UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
Revane Development Company, Inc.,	)	**Docket No. CWA-01-2008-0027**
	)	
Respondent.	)	

ORDER

I. Procedural History

This matter was initiated on December 31, 2007 by Complainant, the United States Environmental Protection Agency, Region 1, filing a two count Administrative Complaint under Section 309(g) of the Clean Water Act (CWA), 33 U.S.C. § 1319(g), against Respondent Revane Development Company, Inc. Count 1 of the Complaint alleges that Respondent violated Section 301(a) of the CWA (33 U.S.C. §§ 1311(a)), by discharging storm water associated with industrial activity without authorization under a National Pollutant Discharge Elimination System (NPDES) permit from "August 22, 2004 to present." Count 2 alleges that Respondent violated CWA Section 308 (33 U.S.C. § 1318) by failing to timely apply for a permit and "continues to be in violation." The Complaint proposes that civil penalties be issued against Respondent of up to $11,000 per day for each day of violation up to the statutory maximum of $157,500.

On January 31, 2008, Respondent, through counsel, filed an Answer to the Complaint denying the violations, raising certain affirmative defenses, and requesting a hearing thereon. The parties were subsequently offered an opportunity to participate in this Tribunal's Alternative Dispute Resolution (ADR) process. While Complainant accepted the offer, Respondent failed to respond thereto, and therefore the case was not referred for ADR.

On March 13, 2008, a Prehearing Order was issued providing that "[p]ursuant to Section 22.19(a) of the Rules, each party shall file with the Regional Hearing Clerk and shall serve on the opposing party *and on the Presiding Judge*" a prehearing exchange as outline in the Order. Said Prehearing Order also provided detailed information on the addresses to be used for serving the Presiding Judge with a copy of the exchange and contact information for the Tribunal's staff in the event a party had any question in regard to the matter.

On April 18, 2008, Complainant timely filed its Prehearing Exchange and served a copy thereof on the undersigned Presiding Judge and Respondent. On April 22, 2008, Respondent's counsel withdrew their appearance advising that the Respondent company, through its President Thomas Revane, had decided to proceed *pro se* in this matter. Subsequently, it came to this

Tribunal's attention that it had not received a copy of Respondent's Prehearing Exchange due on or before May 9, 2008. Upon inquiry, the Tribunal was advised by the Regional Hearing Clerk that such exchange had been timely filed by Respondent with her, but it appeared from such filing that Respondent had failed to serve a copy thereof on the Tribunal or the Complainant.[1] Attempting to expeditiously and courteously rectify this oversight by a *pro se* litigant, this Tribunal included in its Order granting Complainant's Motion for a Second Extension of Time to Submit its Rebtuual Prehearing Exchange issued on June 3, 2006, its observation of the oversight and the following directive: "**Respondent shall submit a copy of its Prehearing Exchange to this Tribunal within 10 days of this Order.**"

After 10 days, having still not received a copy of Respondent's Prehearing Exchange in accordance with the Prehearing Order and Order of June 3, 2006, the Tribunal had her staff repeatedly telephone Respondent over the next several weeks requesting the same. Notes of such conversations indicate that Respondent's President represented in each such instance that he would promptly send a copy of his Prehearing Exchange to the Judge.

Unfortunately, Respondent's President did not follow through on his representations. As a result, on June 30, 2008, the undersigned issued an Order to Show Cause, requiring that on or before July 10, 2008, Respondent show good cause why it failed to submit its Prehearing Exchange to this Tribunal as required by the prior Orders and "why a default should not be entered against it."[2]

Respondent did not respond to the Show Cause Order in a timely manner and again this Tribunal extended to Respondent the courtesy of a reminder telephone call from the Tribunal's staff. On July 28, 2008, over two and a half months late, the undersigned Presiding Judge finally received a copy of what purports to be Respondent's Prehearing Exchange. The Respondent did not include with this submission any response to the Show Cause Order, nor is there a certificate of service attached to the filing.

Further, it appears that the Respondent's Prehearing Exchange does not meet the requirements of the Prehearing Order. The Prehearing Exchange submitted by Respondent identifies one witness (Donald Miller), or two if read liberally to identify Respondent's President as a witness, and ten documents copies of which are attached. Among Respondent's documents are tax returns in support of a claimed inability to pay penalty, a Stormwater Pollution Prevention Plan dated January 30, 2008, various correspondence, and a document wherein Respondent appears to be claiming an exemption from the CWA permit requirements on the basis that the project started in 1966 and therefore he was not a "new discharger," as that term is defined in 40

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[1] The Complainant indicated in its Motion for Extension of Time to File its Rebuttal Prehearing Exchange dated May 15, 2008 that it was not served by Respondent with the Prehearing Exchange and instead it obtained a copy thereof from the Regional Hearing Clerk.

[2] On that same date, July 10, 2008, Complainant submitted its Rebuttal Prehearing Exchange indicating it was reducing the proposed penalty to $50,000 in consideration, *inter alia*, Respondent's ability to pay.

C.F.R. § 122.[3] The Exchange does not include the narrative responses requested in Section 3 of the Prehearing Order or other information requested of Respondent in such Order to facilitate scheduling the hearing in this matter such as Respondent's proffer as to the appropriate location for hearing.

II. The Standards on Default

Section 22.17(a) of the Consolidated Rules of Practice provides that:

> 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. . . .

40 C.F.R. § 22.17(a).

Section 22.17(c) of the Consolidated Rules of Practice provides that:

> When the Presiding Officer finds that 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. If the order resolves all outstanding issues and claims in the proceeding, it shall constitute the initial decision under these Consolidated Rules of Practice. The relief proposed in the complaint or motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act. . . .

40 C.F.R. § 22.17(a).

The Prehearing Order issued in this case referred to these Rules stating:

> Each party is hereby reminded that failure to comply with the prehearing exchange requirements set forth herein . . . can result in the entry of a default judgment against the defaulting party. See Section 22.17 of the Rules of Practice, 40 C.F.R. § 22.17.

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[3] The correspondence Respondent included in its exchange apparently contained information as to specific monetary amounts offered by each side in settlement. Such information would not be admissible under the Rule 22.22(a)(1) (40 C.F.R. § 22.22(a)(1)) and is inappropriate to put before the Presiding Judge who, in the event of hearing, must determine the appropriate penalty. Therefore, such information was blacked out on the copy of the exchange by this Tribunal's staff before filing.

III. Discussion

Pro se litigants are generally held to a more lenient standard than parties represented by learned members of the bar and their filings accepted even though they do not conform to the exacting and technical pleading requirements of the Rules. Such leniency, however, does not extend so far as to completely excuse *pro se* litigants from complying with any and all pleading requirements. *Jiffy Builders,* 8 E.A.D. 315, 321 (EAB 1999); *Rybond, Inc.*, 6 E.A.D. 614, 627 (EAB 1996). In particularly, *pro se* litigants are not excused from complying with time deadlines, as it takes no particular legal expertise to act in a timely manner. *The Bullen Companies, Inc.*, 9 E.A.D. 620, 626 n. 11 (EAB 2001)(finding litigant's *pro se* status did not excuse its failure to comply with time deadline for filing of cross-appeal).

Clearly, Respondent is technically in default in this action for many reasons including, but not limited to, its failure to serve this Tribunal (and the Complainant) with a copy of its Prehearing Exchange in a timely manner, failure to fully respond to the requirements for such exchange set forth in the prehearing order, failure to timely respond to the directive to correct this oversight contained in the Order of June 3, 2008, and failure to respond at all to the Order to Show Cause by proffering any explanation for its failure to comply with the prior Orders of this Tribunal and/or justification for not entering a default against it in this matter.

Moreover, it is noted that such failures were not inconsequential in that they caused this Tribunal and her staff to unnecessarily expend substantial amounts of time and effort determining the status of Respondent's filings and attempting to persuade Respondent to voluntarily correct the "oversight" and provide a copy of the exchange to the undersigned. This Tribunal, situated in Washington, D.C. was in no position to merely view the copy of the exchange filed by the Respondent with the Regional Hearing Clerk, as such Clerk's Offices are some 400 miles away in Boston, Massachusetts. In addition, the failure of Respondent to serve the undersigned with a copy of its exchange has delayed the setting of this matter for hearing and undermined this Tribunal's effort to be efficient, maintain order, and avoid delay as required by 40 C.F.R. § 22.4(c)

However, default is a harsh and disfavored sanction, reserved only for the most egregious behavior. A default judgment is appropriate where the party against whom the judgment is sought has engaged in willful violations of court rules, contumacious conduct, or intentional delays. *Forsythe v. Hales*, 255 F. 3d 487, 490 (8th Cir. 2001)(quoting *Fingerhut Corp. v. Ackra Direct Mktg. Corp.*, 86 F. 3d 852, 856 (8th Cir. 1996)). Default judgment "is not an appropriate sanction for a marginal failure to comply with the time requirements [and] . . . should be distinguished from dismissals or other sanctions imposed for willful violations of court rules, contumacious conduct, or intentional delays." *Time Equipment Rental & Sales, Inc. v. Harre,* 983 F. 2d 128, 130 (8th Cir. 1993)(12 day delay in filing answer did not warrant entry of default). Moreover, Administrative Law Judges have broad discretion in ruling upon default. Issuance of such an order is not a matter of right, even where a party is technically in default. *See, Lewis v. Lynn*, 236 F. 3d 766 (5th Cir. 2001). This broad discretion is informed by the type and the extent of any violations and by the degree of actual prejudice to the Complainant." *Lyon County Landfill*, EPA Docket No. 5-CAA-96-011, 1997 EPA ALJ LEXIS 193 * 14 (ALJ, Sept. 11, 1997).

It does not appear that the *pro se* Respondent willfully violated the Rules or Orders, or that it acted with contumacious conduct or using any willful delaying tactics. Further, it does not appear that Complainant has suffered any substantive prejudice due to Respondent's failure to comply with the Orders of this Tribunal. In particular, it is noted that Complainant has not moved to compel additional information from Respondent consistent with the Prehearing Order. Additionally, it appears that Respondent has raised arguments as to its liability in this matter as well as penalty, and provided some support therefor. The Presiding Judge is charged with the responsibility not only to avoid delay, but also to conduct a fair and impartial proceeding. 40 C.F.R. § 22.4(c). Entry of a default order is therefore not warranted.

However, Respondent is hereby advised to strictly follow the Rules of Practice and instructions set forth in orders issued in this proceeding from this day forward, as such leniency may not be shown again in this proceeding. Respondent is also advised to follow the rules regarding filing and service of documents, and to include a certificate of service with each document filed, showing that it mailed the Regional Hearing Clerk the original document and that EPA counsel and the undersigned each have been sent a copy.

Susan L. Biro
Chief Administrative Law Judge

Dated: July 29, 2008
Washington, D.C.

In the Matter of Revane Development Company, Inc., Respondent
Docket No. CWA-01-2008-0027

CERTIFICATE OF SERVICE

I certify that the foregoing **Order**, dated July 29, 2008, was sent this day in the following manner to the addressees listed below:

Maria Whiting-Beale

Maria Whiting-Beale
Staff Assistant

Dated: July 29, 2008

Original And One Copy By Pouch Mail To:

Wanda I. Santiago
Regional Hearing Clerk
U.S. EPA
One Congress Street, Suite 1100
Boston, MA 02114-2023

Copy By Pouch Mail To:

Jeffrey Kopf, Esquire
Enforcement Counsel (SEL)
U.S. EPA
One Congress Street, Suite 1100
Boston, MA 02113-2023

Copy By Regular Mail and Facsimile To:

Thomas Revane, President
Revane Development Company, Inc.
342 Greenwood Street
Worcester, MA 01607