UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the matter of	**)**	
	)	
Marc Mathys d/b/a Green Tree Spray Technologies, LLC,	**)**	**Docket No. RCRA-03-2005-0191**
	)	
	)	
Respondent	**)**	

ORDER GRANTING RESPONDENT'S MOTION TO SET ASIDE DEFAULT ORDER

Respondent Marc Mathys d/b/a Green Tree Spray Technologies, LLC ("Mathys"), has filed a motion styled, "Motion to Dismiss for Lack of Jurisdiction, Motion to Set Aside Default, and Motion to Reopen Hearing." This motion is in response to a Default Order issued against respondent on December 12, 2005. 40 C.F.R. 22.17. In the Default Order, Mathys was found to be non-compliant with this tribunal's Order Setting Prehearing Procedures, dated September 14, 2005, as well as with a subsequently issued Order to Show Cause, dated November 2, 2005. Accordingly, a default order issued in which Mathys was found in violation of the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6921-6939e, its implementing regulations at 40 C.F.R. Parts 260-265, 268, and 270, and the Delaware Regulations Governing Hazardous Waste, Parts 122, 124, and 260-79. A civil penalty of $103,738 was assessed against respondent for these violations. Respondent now seeks relief from this Default Order. The U.S. Environmental Protection Agency ("EPA") opposes the motion. As explained below, respondent's motion is *granted* insofar as it seeks that the Default Order be *vacated*, and the record reopened.[1]

The Consolidated Rules of Practice which govern this civil penalty enforcement proceeding are found at 40 C.F.R. Part 22. Rule 17(c) is titled, "Default order," and it in part provides that if the default order "resolves all outstanding issues and claims in the proceeding, it shall constitute the initial decision." 40 C.F.R. 22.17(c). The Default Order issued against respondent in this matter did precisely that, finding Mathys liable for all violations alleged in the complaint and assessing the civil penalty sought by EPA. Rule 17(c) further provides, however, that "[f]or good cause shown, the Presiding Officer may set aside a default order." *Id.* It is against this "good cause shown" standard that the merits of Mathys' present motion for relief will be measured.

[1] This order does not address Mathys' argument as to the merits of the case or its claim that the penalty proposed in this matter will adversely affect its ability to continue to do business.

In *Thermal Reduction Company,* 4 E.A.D. 128, 131 (EAB 1992), the Environmental Appeals Board held that a default order may be set aside "when fairness and a balance of the equities so dictate." Although a technical case can be made to support EPA's argument that the Default Order in this case should be upheld, a fairer and more equitable result obtains when considering "fairness and a balanc[ing] of the equities."

In that regard, this tribunal finds compelling Mathys' assertions in his affidavit that while he was aware that EPA had instituted an action against Green Tree Spray Technologies, LLC ("Green Tree"), he was unaware that the action was against him personally. Resp. Ex. A., ¶¶ 18 & 21. This statement by respondent is supported by the discrepancy in the Certificates of Service attached to the Complaint that was served upon the company and the same Complaint that was filed with the EPA Regional Hearing Clerk, who maintains the official record in this case. Resp. Exs. B & C. Given the incomplete Certificate of Service attached to the Complaint served upon Green Tree, it certainly is plausible that Mathys did not understand that EPA was proceeding against him personally. Specifically, that Certificate of Service only indicated that the Complaint had been filed with the Regional Hearing Clerk.

Moreover, Respondent's Affidavit Exhibit 8 (a document that EPA finds reliable and persuasive) lends further support to the reasonableness of Mathys' belief that the EPA complaint was filed against Green Tree and not against him as an individual. Exhibit 8 is a correspondence between a Green Tree employee, Tyler Clark, and a law firm representing the company. In this correspondence, Clark discusses the present EPA enforcement action and in so doing references Mathys' mistaken belief that Green Tree had already been set up as an "LLC." There is no indication that the company's law firm thereafter informed Mathys that it was he who is the respondent in this matter, and not Green Tree.

In sum, the equities in this case lie with respondent Marc Mathys. Given the substantial civil penalty at issue in this case, and given the fact that proceedings in this matter have progressed only to the Prehearing Exchange stage, it would be a draconian measure indeed to find Mathys in default under the present circumstances. It is certainly understandable how Marc Mathys could arrive at the mistaken belief that this enforcement proceeding was against Green Tree Spray Technologies, LLC, as a corporate entity.

Accordingly, consistent with the "good cause" standard of 40 C.F.R. 22.17(c) and the reasoning of the Environmental Appeals Board in *Thermal Reduction Company, supra,* the

Default Order issued against respondent in this matter is *vacated* and the record in this proceeding is reopened.

Carl C. Charneski
Administrative Law Judge

Issued: April 17, 2006
Washington, D.C.