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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

In the Matter of:	)	
	)	Docket No. TSCA-05-2008-0019
Mardaph II, LLC, Mardaph III,	)	
LLC, and Vinnie Wilson,	)	
Cincinnati, Ohio	)	
	)	
Respondents.	)	
	)	

ORDER DENYING COMPLAINANT'S MOTION FOR DEFAULT AND ESTABLISHING BRIEFING SCHEDULE

Complainant, the Director of the Land and Chemicals Division, United States Environmental Protection Agency ("U.S. EPA") Region 5, initiated this administrative action on August 4, 2008, alleging that Respondents Mardaph II, LLC, Mardaph III, LLC, and Vinnie Wilson violated the Toxic Substances Control Act. The Complaint alleges that the two corporations (as lessors) and Ms. Wilson (as the owner and/or agent for the owner of rental units) failed to provide its lessees with the required disclosures regarding the possible presence of lead paint. The Complaint alleges that a total of 77 violations were committed by the three respondents at ten residential units.

On January 22, 2008, Complainant moved for the entry of a default order against only Respondent Vinnie Wilson, and seeks the assessment of a penalty of $91,090 against her.[1]

Respondent Vinnie Wilson appears in this matter *pro se*. On February 27, 2009, Respondent Wilson filed a "Motion for an Order Setting Aside A Motion for Default Judgment and/or in the Alternative, Motion for an Evidentiary Default Hearing Before an Official Hearing Board Panel" ("Respondent's Motion"). With that motion, Respondent Wilson submitted a document titled "Affidavit Statements" in which she states:

(1) Respondent Wilson's attorney is no longer representing her;
(2) her mental ability has been impaired and she was incapable of filing an answer;
(3) she is being treated by a medical doctor for anxiety and dysthymia;
(4) the Complaint fails to state a claim upon which relief can be granted because it was not "verified" and, accordingly, should be dismissed;
(5) the Complaint "did not accrue and/or filed [sic] within one (1) year after Notice of Intent to File and Administrative Action was taken 4/14/07...."
(6) she was misled by the Cincinnati Metropolitan Housing Authority; and
(7) she has successfully completed an approved lead training course for contractors, which she states "is a colorable claim of mitigation [sic] circumstances."

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[1] Complainant did not seek a default order against other respondents. *See* Brief in Support of Motion for Default, filed Jan. 22, 2009, at n.1.

Respondent Wilson further states that the "default judgment" should be set aside and requests "an opportunity to be heard in person." She also submits several exhibits to support her factual allegations as well as a copy of federal, state and local tax returns for 2007.

To date, Complainant has not responded to Respondent's Motion. Accordingly, pending before the Presiding Officer is Complainant's Motion for Default ("Complainant's Motion") and Respondent's Motion.

Discussion

This proceeding is governed by the Consolidated Rules of Practice, 40 C.F.R. Part 22 ("Consolidated Rules"). According to the Consolidated Rules, where a respondent contests any material fact alleged in a complaint, contends that the proposed penalty or compliance order is inappropriate, or contends that it is entitled to judgment as a matter of law, it shall file an answer within 30 days after service of the complaint. 40 C.F.R. § 22.15(a). The record in this matter indicates that service was perfected on Respondent Wilson on October 22, 2008.[2] Thus, her answer was due on November 21, 2008. In this case, the docket reflects that no answer has been filed by any of the three respondents, the only pleading being the recent motion filed by Respondent Wilson. In addition, the Consolidated Rules allow parties fifteen days to respond to a motion, allowing five days for service by mail. Thus, Respondents' response to Complainant's Motion for Default was due on February 11, 2009. Respondent's Motion was filed on February 27, 2009.[3]

With respect to default, the Consolidated Rules provide in part:

> (a) *Default.* A party may be found to be in default: after motion, upon failure to file a timely answer to the complaint; upon failure to comply with [prehearing exchange requirements] or an order of the Presiding Officer; or upon failure to appear at a conference or hearing. . . . 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. . . .
>
> (c) *Default order.* When the Presiding Officer finds that a default has occurred, he shall issue a default order against the defaulting party as to any or all parts of

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[2] The record reflects that a copy of the Complaint was sent by certified mail to Vinnie Wilson on or about August 4, 2008, as well as to the Statutory Agent for the Mardaph corporations. The Complaint was served personally on Ms. Wilson on October 22, 2008. Complainant's Motion Ex. 13. It is also noted that the State of Ohio certified that the Statutory Agent for the Mardaph corporations resigned on August 11, 2008. Complainant's Motion Ex. 8.

[3] Whether it is considered a response to Complainant's Motion or a responsive pleading, Respondent's Motion was filed out of time. I will, however, permit it to be made part of the record in this matter in this instance.

> the proceeding unless the record shows good cause why a default order should not be issued. . . .

40 C.F.R. § 22.17.

Clearly the issuance of a default order is a matter within the discretion of the Presiding Officer, for even where a default has occurred, she retains the discretion not to issue a default order where the record shows good cause. The Environmental Appeals Board has ruled that default orders are not favored and doubts are usually resolved in favor of the defaulting party. *In re JHNY, Inc.*, 12 E.A.D. 372, 384 (EAB 2005). A default is generally a harsh measure and should not be entered where there has been some responsible action by the respondent and reasonable attempts at a defense. *In re Protega*, TSCA-05-2002-0010 (Feb. 18, 2003) slip op. at 3.

Complicating this matter is the fact that Respondent Wilson is appearing without the assistance of legal counsel. Nonetheless, civil administrative enforcement matters such as this are governed by rules of procedure that apply to all parties, whether or not they are represented by counsel. A litigant who elects to appear *pro se* takes upon herself the responsibility of complying with the procedural rules that apply to this proceeding and may suffer adverse consequences in the event of noncompliance. *In re Rybond*, 6 E.A.D. 614, 627 (EAB 1996). The Environmental Appeals Board has recognized, however, that "more lenient standards of competence and compliance apply to *pro se* litigants." *Id.* Thus, while the mere fact that a party is not represented by counsel does not necessarily constitute good cause to deny a motion for default, *id.*, Respondent Wilson's *pro se* status is a factor I will consider in evaluating whether to issue a default, along with her claims of medical impairment and her belated attempt to present a defense in this matter. Thus, while Respondent Wilson is technically in default, I conclude that good cause exists to not issue a default order against her at this time.

A careful review of Respondent's Motion demonstrates that it does not "clearly and directly admit, deny or explain each of the factual allegations contained in the complaint," and, thus, does not meet requirements of an answer. 40 C.F.R. § 22.15(b). It does, however, specifically request a hearing and set forth circumstances or arguments which could constitute the grounds of certain defenses. Further, the Respondent's Motion states unequivocally that the Complaint:

> fails to state a claim upon which relief can be granted, where said complaint was not verified by the required affidavit of verification of proof to verify the complaint requirements, accordingly, should be dismissed against said respondent [sic].

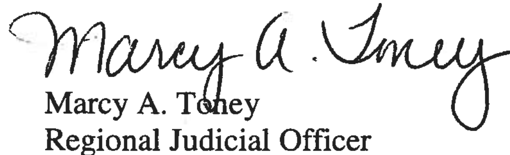
The Consolidated Rules explicitly contemplate the filing of pre-answer motions, *see* 40 C.F.R. § 22.16(c), but are silent as to the effect of such motions on the requirement that an answer be filed within thirty days of service of the Complaint. We can, however, look to the Federal Rules of Civil Procedure for guidance on this issue. *See In re Commercial Cartage Co. Inc.*, 5 E.A.D. 112, 117 n.9 (EAB 1994). Under the Federal Rules, the filing of a motion to dismiss for failure

to state a claim suspends the time to answer a complaint and avoids default. *See Cetenich v. Alden,* 177 F.R.D. 94 (N.D.N.Y. 1998); *In re City of Orlando*, CWA-04-501-99 (Dec. 20, 1999). Respondent's Motion appears to be a good faith attempt to request a hearing, raise certain defenses and other preliminary issues.

In consideration of Respondent Wilson's *pro se* status, her claims of medical impairment, her attempts to marshal a defense to this matter, albeit out of time, I hereby DENY Complainant's motion for default. In addition, I consider Respondent's Motion to have plainly moved for dismissal of the Complaint on the grounds that it fails to state a claim upon which relief can be granted because it was not accompanied by the "required affidavit of verification." Complainant is hereby ORDERED to respond to Respondent's Motion to Dismiss on or before **April 3, 2009**. Complainant should address whether (1) the Complaint states a claim for which relief can be granted and (2) whether the Complaint should be dismissed because it was not accompanied by an "affidavit of verification." Respondent Wilson will be permitted to reply to Complainant's response, but that response must be filed with the Regional Hearing Clerk no later than **April 20, 2009**.[4] Late submissions will no longer be tolerated by this Presiding Officer.

SO ORDERED.

Dated: March 19, 2009



Marcy A. Toney
Regional Judicial Officer

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[4] At that point, the Presiding Officer will rule on Respondent's Motion to Dismiss, and depending on the outcome of that motion, may order Respondent Wilson to properly answer the Complaint.

A document is filed on the date it is received by the Regional Hearing Clerk. Thus, Respondent should allow sufficient time for her response to reach the Regional Hearing Clerk by mail on or before April 20, 2009.

Respondent should file the original and one copy of any response with the Regional Hearing Clerk by mailing the response to the Clerk at this address: Regional Hearing Clerk (E-19J), U.S. EPA Region 5, 77 West Jackson Boulevard, Chicago, IL 60604. Respondent should serve a copy of her response on Complainant's counsel by mailing it to him: Peter Felitti, Assistant Regional Counsel (C-14J), U.S. EPA Region 5, 77 West Jackson Boulevard, Chicago, IL 60604. Finally, Respondent should serve a copy by mailing it to the Regional Judicial Officer: Marcy A. Toney, Regional Judicial Officer (C-14J), 77 West Jackson Boulevard, U.S. EPA Region 5, Chicago, IL 60604.

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Docket No. TSCA-05-2008-0019

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CERTIFICATE OF SERVICE

I certify that the foregoing Order to Show Cause and Order to Supplement the Record, dated March 19, 2009, was sent this day in the following manner:

Original hand delivered to:

Regional Hearing Clerk
U.S. Environmental Protection
Agency, Region 5 (E-19J)
77 West Jackson Boulevard
Chicago, IL 60604-3590

Copy hand delivered to
Attorney for Complainant:

Peter Felitti
U. S. Environmental Protection
Agency, Region 5 (C-14J)
Office of Regional Counsel
77 West Jackson Boulevard
Chicago, IL 60604-3590

Copy by U.S. Mail to:

Ms. Vinnie Wilson
P.O. Box 317639
Cincinnati, Ohio 45231

Dated: 3/19/09

By: [signature]
Darlene Weatherspoon
Secretary