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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
Thomas Waterer & Waterkist Corp., d/b/a Nautilus Foods,	)	**Docket No. CWA 10-2003-0007**
	)	
Respondent	)	

ORDER DENYING MOTION FOR ENTRY OF DEFAULT and RULING ON ORDER TO SHOW CAUSE

This case arises under Section 309(g)(2)(B) of the Clean Water Act ("CWA" or "Act"), 33 U.S.C. § 1319(g)(2)(B), and is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Rules"), 40 C.F.R. Part 22. On August 5, 2003, the United States Environmental Protection Agency ("Complainant" or "EPA") filed a Motion for Default against Respondent, Thomas Waterer & Waterkist Corp., d/b/a Nautilus Foods ("Respondent") for the failure to file its prehearing exchange and requested that Respondent be assessed a civil penalty in the amount of $137,500. For the reasons set forth below, Complainant's motion is DENIED.

I. Background

On December 11, 2002, EPA filed a Complaint against Respondent for the alleged unlawful discharge of pollutants into navigable waters in violation of section 301(a) of the CWA, 33 U.S.C. § 1311(a). EPA served Respondent with a copy of the Complaint by mail, return receipt requested. The Complaint was returned to EPA by the U.S. Postal service as "refused by the recipient."[1] On December 18, 2002, EPA's attorney of record, Mark A. Ryan, spoke with Respondent's counsel and inquired why service by mail had been denied. Respondent's Counsel stated that he would speak with his client and, if approved by the client, he would accept service

[1] Complainant's Motion for Default (February 14, 2003), Exhibit A – Declaration of Administrative Assistant Melissa Whitaker in Support of Motion for Default.

on behalf of Respondent.[2] On December 23, 2002, Respondent's attorney, Edward P. Weigelt, Jr., filed an "Acceptance of Service of Summons and Complaint," accepting service for Respondent as of December 19, 2002, making the Answer due on January 21, 2003.

On January 28, 2003, EPA contacted Respondent's counsel to inquire whether an Answer had been filed.[3] Counsel confirmed that Respondent had not yet filed an Answer, but would do so "soon."[4] EPA informed Respondent's counsel that Respondent was in default and that if no answer was filed by the end of the week of February 3, 2003, EPA would move for default. On February 14, 2003, EPA filed its first Motion for Default. Respondent filed an Answer to Complaint, Request for Hearing, and Request for Informal Settlement Conference on February 21, 2003.

The Court issued a Prehearing Order in this matter on May 19, 2003.[5] That order required, among other items, that the parties make a simultaneous, initial prehearing exchange by Monday, July 21, 2003. As noted above, on August 5, 2003, EPA filed its second Motion for Default, this time for the failure to submit its pre-hearing exchange. As a result of that motion, this Court issued an Order to Show Cause on August 15, 2003, requiring Respondent to respond by August 22, 2003 and to show good cause demonstrating why a default order should not be issued against it. On August 22, 2003, Respondent filed a Response to EPA's Motion for Default, along with a Declaration by Respondent M. Thomas Waterer and a copy of Respondent's Prehearing Exchange. EPA filed a Reply to Respondent's Response to EPA's Motion for Default for Failure to Submit Pre-Hearing Exchange on August 25, 2003.

In its Response to EPA's Motion for Default, Respondent asserted several reasons for its inability to timely file its Prehearing Exchange. These reasons include: 1) an incomplete understanding of the basis of EPA's allegations; 2) The EPA's failure to permit discovery; 3) EPA's own failure to timely file its Prehearing Exchange, which Respondent did not receive until August 19, 2003; 4) the loss and damage of business records during their relocation from Respondents business office in Seattle, Washington to Valdez, Alaska; and 5) a debilitating personal illness over the last two months which precluded Respondent from being able to locate lost records or reconstructing lost/damaged records.[6] While the Court is sensitive to

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[2] Complainant's Motion for Default (February 14, 2003), Exhibit B – Declaration of Mark A. Ryan in Support of Motion for Default.

[3] *See id.* at ¶ 3.

[4] *Id.*

[5] With the issuance of this court's prehearing order, the motion for default for the untimely answer became moot.

[6] Respondent's Reply to Motion For Default at 3.

Respondent's difficulty with a personal illness, Respondent's other justifications for its tardiness are not persuasive.

First, Respondent is not proceeding *pro se* and Respondent's counsel has a duty to try to understand the basis of EPA's allegations prior to letting deadlines lapse.

Second, Respondent should understand that EPA's alleged failure to permit discovery was irrelevant to whether it could complete its Prehearing Exchange in a timely fashion. Under the Rules governing this Court, discovery is neither appropriate nor required prior to filing a prehearing exchange. Along with the Complaint, Respondent should have received a copy of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Rules"), 40 C.F.R. Part 22. Since Respondent referenced 40 C.F.R. Section 22.19 in its Response to EPA's Motion for Default,[7] this Court can only assume that Respondent is aware of the existence of these Rules and their application to prehearing exchange and discovery. Section 22.19(e) provides that a party may move for additional discovery *after* the information exchange provided for in paragraph (a) of this section, i.e., the prehearing information exchange. 40 C.F.R. § 22.19(e). Finally, this "other discovery" is not a right due to either party, but rather is within the discretionary power of the Court to grant. *See* 40 C.F.R. § 22.19(e) (The Presiding Officer *may* order such other discovery . . .). Therefore, EPA's alleged failure to permit discovery, in accordance with the Rules, does not excuse Respondent's failure to timely submit its Prehearing Exchange.

Third, while EPA admitted that it made a mistake in addressing the Prehearing Exchange to Respondent, the late date at which Respondent received EPA's Prehearing Exchange does not appear to be entirely EPA's fault. EPA filed its Prehearing Exchange with the Regional Hearing Clerk on July 21, 2003, as required by this Court's Prehearing Order. EPA also mailed a copy to Respondent on July 21, 2003. On July 24, Respondent's copy of EPA's Prehearing Exchange was returned as undeliverable due to a typographical error in the Certificate of Service.[8] The package was re-mailed to the correct address the same day.[9] On August 14, Respondent's copy of EPA's Prehearing Exchange was again returned, this time as "unclaimed."[10] On August 14,

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[7] *See* Respondent's Reply to Motion for Default at 2.

[8] *See* Complainant's Motion for Default For Failure to Submit Prehearing Exchange at n.1 (August 5, 2003); *see also* Complainant's Reply to Respondent's Response to EPA's Motion for Default for Failure to Submit Prehearing Exchange at 2.

[9] *See id.*

[10] *See* Complainant's Reply to Respondent's Response to EPA's Motion for Default for Failure to Submit Prehearing Exchange at 2, Exhibit B – Declaration of Valerie D. Badon in

2003, EPA mailed the package to Respondents for the third time.[11] Furthermore, even though Respondent did not receive EPA's Prehearing Exchange until August 19, 2003, EPA's mistakes should not have affected Respondent's ability to file its own Prehearing Exchange on time. This Court's Prehearing Order required both parties to *simultaneously* make their initial prehearing exchange by Monday, July 21, 2003. EPA's failure in this matter does not excuse Respondent from its own obligations.

Fourth, despite the loss and damage of business records, Respondent was able to put together a prehearing exchange in short order when confronted with the Court's Order to Show Cause, as it delivered its exchange along with its response to the Show Cause Order in one week. Respondent also had two viable options under the Rules to deal with lost and damaged business records. Respondent could have requested an extension of time under 40 C.F.R. § 22.7(b), in order to find and restore the missing records. In addition, Respondent could have produced what it had within the allotted time frame, and then supplemented its prior exchange when other information became available, as per 40 C.F.R. § 22.19(f).

Last, there is Respondent's claim that a "debilitating personal illness" precluded Mr. Waterer from being able to locate or reconstruct lost and damaged records. With reservations, the Court accepts this last basis for Respondent's failure to comply with the prehearing order.

II. Discussion

The procedural rules provide that a "party may be found to be in default, after motion ... upon failure to comply with the information exchange requirements of § 22.19(a) or an order of the Presiding Officer . . . [d]efault 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." Consolidated Rules of Practice, 40 C.F.R. § 22.17(a). Such a motion for default may ask to resolve all or part of the proceeding, but if the motion seeks the assessment of a penalty, the movant must set forth the penalty and state the legal and factual grounds for that penalty. 40 C.F.R. § 22.17(b). "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." 40 C.F.R. § 22.17(c).

As a default order is a harsh sanction, such actions are not favored by courts and are utilized only in extreme situations. Issuance of such an order is not a matter of right, even when an "unresponsive party is technically in default." Donald L. Lee and Pied Piper Pest Control, Inc., FIFRA 09-0796-92-13, November 9, 1992, 1992 WL 340775 (E.P.A.). Administrative law judges have broad discretion in ruling upon such motions. Gard Products, Inc. IFFRA-98-005,

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Support of Motion for Default at ¶ 5.

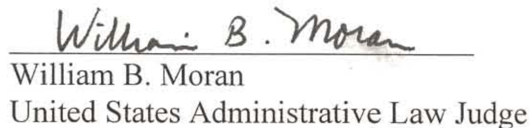
[11] *See id.*

June 2, 1999, 1999 WL 504712 (E.P.A.). Such discretion is informed by "the type and the extent of any violations and by the degree of actual prejudice to the [party seeking default]." Lyon County Landfill, 5 CAA 96-011, September 11, 1997, 1997 WL 821131 (E.P.A.).

The Court notes that the Respondent did make some efforts, albeit misguided, to attend to this action. It is not disputed that on February 28, 2003, it sent its first discovery requests to EPA. While, as explained above, this had no effect on its duty to comply with the Court's prehearing order, it still shows some attention to the matter. Given that the Respondent maintains that it "vehemently dispute[s]" the alleged violations and that it contends the penalties sought are excessive, the Court is reluctant to deprive the Respondent of the opportunity to fully contest the issues through the hearing process. However, the Respondent may not ignore its responsibilities. **The Respondent is warned that any further delays in filings, subsequent failures to comply with the procedural rules, as set forth at 40 C.F.R. Part 22, or with the Court's orders, will not be overlooked**.

Because the Respondent did respond to the Order to Show Cause with a putative explanation for its delay, the Court has determined that a default order is not appropriate on this occasion.

Accordingly, Complainant's Motion for Default Judgment is DENIED.



William B. Moran
United States Administrative Law Judge

Dated: November 5, 2003
Washington, D.C.

In the Matter of *Thomas Waterer & Waterkist Corp., d/b/a Nautilus Foods*, Respondent
Docket No. CWA-10-2003-0007

CERTIFICATE OF SERVICE

I hereby certify that the following **Order Denying Motion for Entry of Default and Ruling on Order to Show Cause**, dated November 5, 2003, was sent in the following manner to the addressees listed below.

Nelida Torres
Legal Staff Assistant

Dated: November 5, 2003

Original and One Copy by Pouch Mail to:

Carol Kennedy
Regional Hearing Clerk
U.S. EPA
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Copy by Facsimile and Regular Mail to:

Mark A. Ryan, Esq.
Assistant Regional Counsel
U.S. EPA Region X
Idaho Operations Office
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Boise, ID 83706

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