IN RE PRODUCTION PLATED PLASTICS, INC.

RCRA (3008) Appeal No. 92-3

ORDER DISMISSING APPEAL

Decided February 9, 1994

Syllabus

Respondent Production Plated Plastics, Inc. has filed an appeal of the Initial Decision and Default Order issued in this case by the Regional Administrator of U.S. EPA Region V.

Held: The appeal was filed in an untimely manner and is therefore dismissed.

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.

Opinion of the Board by Judge McCallum:

I. *BACKGROUND*

Production Plated Plastics, Inc. (PPP) has filed an appeal of an Initial Decision and Default Order issued in this case by the Regional Administrator of U.S. EPA Region V. The default order held that PPP had failed to comply with RCRA § 3017(g), 42 U.S.C.A. § 6938(g), and provisions of Michigan law requiring that an exporter of hazardous waste file, no later than March 1 of each year, a report summarizing the types, quantities, frequency, and ultimate destination of all hazardous waste exported during the previous calendar year. *See* Mich. Comp. Laws § 299.501 *et seq.*; Mich. Admin. Code r. 299.9309(2)(d), 299.9309(1), & 299.11003(i).[1] PPP failed to submit a timely report for calendar year 1989.

[1] In 1986 Michigan received authorization under RCRA §3006(b), 42 U.S.C.A. §6926(b), to operate its State RCRA program in lieu of the federal program. It is well established that section 3008 of RCRA empowers EPA to take enforcement action in any State authorized under section 3006 for violation of any requirement of the authorized State program. *Wyckoff Co. v. EPA*, 796 F.2d 1197, 1200-01 (9th Cir. 1986); *In re Standard Tank Cleaning Corporation*, RCRA (3008) Appeal No. 91-2 (CJO, July 19, 1991); *In re Landfill Inc.*, RCRA (3008) Appeal No. 86-8, at 2 (CJO, November 30, 1990).

The complaint in this matter was filed on September 28, 1990, by the director of the Waste Management Division, U.S. EPA, Region V, and, according to the Initial Decision and Default Order (p. 5), was received at PPP's place of business on October 5, 1990. The complaint stated that "[f]ailure to answer within thirty days of receipt * * * may result in a finding by the Regional Administrator that the entire amount of the penalty sought in this complaint is due and payable * * *." Complaint, at 9. PPP did not respond to the complaint. Complainant filed a motion for default on February 3, 1992. PPP did not respond to the motion. On July 15, 1992, the Regional Administrator issued the above-mentioned Initial Decision and Default Order. The order assesses a penalty of $9,500, the amount sought in the complaint, and requires PPP to comply with all reporting requirements. This appeal followed.

PPP raises two issues on appeal. First, PPP contends that the complaint was not properly served because PPP had ceased all business and operations in 1989 and "retained no employees, representatives, agents, managers, officers or other personnel at its former place of business who would have been qualified to accept service or know what to do with it." Brief in Support of Notice of Appeal, at 5. Second, PPP argues that it should not be assessed a penalty for failing to submit a report regarding exports of hazardous waste by March 1, 1990, because the company went out of business in 1989, and because it no longer has sufficient funds to pay the penalty. *Id.* at 6-7.

II. *DISCUSSION*

Region V contends that PPP's appeal is untimely because it was not filed within 20 days of service of the Initial Decision and Default Order as required by 40 C.F.R. § 22.30(a) of the Consolidated Rules of Practice. This section states, in pertinent part:

> *Notice of appeal.* (1) Any party may appeal an adverse ruling or order of the Presiding Officer by filing a notice of appeal and an accompanying appellate brief with the Environmental Appeals Board and upon all other parties and amicus curiae within twenty (20) days after the initial decision is served upon the parties.

40 C.F.R. § 22.30(a). In addition, "[w]here a pleading or document is served by mail, five (5) days shall be added to the time allowed by these rules for the filing of a responsive pleading or document." 40 C.F.R. § 22.07(c). In this case, the Initial Decision and Default Order were served by mail upon Respondent on July 17, 1992. The deadline for filing an appeal in this case, therefore, was August 11, 1992 (20

days + 5 days). Respondent's notice of appeal was not received (filed) until September 1, 1992.[2]

PPP argues that the Initial Decision and Default Order granted it 45 days to file its appeal. Respondent's Brief in Support of Notice of Appeal at 2. In particular, PPP relies on the following statement contained in the Initial Decision and Default Order (p. 8):

> Pursuant to 40 C.F.R. § 22.27, this Default Order shall become final within forty-five (45) days after service upon the parties unless it is appealed to the EPA Administrator or the Administrator elects, sua sponte, to review it.[3]

PPP's contention is without merit. The above-quoted statement merely specifies the period of time (45 days) that it takes for a default order to become a final decision in the absence of an appeal (or sua sponte review). While the statement can be faulted for not divulging the time period for perfecting an appeal (20 days), which is the more pertinent time period from the perspective of a potential appellant, this dereliction is one of parsimony, not deception. Accordingly, we do not think that it is asking too much of a potential appellant to consult the rules themselves, to ensure an adequate and full understanding of the pro-

[2] The Appeal is dated August 27, 1992, and indicates that it was served by mail on that date. In its reply brief, the Region uses this date as the filing date for the appeal and concludes accordingly that the appeal was filed forty-one (41) days after service of the Initial Decision and Default Order. It is well established, however, that, unless provided otherwise in the regulations, the Agency looks to the date the appeal is *received* in determining whether an appeal has been timely filed, not the date of mailing. *See In re Custom Chemical & Agricultural Consulting, Inc.*, FIFRA Appeal No. 86-3, at 4 n.4 (CJO, March 6, 1989) (an appeal *received* by the end of the appropriate time period was timely filed); *In re Federal-Hoffman, Inc.*, RCRA (3008) Appeal No. 87-15, at 3 (CJO, Nov. 15, 1989) (appeal must be filed with the Headquarter's hearing clerk within twenty days of service of the initial decision); *In re O.M. Scott & Sons*, RCRA (3008) Appeal No. 87-2, at 2 (CJO, June 12, 1987) (dismissing as untimely an appeal not *received* by the Administrator within the filing period); *In re Agland Incorporated*, FIFRA Appeal No. 83-2, at 4-5 (CJO, April 18, 1985) (an appeal *received* within the filing period is timely); *cf. In re Georgetown Steel Corporation*, RCRA Appeal No. 91-1, at 3 n.3 (Adm'r, June 10, 1991) (interpreting 40 C.F.R. §124.19 as requiring that a petition for review be *received* within the appropriate filing period). Using the date of receipt is consistent with the language of Section 22.30(a) of the Consolidated Rules of Practice, which states that appeals must be *filed with the Board* within 20 days of service of the initial decision. There is nothing in section 22.30(a) to suggest that *serving* a document by mail on the Board is equivalent to *filing* the document with the Board.

[3] Section 22.27(c) cited by the Regional Administrator no longer refers to the "Administrator." That section now refers to the Environmental Appeals Board.

cess for perfecting an appeal.[4] There, in Section 22.30, under the boldface heading, "Appeal from or review of initial decision," the appellant will find the 20-day requirement in the clearest of terms.

Moreover, this case does not present any special circumstances that would warrant relaxation of the time for filing an appeal. *See In re B & B Wrecking and Excavating, Inc.*, TSCA Appeal No. 92-2, at 2 (EAB, April 23, 1992) (time requirements must be followed unless "special circumstances warrant relaxation"). First, even if PPP relied on the 45-day language, identified above, PPP's appeal would still be untimely. PPP did not file this appeal until September 1, 1992, 46 days after service of the Initial Decision and Default Order. Second, the record does not appear to support PPP's alleged bases for appeal in any event. For example, although PPP states that it was no longer in business in 1989 and thus could not have submitted the required report in March of 1990, the record on appeal indicates that PPP did in fact submit the required report on February 15, 1991, eleven months after it was due.[5] In addition, the transmittal letter for the report states expressly that any correspondence should be mailed to Production Plated Plastics at the following address: 6600 E. Fifteen Mile Road, Sterling Heights, MI. This is precisely the address used by the Region to serve the complaint in October of 1990. Thus, PPP's assertions that it was unable to submit the required report and that the complaint was not properly served are suspect at best.[6] We therefore decline to waive our filing requirement in this instance. PPP's appeal is dismissed as untimely.

III. *CONCLUSION*

PPP is hereby ordered to pay the full amount assessed in the Initial Decision and Default Order ($9,500) within sixty (60) days after receipt of this order unless otherwise agreed by the parties and to comply with all other provisions of that Order. Payment shall be made

[4] Nonetheless, we strongly recommend that in future cases the Regional Administrator should either expressly inform the parties of the 20-day time period in Section 22.30, or, at least, make specific reference to that section when informing the parties of when a default order becomes final.

[5] The report was dated February 5, 1991. The Regional Administrator specifically referred to this report in the Initial Decision and Default Order (p. 5 n.1). PPP, however, makes no mention of the report in its appeal.

[6] The Sterling Heights address was also used for service of the February 1992 motion for default and the July 1992 Initial Decision and Default Order.

by forwarding a cashier's check or certified check payable to the Treasurer, United States of America to:

U.S. EPA Region V
Regional Hearing Clerk
P.O. Box 70753
Chicago, IL 60673

So ordered.