BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:	)	
	)	
Ag-Air Flying Services, Inc.	)	FIFRA Appeal No. 06-01
	)	
Docket No. FIFRA-10-2005-0065	)	
	)	
	)	

RESPONSE BRIEF OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION 10

Complainant, U.S. Environmental Protection Agency, Region 10 ("EPA") provides this response brief in accordance with the Consolidated Rules of Practice, 40 C.F.R. § 22.30(a)(2). EPA filed a Complaint and Notice of Opportunity for Hearing ("Complaint") in this matter on January 20, 2005, alleging that Ag-Air Flying Services, Inc. ("Ag-Air") violated the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") by spraying a pesticide in a manner inconsistent with the labeling for that pesticide. Ag-Air filed an Answer and Affirmative Defenses to Complaint and Notice of Opportunity for Hearing ("Answer") denying the allegations made by EPA. After approximately one year of litigation, on January 27, 2006, the Presiding Officer, Chief Administrative Law Judge Susan L. Biro, issued an Order Granting Complainant's Motion for

Default for Failure to Submit Additional Discovery ("Default Order"). The ruling by Judge Biro found Ag-Air liable for the violation of FIFRA, and assessed Ag-Air the penalty proposed by EPA, $3,120. Ag-Air appealed the Default Order to the Environmental Appeals Board ("EAB") on February 2, 2006. For the reasons set forth below, the EAB should uphold the Default Order.

STANDARD OF REVIEW

The EAB applies a "totality of the circumstances" test when considering the appeal of a default order. *In re Thermal Reduction Co.*, 4 E.A.D. 128, 131 (EAB 1992); *accord In re Rybond, Inc.*, 6 E.A.D. 614, 625 (EAB 1996); *In re Pyramid Chem. Co.*, RCRA-HQ-2003-001, slip op. at 6 (EAB Sept. 16, 2004), 11 E.A.D. ___; *In re B&L Plating, Inc.*, CAA Appeal No. 02-08, slip op. at 12-13 (EAB Oct. 20, 2003), 11 E.A.D.___; *In re JHNY, Inc., a/k/a Quin-T Technical Papers and Boards*, CAA Appeal No. 04-09, slip op. at 17 (EAB Sept. 30, 2005). In applying this test, the EAB may take into account the nature of the alleged procedural omission, along with the validity of any explanation for this omission. *See Rybond*, 6 E.A.D. at 625; *In re Midwest Bank & Trust Co.*, 3 E.A.D. 696, 698 (CJO 1991); *Pyramid Chem.*, slip op. at 7, 11 E.A.D. at ___; *JHNY, Inc.*, slip op. at 17. The EAB may also consider whether the defaulting party has demonstrated a "strong probability" of succeeding on the substantive merits if a hearing were to be held. *Pyramid Chem.*, slip op. at 8, 11 E.A.D. ___; *In re Jiffy Builders, Inc.*, 8 E.A.D. 315, 322 (EAB 1999); *Midwest Bank & Trust*, 3 E.A.D. at 701; *JHNY, Inc.*, slip op. at 17. This inquiry may include an assessment as to whether the assessed penalty is a reasonable one. *JHNY, Inc.*, slip op. at 17.

The EAB recognizes that the law disfavors the resolution of a case based upon default. *Thermal Reduction*, 4 E.A.D. at 131; *Rybond, Inc.*, 6 E.A.D. at 616; *JHNY, Inc.*, slip op. at 16. At the same time, the EAB accords substantial deference to the administrative law judge who conducted

the proceeding. *JHNY, Inc.*, slip op. at 17-18. Such deference is especially warranted with regard to matters pertaining to the prehearing exchange and discovery. *Id.*

ARGUMENT

The Default Order issued by Judge Biro describes in detail Ag-Air's failures to comply with her orders during the course of the proceeding below. The particular omission which resulted in issuance of the Default Order was the failure of Ag-Air to provide discovery as required by Judge Biro's Order on Complainant's Motion for Accelerated Decision on Liability and Penalty, Motion to Supplement Complainant's Prehearing Exchange, and Motion for Discovery ("Discovery Order"). This omission, however, was just the most recent, however; during this proceeding Ag-Air has flaunted other deadlines as well, including the deadline for filing the initial prehearing exchange.[1]

I. Granting The Default Order Was Not An Abuse Of Discretion.

Judge Biro exercised her legally recognized discretion to enforce the procedural rules and the Discovery Order. *See, e.g., In re CDT Landfill Corp.*, CAA Appeal No. 02-02, slip op. at 27 (EAB June 5, 2003), 11 E.A.D. ___ (quoting *In re Lazarus, Inc.*, 7 E.A.D. 318, 334 (EAB 1977); *accord In re Carroll Oil Co.*, 10 E.A.D. 635, 650 (EAB 2002)). This discretion includes the authority to "sanction through default a party's disregard of a procedural order." *JHNY, Inc.*, slip op. at 14. EPA and Ag-Air each had the obligation to submit evidence at a time, and in a manner, that was prescribed by Judge Biro. EPA complied with this requirement, but Ag-Air did not. By failing to meet an obligation imposed by the Presiding Officer, Ag-Air subverted the proper administration of

[1] Judge Biro has been more than fair to Ag-Air. Although Ag-Air missed the deadline for submitting the initial prehearing exchange, as established by the Prehearing Order, Judge Biro denied EPA's motion for default for failure to meet this deadline and gave Ag-Air additional time to comply, denying. *See*, Motion for Default for Failure to Submit Prehearing Exchange; Order on Motions for Extensions of Time.

this proceeding. *Id.* at 23-24. This conduct is a sufficient basis for default.

II. Ag-Air Has Not Demonstrated That There Was Good Cause For Failing To Comply With The Discovery Order.

In its Appeal, Ag-Air states that it failed to comply with the Discovery Order due to the illness and vacation plans of counsel. Ag-Air previously cited the illness of counsel[2] to explain its failure to comply with the Discovery Order.[3] Judge Biro found this explanation to be an insufficient excuse, and issued the Default Order. Judge Biro's ruling is consistent with the dictates of the EAB, which has held that the failure to provide information in accordance with an order of an administrative law judge, together with a failure to provide a meaningful justification for having done so, is a basis for default. *JHNY, Inc.*, slip op. at 14.

Ag-Air now attempts to supplement the illness of counsel explanation that was rejected by Judge Biro with extra-record statements. According to Ag-Air, counsel also was unable to comply with the Discovery Order due to "vacation" and a "previously planned shut-down" of his law practice.[4] Ag-Air fails to explain why this information was not revealed to Judge Biro earlier, or why this new information should be viewed as good cause for ignoring the deadline in the Discovery Order.

The supplemental explanation provided by Ag-Air actually serves to further validate Judge Biro's ruling. It now seems that the absence of Ag-Air's counsel was planned in advance, so that

---

[2] Notice of Appeal at 2. The reference to "personal health reasons" as the basis for the failure to comply is assumed to mean the same thing as the previously referenced "illness" of counsel. *See* Appellant Brief at 5; Memorandum Opposing Motion for Extraordinary Sanction of Default, and Response to Discovery Complaints ("Opposition to Default") at 3.

[3] Opposition to Default at 3. Ag-Air also contended that it was "difficult" to produce certain requested data. *Id.* However, this excuse does not justify the failure to submit the other requested documents by the discovery deadline, and does not explain why Ag-Air failed to even make an effort to obtain this data until well after the due date.

[4] Appellant Brief at 5.

counsel could have made arrangements to meet deadlines likely to occur during his absence, and it was his responsibility to do so. At the time of this pre-planned absence, the Discovery Motion had been pending before Judge Biro for almost 4 weeks. Given that Ag-Air chose not to oppose the Discovery Motion, the relevance of the requested documents to the defense raised by Ag-Air, and the imminent hearing date, counsel for Ag-Air could have anticipated that Judge Biro would grant EPA's motion, and that such a ruling might well be issued during his absence. More importantly, the Discovery Order was issued on December 19, 2005, and was sent by facsimile to counsel for Ag-Air that very same day.[5] This means that Ag-Air had notice of the required discovery, and of the due date for production, before counsel for Ag-Air closed his law office on December 20, 2005.

In sum, despite notice of the Discovery Order and its requirements, Ag-Air failed to comply. Ag-Air now offers various excuses, but "the paucity of the explanation suggests that the oversight was the product of neglect rather than good cause." *JHNY, Inc.*, slip op. at 15. Therefore, the Default Order should be upheld.

III. Ag-Air's Other Arguments Do Not Provide A Basis For Vacating The Default Order.

The other arguments presented by Ag-Air do not provide valid reasons for missing the discovery deadline. Most are a series of claims alleged about bias on the part of Judge Biro.[6] These arguments do not demonstrate that good cause exists for setting aside the Default Order.

Ag-Air contends that Judge Biro failed to act in accordance with the "Appearance of Fairness Doctrine," but does not explain this doctrine, cite any authority documenting the existence of such

---

[5] *See* Certificate of Service to Discovery Order.

[6] Ag-Air asks for reassignment of this case to someone other than Judge Biro. Notice of Appeal at 2; Appellant Brief at 12, 15, 16. However, Ag-Air has made the request in the wrong forum. Under 40 C.F.R. § 22.4(d)(1), a request for the disqualification must be made by motion to the Presiding Officer.

a doctrine, or state how the doctrine applies to this proceeding.[7] It may be that Ag-Air was referring to the "Appearance of Fairness Doctrine" which has been codified as law in the state of Washington.[8] However, this codified doctrine applies exclusively to quasi-judicial state land use proceedings.[9] This provision appears to be a codification of state common law designed to protect public confidence in the conduct of quasi-judicial land use proceedings.[10] As state law which applies to state quasi-judicial land use proceedings, not not federal law that applies to federal civil penalty actions before administrative law judges, this doctrine has no application to the instant matter.

Ag-Air also contends that the Report of the Status of Settlement Efforts ("Status Report"), filed by EPA on January 19, 2006, contains prejudicial statements characterizing the substantive negotiating positions of the parties, and that Judge Biro improperly relied on these statements in granting the Default Order.[11] Ag-Air states no legal authority as support for such a contention, fails to indicate which statements are allegedly problematic, and does not explain how these statements contributed to an unfair result. The entire Status Report consists of two fairly innocuous statements about the procedural history of settlement efforts between the parties, and one statement explaining that counsel for EPA had informed Ag-Air that a settlement need not contain an admission of liability. These limited statements are not prejudicial in that they do not reveal the substantive negotiating positions of the parties. Further, since the Default Order contains no reference to anything in the Status Report, there is no basis to conclude that any statements in the Status Report

---

[7] Notice of Appeal at 3; Appellant Brief at 13, 16.

[8] Revised Code of Washington, Chapter 42.36.

[9] *Id.* at 42.36.010.

[10] *Bunko v. City of Puyallup Civil Service Commission,* 95 Wash. App. 495, 97 P. 2d 1055, as amended (1999).

[11] Notice of Appeal at 2; Appellant Brief at 5-6, 14.

influenced the ruling in this matter.

Ag-Air argues that Judge Biro erroneously concluded that the absence of evidentiary stipulations in this case was due to the unwillingness of counsel for Ag-Air to enter into such stipulations, and that the basis for this conclusion was a result of improper contacts.[12] These claims simply are not true. The parties were directed in the Order Scheduling Hearing to make a good faith effort to enter into evidentiary stipulations. In accordance with that order, EPA prepared and sent proposed written evidentiary stipulations to Ag-Air on two occasions, but received no response to either proposal.[13] Then, during the Prehearing Conference, proposed evidentiary stipulations were again offered by EPA, but each proposal was rejected by Ag-Air, who in turn made no counter-proposal to EPA.[14] Bringing these matters to the attention of the Presiding Officer was not improper, because the information was provided in response to a specific request of Judge Biro. In summary, the conclusion by Judge Biro that Ag-Air was reluctant to enter into evidentiary stipulations is entirely accurate, and was based on information that was properly before the Presiding Officer.

Ag-Air also contends, without any support, that there were "extrajudicial" and "ex parte" communications between M. Lisa Knight, Senior Staff Attorney in the Office of Administrative Law Judges, and Judge Biro, and that this alleged misconduct played an improper role in the Default Order.[15] Although Ag-Air takes issue with communications between Judge Biro and Ms.

---

[12] Appellant Brief at 6-7.

[13] *See*, e.g., Motion to Reschedule Hearing at 3. EPA also never received any written proposed evidentiary stipulations from Ag-Air.

[14] *See*, e.g., Motion to Reschedule Hearing at 3.

[15] Notice of Appeal at 2, 3; Appellant Brief at 6, 7, 8, 13.

Knight, Ag-Air apparently recognizes that at least some such communications are appropriate.[16] Most importantly, Ag-Air provides no supporting authority for the proposition that information about a case over which a judge is presiding, and that is contained in communications between counsel for the parties and a staff attorney for that judge, should be withheld from the judge by that attorney.

Ms. Knight's direct involvement with the parties in this case first occurred during the Prehearing Conference held on January 12, 2006. The only other communications involving Ms. Knight and the parties occurred subsequent to the Prehearing Conference in the form of some electronic mail messages.[17] It is important to note that all of these communications occurred after Ag-Air had already failed to comply with the Discovery Order, so that the involvement of Ms. Knight, whatever it may have been and regardless of its propriety, was not the basis for the Default Order.

Ag-Air also complains about having been required to file a reply to the Default Motion in a shortened fashion.[18] Ag-Air fails to recognize that it brought this short deadline on itself. Specifically, the basis for the Default Motion was Ag-Air's continuing failure to produce discovery as directed, and the hearing date was drawing near.[19] The Default Motion and shortened reply time would not have been both essential and urgent except for this failure by Ag-Air.

---

[16] For example, Ag-Air states that "Judge Biro, through her staff law clerk, Attorney Lisa Knight, encouraged the parties to stipulate to a continuance of the February 14, 2006, contested hearing." Appellant Brief at 12. Contained in that statement is the recognition that the Senior Staff Attorney acts as an authorized representative of the Presiding Officer.

[17] In the communications to which EPA was privy, there was no evidence of hostility on Ms. Knight's part. To the contrary, Ms. Knight appeared to be completely impartial toward the parties.

[18] Appellant Brief at 9.

[19] Starting a couple of weeks after the due date, limited and cryptic interrogatory-type answers did begin to trickle in from Respondent, seemingly in response to the Discovery Order. However, these submissions were incomplete. No actual documents were ever produced by Ag-Air, including the pertinent data requested by EPA. With the hearing so close at hand, and with the late timing and incompleteness of this effort, Complainant remained at an unfair disadvantage.

IV. The Record Supports A Finding Of Liability And The Assessed Penalty

Ag-Air has not met its burden of demonstrating a strong probability of success on the merits of this case. To the contrary, there is an eye-witness who observed application of pesticide by Ag-Air to non-target property, along with sampling information, which together demonstrate the liability of Ag-Air.[20] Although Ag-Air now contends, without support and for the first time in this proceeding, that EPA has been inconsistent regarding the pleading in this case, EPA has always maintained the same claim. Ag-Air confuses the direct claim of EPA with the rebuttal case of EPA, which is aimed at the defense raised by Ag-Air.

In response to the allegation in the Complaint that Ag-Air violated FIFRA, other than making a self-serving denial, Ag-Air raised a defense based upon a technology system referred to as "SATLOC." While generally asserting that the "SATLOC" system shows there could not have been an application of pesticide to non-target property in this matter, Ag-Air has never produced the pertinent information to back up this assertion. This information was not produced in either the prehearing exchange, or in response to the Discovery Order. Absent this information, Ag-Air would not have been able to present a defense with a strong probability of succeeding on the merits.[21] Therefore, the liability judgment should be upheld.

---

[20] *See*, e.g., Complainant's Exhibits 1, 5, 9-14 attached to Complainant's Initial Prehearing Exchange; Declaration of Heidi Bolong, Declaration of Rodney M. Guske attached to Motion for Accelerated Decision on Liability and Penalty; Second Declaration of Rodney M. Guske, Second Declaration of Heidi Bolong attached to Reply in Support of Motion for Accelerated Decision on Liability and Penalty.

[21] Ag-Air suggests that Judge Biro, as an alternative to issuing the Default Order, could have prohibited Ag-Air from introducing into evidence the requested information about the "SATLOC" defense. Notice of Appeal at 3; Appeal Brief at 10, 11-12, 15-16. This is an implausible suggestion for several reasons. First, this suggestion was never raised by Ag-Air to Judge Biro. Second, this suggested ruling would have the same effect as denying the Discovery Motion issued by Judge Biro, which means that EPA would again be prejudiced by not having the information pertinent to a rebuttal case. Third, if Ag-Air is actually suggesting that even the merest reference to the "SATLOC" defense should have been excluded from this case, then this is the equivalent of saying that, except for a self-serving denial, the defense of Ag-Air should have been limited to the cross-examination of EPA witnesses. This approach does not support a conclusion that there would have been a strong probability of success by Ag-Air on the merits of the case.

The penalty assessed in this matter takes into account the factors prescribed by FIFRA, and EPA applied these factors by following the applicable penalty policy.[22] While generally raising an ability to pay claim, Ag-Air never substantiated this claim with any documentation, and has made no showing of any support for this claim on appeal. Therefore, the EAB should uphold the penalty assessment.

CONCLUSION

Ag-Air has disregarded procedural rules and orders issued by the Presiding Officer, impeding the efficient resolution of issues in this case. Ag-Air attempts to blame others for the default in this matter, but the basis for the Default Order is the failure of Ag-Air to abide by procedural requirements set by the Presiding Officer. There is an extensive record supporting the Default Order, and Ag-Air has not presented good cause for vacating that ruling. Therefore, the Default Order should be upheld.

Respectfully submitted,

Dated: 3/20/06

Margaret B. Silver
for Richard D. Mednick
Associate Regional Counsel
1200 Sixth Avenue, ORC-158
Seattle, Washington 98101
(206) 553- 1797 (telephone)
(206) 553-0163 (facsimile)
Attorney for U.S. EPA

Of Counsel:

Gary Jonesi
Office of Civil Enforcement
Office of Enforcement and Compliance Assurance
Washington, DC

[22] *See*, e.g., Complainant's Exhibits 4, 7, 8, 18 attached to Complainant's Initial Prehearing Exchange.

CERTIFICATE OF SERVICE

I certify that the Response Brief of the United States Environmental Protection Agency, Region 10 to Ag-Air Flying Services, Inc.'s Appeal to the Environmental Appeals Board, FIFRA 06-01, was sent to the following persons, in the manner specified, on the date below:

Original, and true and correct copy, by Federal Express to:

United States Environmental Protection Agency
Clerk of the Board, Environmental Appeals Board
Colorado Building
1341 G Street, N.W., Suite 600
Washington, D.C. 20005

True and correct copy by hand delivery to:

Carol Kennedy, Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 10
1200 Sixth Avenue, Mail Stop ORC-158
Seattle, Washington 98101

True and correct copy by U.S. Postal Service first class mail to:

The Honorable Susan L. Biro
Chief Administrative Law Judge
U.S. EPA, Mail Code 1900L
1200 Pennsylvania Avenue, NW.
Washington, DC 20460

True and correct copy by U.S. Postal Service first class mail to:

J.J. Sandlin
Attorney at Law
Sandlin Law Firm
P.O. Box 1005
Zillah, Washington 98953

Dated: 3/20/06

Janet E. Kesler

Janet E. Kesler