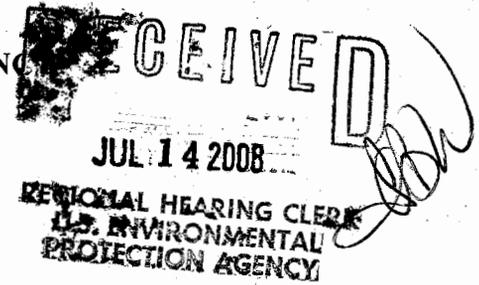


UNITED STATES OF AMERICA  
ENVIRONMENTAL PROTECTIONS AGENCY

BEFORE THE ADMINISTRATOR



In the Matter of: )

Edward L. Murray, Jr. )

Respondent. )

Docket No. TSCA-05-2007-0013

**ORDER DENYING CLAIMANT'S REQUEST FOR A DEFAULT ORDER  
AND RESPONDENT'S REQUEST FOR AN EXTENSION OF TIME**

**I. Background and Arguments of the Parties.**

On August 13, 2007, the United States Environmental Protection Agency, Region V, ("EPA" or "Complainant") initiated this action against Edward L. Murray Jr. ("Respondent") to assess a civil penalty under Section 16(a) of the Toxic Substance Control Act (TSCA), 15 U.S.C. § 2615(a). After that parties' unsuccessful attempts at settlement through alternative dispute resolution, the undersigned was designated to preside over this matter and issued a Prehearing Order setting forth deadlines for the filing of the parties' prehearing exchanges.

On May 19, 2008, Respondent filed a Motion for Enlargement of Time to File a Consent Agreement and Final Order (CAFO). Respondent failed to properly serve its Motion on the undersigned as required by 40 C.F.R. § 22.5(b). Consequently, both Respondent and Complainant missed the original due dates for filing their prehearing exchanges. Nevertheless, on June 18, 2008, the undersigned courteously granted Respondent's Motion and set July 7, 2008 as the new deadline for filing the parties' prehearing exchanges or a fully executed CAFO.

On July 7, 2008, the undersigned received by facsimile, Respondent's Motion for a Second Enlargement of Time to File Consent Agreement and Final Order ("Motion for a Second Enlargement of Time"). In his Motion for a Second Enlargement of Time, Respondent asserts that the parties are in the process of finalizing a CAFO. Respondent requests an additional thirty (30) days to file the CAFO.

The following day, July 8, 2008, Complainant filed a Response to the Motion wherein it argues that it made numerous attempts to contact Respondent regarding the CAFO and that Respondent did not allow Complainant the amount of time it required to review comments on the CAFO. Complainant further contends that it was not made aware of Respondent's intention to file a Motion for a Second Enlargement of Time. Complainant writes that, "[g]iven the time and effort required to comply with the prehearing exchange requirements, Complainant believes it

would be prejudiced by the prior settlement terms agreed to by Complainant.” (Complainant’s Response at ¶ 17). In addition, Complainant asserts that Respondent did not file its Prehearing Exchange by the July 7<sup>th</sup> deadline and accordingly, requests a Default Judgment against Respondent pursuant to 40 C.F.R. Part 22.17 for Respondent’s failure to comply with an order of the Presiding Judge.

Later that same day (July 8, 2008) Respondent submitted a Reply to Complainant’s Response asserting that the parties have reached an agreement in principle, but that due to calendar restrictions were not able to file a CAFO in this matter. Respondent disputes Complainant’s assertion that it was not made aware of Respondent’s intention to file a Second Request for Extension of Time and asserts that it did file its prehearing exchange by the July 7<sup>th</sup> deadline. (Respondent’s Reply at ¶ 4).

## II. Discussion

The Consolidated Rules of Practice that govern these proceedings provide that “[a] party may be found in default [] after motion . . . upon failure to comply with the information exchange requirements of § 22.19(a) or an order of the Presiding Officer”. 40 C.F.R. § 22.17. Default is a harsh and disfavored sanction and is not given as a matter of right even where a party is technically in default. *See, Lewis v. Lynn*, 236 F.3d 766, 767 (5th Cir. 2001). Default is inappropriate for instances where there has been only 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 Equip. Rental & Sales, Inc. v. Harre*, 983 F.2d 128, 130 (8th Cir. 1993).

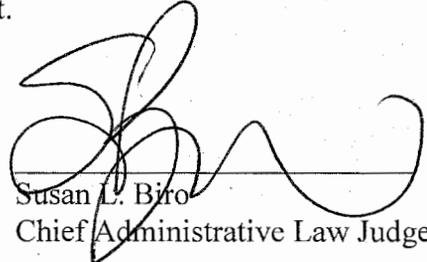
According to the pleading, Respondent served its Prehearing Exchange on the Regional Hearing Clerk and the undersigned by mail sent on July 7, 2008, the day of the deadline. In all likelihood the filing was not received by the hearing clerk until some days thereafter, as it was not received by the undersigned until today, July 10, 2008. Thus, technically, Respondent did *not* meet the filing deadline as the Consolidated Rules provide that “[a] document is filed when it is *received* by the appropriate Clerk.” 40 C.F.R. § 22.5(a)(italics added). However, this is a marginal failure to comply with the Rules not warranting entry of default under these circumstances at this time. Therefore, Complainant’s request for entry of a default order is denied.

**Nevertheless, Respondent is well advised to strictly comply with the Rules of Practice and Orders of this Tribunal for the duration of this proceeding, lest he run the very tangible risk of the imposition of the severest sanction for even the slightest divergence, barring a cogent justification for such noncompliance.**

As to the extension requested by Respondent for filing the Consent Agreement, such extension is not required as there are no outstanding deadlines and the parties have completed the prehearing exchange process. Therefore, this matter can move forward on an expedited basis towards hearing and such order will follow forthwith.

**ORDER**

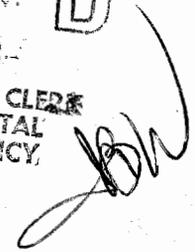
1. Complainant's Motion for Entry of a Default Order is hereby **DENIED**; and
2. Respondent's Motion For a Second Enlargement of Time to File a Consent Agreement and Final Order is hereby **DENIED** as moot.



Susan L. Biro  
Chief Administrative Law Judge

Issued: July 10, 2008  
Washington, D.C.

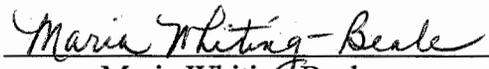
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PROTECTION AGENCY



In the Matter of Edward L. Murray, Jr., Respondent  
Docket No. TSCA-05-2007-0013

CERTIFICATE OF SERVICE

I certify that the foregoing **Order Denying Claimant's Request For A Default Order And Respondent's Request For An Extension Of Time**, dated July 10, 2008, was sent this day in the following manner to the addressees listed below.

  
\_\_\_\_\_  
Maria Whiting-Beale  
Staff Assistant

Dated: July 10, 2008

Original And One Copy By Pouch Mail To:

Sonja Brooks-Woodard  
Regional Hearing Clerk  
U.S. EPA  
77 West Jackson Boulevard, E-13J  
Chicago, IL 60604-3590

Copy By Pouch Mail To:

Cynthia A. King, Esquire  
Associate Regional Counsel  
U.S. EPA  
77 West Jackson Boulevard, C-14J  
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Copy By Regular Mail To:

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Indianapolis, IN 46240

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