

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

2010 APR -9 AM 10: 58

IN THE MATTER OF:)
)
Fulton Fuel Company)
)
a Montana Corporation)
)
Respondent.)
_____)

Docket No. CWA-08-2009-0006

Proceeding under Subsection 311(b)(6) of
the Clean Water Act, 42U.S.C.§1321(b)(6)

FILED
EPA REGION VIII
HEARING CLERK

DEFAULT INITIAL DECISION AND ORDER

On March 8, 2010, Respondent's Motion to Set Aside Default and to Set Hearing on Merits ("Motion to Set Aside") was filed with the Regional Hearing Clerk. Concurrently, Respondent filed an Answer and Request for Hearing. In it's Memorandum in Support of the Motion ("Memo in Support"), Respondent stated, "An Order of Default may not yet have been entered in this case. If not Respondent requests that its Answer be filed. If Default is deemed already entered, Respondent requests that its Answer be lodged pending an Order of the Court on the pending motion." On March 17, 2010, this Presiding Officer issued a Default Initial Decision and Order ("Default Order") pursuant to 40 C.F.R. § 22.17(c). Under the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, and the Revocation or Suspension of Permits ("Consolidated Rules" or "Part 22"), 40 C.F.R. Part 22, there are provisions that address setting aside a default order. See, 40 C.F.R. §§ 22.17(c) and 22.27(c).

The Consolidated Rules state that the Presiding Officer may set aside a default order upon good cause shown. Part 22 states:

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 the proceeding unless the record shows good cause why a default order should not be issued. If the order resolves all outstanding issues and claims in the proceeding, it shall constitute the initial decision under these Consolidated Rules of Practice **For good cause shown, the Presiding Officer may set aside the default order.** (emphasis added).

40 C.F.R. § 22.17(c).

The rule seems to presume that a default order must be issued before a Presiding Officer can decide whether to set aside the default. In the instant case, the court was attempting to understand Respondent's lack of response to the Complaint and Motion for Default before a default order was issued. Once the Default Initial Decision and Order was issued, this Presiding Officer found no good cause to set aside the Default Order as

explained below.

Furthermore, Part 22 states that a party may move to “set aside a default order that constitutes an initial decision.” 40 C.F.R. § 22.27(c). The Motion to Set Aside was filed prematurely since the Default Initial Decision and Order had not been issued at the time the Motion was filed. Respondent’s recourse at this juncture is under 40 C.F.R. § 22.30.

The Motion to Set Aside was untimely for two reasons. First, the Motion was filed before the Default Initial Decision and Order was issued. Second, Respondent did not comply with this court’s February 2, 2010 Order to Show Cause by March 3, 2010. (See, February 2, 2010 Order). The Order stated, “Respondent shall show cause why a default order should not be issued...by **March 3, 2010.**” (emphasis not added). Respondent did not specifically address the court’s request to show cause rather it filed the Motion to Set Aside Default and to Set Hearing on Merits and Answer and Request for Hearing. In its Motion to Set Aside, Respondent provided its reasons for not addressing the pleadings, as presented below, which could be interpreted as showing cause. Furthermore, the Motion and Answer were filed after the court ordered March 3, 2010 deadline. For these reasons, the court is not persuaded that good cause to set aside the default exists.

To support its position, Respondent argues excusable neglect as good cause. Respondent states it “hired counsel, other than its present counsel and reasonably believed such hired counsel was meeting EPA claims and complaints.” (See, Memo in Support, p. 3). Respondent’s statements do not comport with the record. Mr. Fulton, President and Registered Agent of Fulton Fuel Company, denied service of all documents sent certified mail from Complainant and the Presiding Officer. Both the Complaint and the Motion for Default were hand served to Mr. Fulton by the Montana Sheriff. In his March 5, 2010 Affidavit, Mr. Fulton states “I do not handle any legal matters for Fulton Fuel Company.” (See, Affidavit of William M. Fulton, Jr., p.3). Mr. Fulton believed that Renee Coppock was handling all legal matters related to EPA’s investigation and the Administrative Complaint. (See, Affidavit of William M. Fulton, Jr., p.3). However, before December 21, 2009, no attorney claimed to represent Respondent after several attempts by Complainant to determine if this was the case. (See, Complainant’s March 22, 2010 Reply in Opposition to Respondent’s Motion to Set Aside Default, p. 14, Ex. H-I). With no attorney of record in the matter and Mr. Fulton as the registered agent for Fulton Fuel Company, Mr. Fulton is legally responsible to ensure that the Complaint and related pleadings are accepted when served, pursuant to Part 22, and either delivered to Respondent’s attorney or addressed by himself as President of the Company. For these reasons, the Motion to Set Aside is summarily dismissed and will not be addressed by this court.¹ Pursuant to 40 C.F.R. § 22.30, Respondent has the right to appeal the Default Initial Decision and Order.

With respect to the Answer and Request for Hearing, the Presiding Officer will

¹ The Motion to Set Aside also asserts certain substantive defenses including lack of jurisdiction, factual issues, acts or omissions of third party and unavoidable accident. This court does not need to address these defenses because this Order summarily dismisses the Motion to Set Aside on procedural grounds.

not accept the Answer at this juncture in the proceeding. Respondent failed to file an Answer as required by 40 C.F.R. § 22.15. Furthermore, 40 C.F.R. § 22.5(c)(5) relating to form of documents states:


... the Presiding Officer may exclude from the record any document which does not comply with this section. Written notice of such exclusion, stating the reasons therefor, shall be promptly given to the person submitting the document. Such person may amend and resubmit any excluded document upon motion granted by the Environmental Appeals Board or the Presiding Officer, as appropriate.

40 C.F.R. § 22.5(c)(5).

Pursuant to this Order, Respondent is given notice that the Answer will be excluded from the record due to its untimely filing. Respondent may resubmit its Answer, if it so chooses, upon motion granted by the Environmental Appeals Board who now has the Default Initial Decision and Order before it. (See, 40 C.F.R. §§ 22.5(c)(5), 22.27(c).

Respondent's Motion to Set Aside Default and to Set Hearing on Merits is **DENIED**.

So Ordered this 9th Day of April, 2010.


Elyana R. Sutin
Regional Judicial Officer

CERTIFICATE OF SERVICE

The undersigned certifies that the original of the attached **DEFAULT INITIAL DECISION AND ORDER** in the matter of **FULTON FUEL COMPANY, SHELBY, MONTANA; DOCKET NO.: CWA-08-2009-0006** was filed with the Regional Hearing Clerk on April 9, 2010.

Further, the undersigned certifies that true and correct copies of the documents were delivered to Marc D. Weiner, Senior Enforcement Attorney, U. S. EPA – Region 8, 1595 Wynkoop Street, Denver, CO, 80202-1129. True and correct copies of the aforementioned document were placed in the United States mail certified/return receipt requested on April 9, 2010, to:

Attorney for Respondent:

Douglas C. Allan
Attorney at Law
P.O. Box 873
Shelby, MT 59474

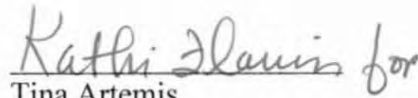
Respondent:

William M. Fulton
Registered Agent for Fulton Fuel Company
Box 603
Shelby, MT 59474

And

William M. Fulton
Registered Agent for Fulton Fuel Company
127 Main Street
Shelby, MT 59474

April 9, 2010


Tina Artemis
Paralegal/Regional Hearing Clerk