcement program in the region. Mr. Janik identified Timothy Osag as the Senior Enforcement Coordinator for FIFRA enforcement in Region 8 and

states that he (Osag) works closely with attorneys on his (Janik's) staff in developing and prosecuting civil enforcement actions for violations of FIFRA. Mr. Janik identified Dana Stotsky as the senior enforcement attorney for FIFRA cases in the region and states that Messrs. Osag and Stotsky have worked together on scores of cases over many years in addition to their respective duties as top technical and legal experts on pesticide enforcement matters in the region. Mr. Janik further states that Messrs. Osag and Stotsky were assigned to the instant FIFRA enforcement proceeding and that on Monday, August 14, 2000, they learned that Mr. Osag's 22-year old son, Chris Osag, had unexpectedly died on the previous day. This tragic news is asserted to have had a deep and intense effect on the many regional employees who have worked with Mr. Osag over the years, including Mr. Stotsky. Mr. Janik states his understanding that the prehearing exchange in the instant matter was due to be filed close to the period of disruption described above, and apologizes on behalf of EPA management for the lack of compliance with the prehearing order. He expresses his conviction that "our error" was due to institutional grief, rather than nonchalance or disrespect.

The motion at issue was apparently filed prior to the time Complainant became aware that Respondent was represented by counsel as the certificate of service shows service only on Respondent. The motion was, however, faxed to Respondent's counsel

on November 9, 2000, the date it was received in the ALJ's office. Respondent is apparently content to rely on its objection to Complainant's motion for an extension of time, because no response to the instant motion has been filed.

#### Discussion

By definition, a motion to file out of time accompanied by the document sought to be filed is being filed after the due date for the filing at issue. Therefore, there can be no doubt as to the ALJ's authority to accept the late filing of Complainant's response to the order to show cause. There is, however, no sound reason for doing so, because prehearing exchanges were due to be filed on or before August 11, 2000, and, under the facts presented, the unexpected and tragic death of Mr. Osag's son, which is offered as justification for Complainant's late filing, occurred on August 13, 2000. It is therefore clear that Complainant was in default even before the untimely and unfortunate event offered as a cause for failure to comply with the prehearing order. Moreover, even if the initial default were excused, the circumstance presented would neither explain or justify Complainant's delay of over six weeks in submitting its prehearing exchange.

Complainant has filed its prehearing exchange and, because the law favors the resolution of actions and controversies on their merits, a party which has cured its default is more likely

to have a motion to file out of time favorably considered.<sup>3/</sup> This is especially true where no hearing has been scheduled and no prejudice to the opposing party has been alleged or shown. See, e.g., General Electric Company, Docket No. TSCA-IV-89-0016, (ALJ, March 5, 1990) (where GE's prehearing exchange was submitted 14 days after due date, complainant's motion for default was denied, because forfeitures are not favored and no prejudice had been alleged or shown). See, however, Detroit Plastic Molding Company, TSCA Appeal No. 87-7, 3 E.A.D. 103 (CJO, March 1, 1990) (sustaining default order against respondent which submitted its prehearing exchange six days after the due date). Under the circumstances, it is my conclusion that Complainant hasn't shown a sound reason for accepting the late filing of its prehearing exchange and it must be held to a higher standard than the delinquency in excess of six weeks shown by this record. Complainant will be found to be in default and the complaint dismissed with prejudice in accordance with Rule 22.17(a) of the Consolidated Rules of Practice (40 C.F.R. Part 22).

#### Order

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<sup>3/</sup> Compare E.I. du Pont de Nemours & Co., Docket No. TSCA-III-540, 1992 EPA ALJ LEXIS 205 (ALJ, June 25, 1992) (49-day delinquency in requesting an extension of time to respond to motion to dismiss denied and motion to dismiss granted where, after a careful review, it was concluded that complainant was unlikely to prevail on the facts alleged in the complaint).

Complainant is found to be in default for failure to submit its prehearing exchange by the August 11 date established by the ALJ's order and the complaint is dismissed with prejudice.

Dated this 8<sup>th</sup> day of December 2000.

Original signed by undersigned

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Spencer T. Nissen  
Administrative Law Judge