UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	**)**	
	)	
ALLIED ENVIRONMENTAL, INC.,	**)**	**Docket No. TSCA-09-99-0004**
	)	
Respondent	**)**	

ORDER DENYING MOTION TO RECONSIDER

By Order dated June 20, 2000, the Complaint in this proceeding was dismissed with prejudice on the basis of Complainant's default resulting from its failure to comply with an Order of the Presiding Judge. Complainant immediately filed a Motion to Reconsider Order Dismissing Complaint With Prejudice (Motion). For the reasons which follow, Complainant's Motion will be denied.

The Complaint in this action was issued on September 30, 1999. Subsequently, an Answer was filed and a Prehearing Order was issued, requiring Complainant to file either a fully executed Consent Agreement and Final Order (CAFO) or its Initial Prehearing Exchange on or before June 8, 2000. In a Status Report dated May 31, 2000, the Complainant reported that the parties had settled, that the CAFO had been signed by Respondent, and that "[i]t is anticipated that the Consent Agreement and Final Order will be signed [by Complainant] and filed by June 8, 2000 in accord with the Prehearing Order." Nevertheless, Complainant filed neither a CAFO, its Prehearing Exchange, nor a motion for extension of time before the June 8, 2000 filing deadline.

When none of these documents were filed, despite over a week grace period following the deadline, the Complaint was dismissed by Order dated June 20, 2000, finding Complainant in default under 40 C.F.R. § 22.17(a), as amended, 64 Fed. Reg. 40182 (July 23, 1999). This provision provides as follows, 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 complainant constitutes a waiver of complainant's right to proceed on the merits of the action, and shall result in the dismissal of the complaint with prejudice.

Also considered in dismissing the Complaint was the fact that the same Assistant Regional Counsel representing Complainant in this case failed to meet filing deadlines in two other cases in the same month. *See also*, Order Terminating Proceedings Before the Chief Administrative Law Judge dated June 19, 2000 in *Bayview Environmental Services, Inc.*, TSCA-09-99-0005; and Order Dismissing Complaint With Prejudice dated June 20, 2000 in *Eric Tate*, FIFRA-09-99-0005.

Following issuance of the Order, the Practice Group Leader and the Branch Chief of the Assistant Regional Counsel immediately entered appearances in this proceeding and filed a Motion to Reconsider the Order Dismissing Complaint with Prejudice, and a Declaration of the Practice Group Leader in support of the Motion. The Motion acknowledged that Respondent had signed the CAFO on May 5, 2000, a month prior to the filing deadline, but that the CAFO had not been signed on behalf of the Agency by anyone or filed before the deadline. The Motion stated that the Assistant Regional Counsel is in her first year at the Office of Regional Counsel and is attending training. The Motion offered apologies for failure to meet the terms of the Prehearing Order, stated that the Office of Regional Counsel "will immediately take steps to ensure that the Court's orders are not missed in the future," and that the Region put a great deal of effort to obtain a settlement in this case, and "humbly asks the Court for an opportunity to correct its error." The Declaration of the Practice Group Leader stated that if the Motion is granted, the CAFO will immediately be submitted to the Regional Judicial Officer for signature and then submitted to the Regional Hearing Clerk for filing. Attached to the Declaration is a copy of the first page and signature page of the CAFO, showing signatures of Respondent, dated May 5, 2000, and of a Senior Associate at EPA Region 9, dated June 22, 2000.

There is no provision in the Consolidated Rules of Practice, 40 C.F.R. part 22, for "reconsideration" of an order, except under 40 C.F.R. § 22.32, which does not apply here. The appropriate remedy for a party who has been found in default is in section 22.17(c), 40 C.F.R., which provides, "[f]or good cause shown, the Presiding Officer may set aside a default order." Complainant's Motion is flawed for its failure to cite to the appropriate rule and request the appropriate relief.

Moreover, even assuming Complainant had cited to 40 C.F.R. § 22.17(c), the Motion offers no facts which could arguably support any assertion of "good cause." In particular, it is noted that Respondent did not contribute to the delay in Complainant executing and/or filing the CAFO, as it was signed by Respondent over a month before the CAFO was due to be filed. The failure to respond to the deadline in any way is solely due to the neglect of Complainant's inexperienced counsel and that of her supervisors. The fact that counsel is inexperienced does not render her neglect excusable, or a basis for good cause, particularly where all that was asked of her was to comply, or file an explanation of her inability to comply, with the explicit written Orders served directly upon her as attorney of record in the case. The Prehearing Order contained the explicit warning that Complainant's "failure to file its prehearing exchange in a timely manner can result in a dismissal of this case . . . THE MERE PENDENCY OF SETTLEMENT NEGOTIATIONS DOES NOT CONSTITUTE A BASIS FOR FAILING TO STRICTLY COMPLY WITH THE PREHEARING EXCHANGE REQUIREMENTS." It is noted that this is not a case where an inexperienced attorney is unfamiliar with informal or local court procedures or unpublished or antiquated precedent, which more seasoned attorneys have garnered through experience. Further, there is no assertion that the inexperienced counsel was led astray by erroneous advice given to her by anyone else. Moreover, the inexperienced counsel's neglect appears not to be based upon counsel's absence from the office, as the Motion does not assert that counsel was out of the office for training during and/or immediately preceding the

deadline for the CAFO or prehearing exchange.

Additionally, the failure can be attributed equally to the inexperienced counsel's supervisors, who were bound by due diligence and professional ethics to adequately train and closely supervise their inexperienced subordinates to avoid just the type of neglect which occurred here. No good cause is offered as to their failure in this regard. To the contrary, it appears clear that the supervisors were making no effort to track the filing deadlines in the cases being handled by their acknowledged inexperienced subordinate and were essentially completely unaware of the counsel's apparent blatant disregard of them.

Finally, the record shows that the CAFO in this case has yet to be fully executed by Complainant. There is a possibility that the Regional Judicial Officer may yet reject the Consent Agreement and not sign a Final Order. Thus, Complainant has not even established that the CAFO is ready to be filed immediately ending this action if the Motion were granted.

It is recognized that a default order is a harsh remedy. However, Complainant has offered no viable explanation for the neglect of counsel or her supervisors, has evidenced disregard for the administrative litigation process, and has not yet provided evidence that the settlement is final.[1] Furthermore, there is no indication in the record that there is any Supplemental Environmental Project, penalty of great magnitude, or compliance order at stake in the settlement. In these circumstances, and based upon the Motion and supporting documents offered at this point, it cannot be concluded that Complainant has shown good cause for setting aside the dismissal of the Complaint.

Accordingly, Complainant's Motion to Reconsider Order Dismissing Complaint with Prejudice is **DENIED.**

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[1]The "good cause" test for setting aside default under Rule 55(c) of the Federal Rules of Civil Procedure, and those Rules in general, are not applicable to these proceedings. *Midwest Bank & Trust Co., Inc.*, RCRA (3008) Appeal No. 90-4, 3 E.A.D. 696, 699 & n. 7 (CJO October 23, 1991). Under the Consolidated Rules of Practice, "[i]t is appropriate to examine whether fairness and a balance of the equities dictate that a default order be set aside. *Id.* For sake of comparison, Federal Rule of Civil Procedure 60(b) provides that relief from a court's judgment may be granted on the basis, *inter alia*, of the party's mistake, inadvertence, surprise or excusable neglect. Federal courts have recognized that the rule should be liberally applied in the context of a default judgment, especially where such judgments result from honest mistakes, rather than willful misconduct, carelessness or negligence. *Ellingsworth v. Chrysler*, 665 F.2d 180 (7th Cir. 1981). It has been stated that courts should refuse to vacate a default judgment where a party has evidenced disregard for the judicial process or where hardship would result. *Kinnear Corp. v. Crawford Door Sales Co.*, 49 F.R.D. 3 (D. S.C. 1970). It has also been held that carelessness by the litigant or his counsel does not afford a basis for relief from judgment under Rule 60(b). *Pelican Production Corp. v. Marino*, 893 F.2d 1143 (10th Cir. 1990).

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Susan L. Biro
Chief Administrative Law Judge

Dated: June 29, 2000
Washington D.C.