



UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
Ag-Air Flying Services, Inc.,) Docket No. FIFRA-10-2005-0065
)
RESPONDENT)
_____)

ORDER ON MOTION FOR EXTENSIONS OF TIME

On March 22, 2005, this Tribunal issued a Prehearing Order (“PHO”) in this matter setting due dates for the Prehearing Exchange (“PHE”). That Order required, *inter alia*, Complainant’s PHE to be filed by May 13, 2005 and Respondent’s PHE to be filed by June 3, 2005. Complainant timely filed its PHE on May 12, 2005. Respondent failed to file its PHE by June 3, 2005. As of June 17, 2005, Respondent still had not filed a PHE, and Complainant therefore filed a Motion for Default on that date. Pursuant to the Rules of Practice, 40 C.F.R. Part 22 (“Rules”), at 40 C.F.R. §§ 22.7(c) and 22.16(b), Respondent’s Response to the Motion for Default was originally due on July 7, 2005. Respondent submitted a “Motion for Three Day Extension of Time to Respond to Motion for Default” dated June 30, 2005. This Tribunal granted Respondent’s Motion by Order dated July 8, 2005 such that, for reasons stated therein, Respondent’s Response to the Motion for Default became due to be *filed* by July 11, 2005.

By Motion dated July 11, 2005, Respondent submitted its “Objection to Motion for Default, and Request for Leave to File, Late, the Respondent’s Discovery, with Disclosure of Expected Evidence and Experts at Time of Hearing” (“Motion for Extensions”).¹ In the Certificate of Service attached to Respondent’s Motion, the Motion is perhaps more accurately

¹ Respondent’s present Motion for Extensions was *not* timely filed pursuant to this Tribunal’s Order of July 8, 2005. The “five-day extension” (Rule 22.7(c)) beyond the 15 days allowed for the filing of responsive motions (Rule 22.16(b)) to allow for service by mail of such responses does not apply to a *filing deadline* set by an *Order of this Tribunal*. Pursuant to Rule 22.5(a), “[a] document is filed when it is received by the appropriate [Regional Hearing] Clerk.” The Certificate of Service attached to Respondent’s Motion for Extensions states that Respondent *mailed* the Motion to the Regional Hearing Clerk by First Class Mail on July 11, 2005. Therefore, the Motion was not *filed* (*i.e., received* by the Regional Hearing Clerk) by July 11, 2005, as mandated by the Order of July 8, 2005 granting Respondent’s first Motion for an Extension of three days. Nevertheless, this Tribunal will entertain Respondent’s present Motion as though it were timely filed.

captioned “Respondent’s Objection to Motion for Default and for Extension of Ten (10 Days) [sic] to Tender Prehearing Exchange *and Answer Motion for Default.*” (Emphasis added). While somewhat misleadingly captioned in either case, Respondent’s Motion appears to be a Motion: 1) for an extension of an unspecified time to file the PHE; 2) for an extension of 10 days to file a Response to Complainant’s Motion for Default; 3) to dismiss for lack of jurisdiction; 4) in “demand” of “production;” and 5) to dismiss for lack of credible evidence.

I. Motion for Unspecified Extension to File PHE

Respondent states that, by its Motion for Extensions, it “submits proposed hearing evidence with request for leave to file said discovery late.” Motion for Extensions at 2. The Motion then recites a litany of “proposed evidence,” including “aerial photographs,” a “curriculum vitae for Carlton Layne,” “expected testimony” of Mr. Layne, certain “invoices,” “copies of GPS track of actual aircraft flight,” “weather reports,” “corporation records,” and other “related documentation.” *Id.* However, the only documents attached to Respondent’s Motion for Extensions are: 1) a written statement signed by Lenard Beierle; 2) a résumé or curriculum vitae of Carlton R. Layne; and 3) a statement of the expected testimony of Mr. Layne.

Respondent’s recitation of “proposed evidence,” along with a smattering of examples of such “proposed evidence,” does not meet the requirement articulated in detail by this Tribunal’s Prehearing Order that Respondent file a Prehearing Exchange. Indeed, Respondent’s Motion, despite being styled as a “Disclosure of Expected Evidence,” is merely a “request for leave to file said discovery late.” *Id.* As such, **Respondent is hereby notified that neither the documents attached to its Motion for Extensions nor any evidence “disclosed” in the Motion are accepted as part of the record of this case or as part of a Prehearing Exchange. If Respondent wishes to proffer such evidence, Respondent must include such evidence with a Prehearing Exchange filed in accordance with the Prehearing Order in this matter.** Additionally, Respondent is reminded that, as stated on page 4 of the Prehearing Order, Section 22.19(a) of the Rules of Practice provides that, except in accordance with Section 22.22(a), **any document not included in the Prehearing Exchange shall not be admitted into evidence, and any witness whose name and testimony summary are not included in the Prehearing Exchange shall not be allowed to testify.** Further, any supplements to Prehearing Exchanges shall be filed with an accompanying motion to supplement the Prehearing Exchange.

That being said, this Tribunal finds that the interests of full factual elicitation and issue adjudication are served by allowing Respondent additional time to file a Prehearing Exchange. Further, Respondent’s Motion states that “case management conflicts in other actions,” certain personal demands on Respondent’s counsel’s time, and a “minimum amount of resources” have resulted in Respondent’s delay in filing a PHE. *See* Motion for Extensions at 3. Accordingly, good cause exists to **grant** Respondent an extension of time to file its Prehearing Exchange, and Respondent shall have until **August 19, 2005** to file its Prehearing Exchange. Complainant shall have until **August 31, 2005** to file its Rebuttal Prehearing Exchange.

However, as originally stated on page 5 of the March 22, 2005 Prehearing Order in this matter: If Respondent intends to elect only to conduct cross-examination of Complainant's witnesses and to forgo the presentation of direct and/or rebuttal evidence, Respondent shall serve a statement to that effect on or before the date for filing its Prehearing Exchange. Respondent is hereby notified that its failure to either comply with the Prehearing Exchange requirements set forth herein or to state that it is electing only to conduct cross-examination of Complainant's witnesses can result in the entry of a default judgment against it.

II. Motion for 10-Day Extension to Respond to Motion for Default

Although Respondent's Motion is entitled, in part, "Objection to Motion for Default," Respondent's Motion is *not* a "Response" to the Motion for Default. Rather, Respondent's Motion "request[s] an additional extension of time, in the amount of ten (10) days, to respond to the Complainant's motion for default." Motion for Extensions at 3.

This Tribunal has already found that the interests of full factual elicitation and issue adjudication are served by allowing Respondent additional time to file its Prehearing Exchange, and that good cause exists to grant such an extension. Therefore, since Respondent has accordingly been granted an extension of time until August 19, 2005 to file its PHE, Complainant's Motion for Default for Failure to Submit Prehearing Exchange by the previous deadlines is hereby **denied**. Thus, Respondent need not file a Response to that Motion for Default, and Respondent's Motion for an Extension of Time to do so is hereby **dismissed as moot**. In the event, however, that Respondent fails to strictly abide by the requirements of this Order or the Rules regarding proceedings in this case, Complainant's Motion for default may be revived or refiled.

III. Motion to Dismiss for Lack of Jurisdiction

Paragraph 4 of Respondent's Motion for Extensions states that "the EPA and this Court have no jurisdiction to enforce the EPA rules and regulations upon the sovereign territory of the Confederated Tribes and Bands of the Yakima Nation." Motion for Extensions at 4. This is an affirmative defense for which Respondent bears the burden of proof. 40 C.F.R. § 22.24(a). Respondent's Motion for Extensions sets forth this "jurisdictional" defense as a bare assertion without any factual or legal analysis whatsoever. Therefore, Respondent's Motion to dismiss this matter for lack of jurisdiction, contained in Respondent's Motion for Extensions, is **denied**. Respondent may raise assertion again by Motion or at hearing at the time it has evidence to proffer in support of its defense.

IV. Motion for Production

Paragraphs 5(i)-(xiv) of Respondent's Motion for Extensions (pages 4-8) reiterates Respondent's "demand[] [for] production" originally set forth in paragraphs 8(b)(i)-(xiv) of its Answer. This Order does not specifically respond to such "demands." Rather, Respondent is advised that it may, *following the Prehearing Exchange required by this Order*, move for "other

discovery” as specified in 40 C.F.R. § 22.19(e). Therefore, to the extent that Respondent seeks discovery via its Motion for Extensions, such “Motion for Production” is **denied**.

V. Motion to Dismiss for Lack of Credible Evidence

Finally, paragraph 6 of Respondent’s Motion for Extensions states that “Complainant’s claims of evidence against the Respondents [sic] must fail” due to various evidentiary shortcomings, including, *inter alia*, improper sample collection, transportation, and/or storage. Motion for Extensions at 8-9. Paragraph 6 of Respondent’s Motion for Extensions is a reiteration of the “affirmative defense” originally set forth as paragraph 9(a) of Respondent’s Answer. Indeed, the assertions set forth in paragraph 6 Respondent’s Motion for Extensions constitute an affirmative defense for which Respondent bears the burden of proof. 40 C.F.R. § 22.24(a). Respondent’s Motion for Extensions sets forth this “corrupt evidence” defense as a bare assertion without any factual or legal analysis whatsoever. Therefore, Respondent’s Motion to dismiss this matter for lack of credible evidence, contained in Respondent’s Motion for Extensions, is **denied**. Respondent may raise assertion again by Motion or at hearing at the time it has evidence to proffer in support of its defense.

Order

1. Respondent shall have until **August 19, 2005** to file its Prehearing Exchange.
2. Complainant shall have until **August 31, 2005** to file its Rebuttal Prehearing Exchange.
3. Complainant’s Motion for Default for Failure to Submit Prehearing Exchange is **DENIED**.
4. Respondent’s Motion for an Extension of Time to file a Response to the Motion for Default is **DISMISSED AS MOOT**.
5. Respondent’s Motion to Dismiss for lack of jurisdiction is **DENIED**.
6. Respondent’s Motion for Production is **DENIED**.
7. Respondent’s Motion to Dismiss for lack of credible evidence is **DENIED**.

Susan L. Biro
Chief Administrative Law Judge

Dated: July 20, 2005
Washington, D.C.