



UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
FARMERS UNION OIL COMPANY,) DOCKET NO. FIFRA-8-99-46
NAPOLEON,)
)
)
RESPONDENT)

ORDER DENYING MOTION FOR EXTENSION OF TIME

In this proceeding under Section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act, as amended ("FIFRA"), 7 U.S.C. § 1361(a), Respondent, Farmers Union Oil Company, Napoleon [ND] is charged with violating FIFRA § 12(a)(2)(L) by failing to file a pesticide production report (EPA Form 3540-16) for the calendar year 1998 by March 1, 1999, as required by FIFRA § 7(c) and 40 C.F.R. § 167.85(d). Respondent answered the complaint by a letter, dated October 8, 1999, which objected to the penalty and was interpreted as a request for a hearing.

The ALJ's order, dated June 21, 2000, directed that the parties, absent a settlement, exchange specified prehearing information on or before August 11, 2000. A receipt for certified mail indicates that Complainant's counsel or his office received the order on June 26, 2000. Respondent complied with this requirement by submitting a letter, dated July 20, 2000, which was

received in the ALJ's office on July 27, 2000. Complainant's prehearing exchange, a document dated, September 26, 2000, and bearing a Regional Hearing Clerk's date stamp of even date, was received in the ALJ's office on October 10, 2000. Complainant's submission was not accompanied by a motion to file out of time nor was any explanation offered for the failure to comply with the August 11, 2000 due date established by the ALJ's order. Therefore, on October 11, 2000, the ALJ issued an order directing that Complainant show cause, if any there be, on or before October 20, 2000, why it should not be found to be in default and the complaint dismissed with prejudice.

Complainant did not respond to the show cause order by October 20, 2000, nor did it by that date move for an extension of time in which to do so. By a motion, dated October 26, 2000, Complainant requested an extension of three weeks in which to respond to the order to show cause, citing as a reason that its attorney suffered a physically incapacitating injury on October 14, 2000, which necessitated surgery on October 20, 2000. The motion, which was signed by attorney Richard H. Baird, represented that Complainant's attorney remains physically incapacitated and asserted that this circumstance establishes good cause for granting the requested extension.^{1/}

^{1/} On October 25, 2000, counsel for Complainant called Ms. Helen Handon, the ALJ's legal staff assistant, and informed her that he had undergone emergency surgery to repair an Achilles
(continued...)

Respondent has made no response to the motion.

Discussion

Rule 22.7 of the Consolidated Rules of Practice (40 C.F.R. Part 22), entitled "Computation and extension of time", clearly contemplates that motions for extensions of time will be filed prior to the due date for the filing of the document in question.^{2/} The Consolidated Rules of Practice were revised in 1999, 64 F.R. 40176 (July 23, 1999). Although former Rule 22.07(b) providing for extensions of time (45 F.R. 24363, April 9, 1980, as amended 57 F.R. 5324, Feb. 13, 1992, reflecting the creation of the Environmental Appeals Board) read substantially as does the current Rule 22.7(b) and required that motions for extensions of time be filed in advance of the due date on which the document is to be

^{1/} (...continued)

tendon and that either he or someone in his behalf would be requesting an extension of time in which to respond not only to the order to show cause, but also to an order issued subsequent to hearings in similar but unrelated FIFRA proceedings (Hoven Coop Service Company, Docket No. FIFRA-8-99-31, et al.) No dates for the injury necessitating the surgery or for the surgery were provided.

^{2/} Rule 22.7(b), Extensions of time, provides: The Environmental Appeals Board or the Presiding Officer may grant an extension of time for the filing of any document: upon timely motion of a party to the proceeding, for good cause shown, and after consideration of prejudice to other parties, or upon its own initiative. Any motion for an extension of time shall be filed sufficiently in advance of the due date so as to allow other parties reasonable opportunity to respond and to allow the Presiding Officer or the Environmental Appeals Board reasonable opportunity to issue an order.

filed, the former rule contained a proviso "...unless the failure of a party to make a timely motion for extension of time was the result of excusable neglect." The preamble to the revised rule (64 F.R. 40148) explains that a "good cause" exception to the requirement that a motion for extension of time be filed in advance of the due date was not included in the rule, because it was considered to be unnecessary and because it may encourage untimeliness and adversely affect the Agency's efforts to make administrative proceedings more efficient.^{3/} The reason a "good cause" exception was considered to be unnecessary bears emphasis, i.e., a motion for leave to file out of time may be filed, stating reasons for not having filed within the time limit, accompanied by the document sought to be filed (supra note 3). Under this view of the rule, the motion at issue here may not be considered a motion to file out of time, because the injury to Complainant's counsel occurred on October 14 and no reason has been advanced or is

^{3/} The preamble to the revised rule (64 F.R. 40148) provides in part: Dow suggested a "good cause" exception to the time limit for filing a motion for extension of time. EPA believes that including such an exception is unnecessary and may encourage untimeliness, and thereby adversely affect the Agency's efforts to make administrative proceedings more efficient. A motion for leave to file a document beyond the time limit ("out of time"), stating the reasons for not having filed within the time limit, may be submitted in accordance with § 22.16(a), along with the document sought to be filed. The time limit provided in the proposed revision does not require a motion for extension to be filed so far in advance of the due date so as to allow other parties the 15 days provided by § 22.16(b) to respond to the motion. A "reasonable opportunity to respond" and a "reasonable opportunity to issue an order" will be construed based on the circumstances of the case.

apparent why the motion for an extension was not filed prior to the October 20, 2000 due date. Moreover, the motion was not accompanied by the document sought to be filed, that is, a response to the order to show cause.^{4/}

Rule 22.7(b) and the preamble explanation leave no doubt that the rule requiring motions for extensions of time to be filed in advance of the due date for the filing of the document in question is to be strictly enforced. Complainant's motion for an extension of time in which to respond to the order to show cause will be denied. By way of contrast, Complainant's motion for an extension in which to respond to the order in the Hoven Coop Service Company, et al. proceedings (supra note 1) will be granted because good cause has been shown and the motion was filed prior to the due date for the filing at issue.

Order

Complainant's motion for an extension of time in which to respond to the order to show cause is denied. A ruling sua sponte

^{4/} In Michael C. Sadd, d/b/a Sadd Laundry and Dry Cleaning Services, Docket No. RCRA-09-002 (Order, August 29, 1991), a decision under the former rule, Respondent's motion for an extension of time filed two days after the due date for filing prehearing exchanges was granted as a matter of discretion notwithstanding that excusable neglect was not shown. Respondent's two-day tardiness in filing for an extension in that case bears little resemblance to Complainant's delinquency of over six weeks in filing its prehearing exchange here.

on whether Complainant should be found to be in default and the complaint dismissed with prejudice will be forthcoming.

Dated this 3RD day of November 2000.

Original signed by undersigned

Spencer T. Nissen
Administrative Law Judge