UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	**)**	
	)	
J. S. CHEM CORPORATION,	**)**	**Docket No. CWA-02-2000-3407**
	)	
Respondent	**)**	

ORDER ON MOTION FOR DEFAULT,
RENDERING AN ACCELERATED DECISION ON THE ISSUE OF LIABILITY

I. Background

This proceeding was initiated by a Complaint filed on August 10, 2000, by the Director, Division of Enforcement and Compliance Assistance, United States Environmental Protection Agency, Region 2. The Complaint alleges that Respondent failed to seek coverage under a National Pollutant Discharge Elimination System (NPDES) Multi-Sector General Permit for its facility's storm water discharges associated with industrial activity, and for its storm water discharges associated with industrial activity without an NPDES permit from December 30, 1998 to July 25, 2000, in violation of Sections 301(a) and 308(a) of the Clean Water Act. The penalty proposed in the Complaint for these violations is $ 80,940.

Respondent filed an Answer to the Complaint on October 18, 2000, asserting that it is without knowledge or information sufficient to form a belief as to the truth of certain allegations, setting forth affirmative defenses and requesting a hearing. The parties agreed to participate in Alternative Dispute Resolution (ADR). The ADR process was initiated on November 1, 2000 and terminated on April 6, 2001, with the parties not having reached a settlement. A Prehearing Order was issued, requiring Complainant to file its Prehearing Exchange on June 15, 2001, and requiring Respondent to file its Prehearing Exchange on July 6, 2001. Complainant timely filed its Prehearing Exchange and served it on Respondent. Respondent did not file a prehearing exchange by the due date.

Consequently, on July 12, 2001, an Order to Show Cause was issued, requiring Respondent to show good cause on or before July 27, 2001, why it failed to submit its prehearing exchange and why a default order should not be issued against it.

On July 16, 2001, Complainant submitted a Motion for Default (Motion). In its Motion, counsel for Complainant asserts that on July 13, 2001, she received a call from Respondent's counsel, inquiring about a settlement offer, and mentioning that Complainant should receive Respondent's Prehearing Exchange on Monday, July 16, 2001. In the Motion, Complainant

asserts that Respondent neither filed the Prehearing Exchange nor requested an extension of time. Complainant therefore requests that a default order be issued, assessing the proposed penalty against Respondent.

On July 26, 2001, Respondent served a "Motion in Response to Order to Show Cause" (Response), which was received by the undersigned on August 6, 2001. Respondent's Prehearing Exchange is attached to its Response. In its Response, Respondent provides a detailed explanation for the delay in submitting the Prehearing Exchange: in short, that counsel for Respondent experienced a computer crash, and his office's manual tickler system reflected a due date for his Prehearing Exchange of July 16, 2001. Respondent sets forth arguments as to why the Motion for Default should be denied. Respondent asserts that the "core factual averments of the Complaint are not at issue," but contests the proposed penalty assessment.

On August 2, 2001, Complainant submitted a Reply to Respondent's Motion In Response to Order to Show Cause (Reply). Complainant maintains that a default order assessing the proposed penalty should be issued, and requests that Respondent's Prehearing Exchange be stricken from the record or not admitted.

II. Discussion

With regard to default, Rule 22.17(a) of the Consolidated Rules of Practice, 40 C.F.R. part 22 (Rules), provides in pertinent part:

> A party may be found to be in default . . . upon failure to comply with the information exchange requirements of § 22.19(a) or an order of the Presiding Officer . . . . 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.

Respondent was served with a copy of the Rules along with service of the Complaint. Respondent was warned of the consequences of failure to file a timely prehearing exchange in the Prehearing Order, which stated:

> If the Respondent elects only to conduct cross-examination of Complainant's witnesses and to forgo the presentation of direct and/or rebuttal evidence, the Respondent shall serve a statement to that effect on or before the date for filing its prehearing exchange. **The 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 the Complainant's Witnesses, can result in the entry of a default judgment against it.** . . . **THE MERE PENDENCY OF SETTLEMENT NEGOTIATIONS OR EVEN THE EXISTENCE OF A SETTLEMENT IN PRINCIPLE DOES NOT CONSTITUTE A BASIS FOR FAILING TO**

STRICTLY COMPLY WITH THE PREHEARING EXCHANGE REQUIREMENTS. ONLY THE FILING WITH THE HEARING CLERK OF A FULLY EXECUTED CONSENT AGREEMENT AND FINAL ORDER, OR AN ORDER OF THE JUDGE, EXCUSES NONCOMPLIANCE WITH FILING DEADLINES.

Despite such warning, Respondent has failed to comply with the information exchange requirements (prehearing exchange) set forth in the Prehearing Order, and failed to seek an order from the Presiding Judge granting an extension of time in which to file its prehearing exchange. *See*, 40 C.F.R. §§ 22.7(b); 22.19(a)("In accordance with an order issued by the Presiding Officer, each party shall file a prehearing information exchange"). Such failures provides a basis for finding Respondent in default. However, the decision as to whether to find a party in default is a matter within the Presiding Judge's discretion.

The question presented by the parties is whether to find Respondent in default, or whether Respondent has shown good cause why a default order should not be issued. The parties state that on July 13, 2001, Respondent's counsel telephoned Complainant's counsel in regard to settlement. According to Respondent, counsel for Respondent sought Complainant's acquiescence to an extension of the deadline for its prehearing exchange, which Respondent's counsel believed to be July 16, 2001. According to Complainant, counsel for Respondent mentioned that Complainant would receive Respondent's prehearing exchange on July 16 or 17, but did not request any extension of time to file it. The parties agree that in the July 13th telephone conversation, Complainant's counsel informed the attorney for Respondent that the prehearing exchange was due July 6th, and that EPA would be filing a motion pertinent thereto. Complainant's counsel asserts that when she called Respondent's counsel on July 16 to inform him of the default motion, he mentioned the technical problems with his computer, but did not mention an extension of time, and "dismissed the importance of [Complainant's] default motion, mentioning that orders granting such request [sic] are rare." Reply at 3.

Respondent asserts, "[a]lthough attempts were made to finalize the Prehearing Exchange on or about July 16th, other professional commitments simply made this impossible." Response at 3. Respondent argues that the problems in his computer and tickler system "were totally beyond his control and do not reflect a willingness to disobey or interest in disavowing the Presiding Officer's Orders in the instant matter." Response at 4. Respondent eventually filed its Prehearing Exchange, albeit three weeks late.

In these circumstances, coupled with the fact that a sizable penalty is proposed, a default order assessing the proposed penalty is not warranted. It is observed that, in view of their harshness, default orders are not favored by the law and as a general rule cases should be decided on their merits whenever possible. *Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986). In the circumstances of this case, an order striking Respondent's Prehearing Exchange from the record will not be granted, as it would essentially preclude Respondent from presenting a defense to the proposed penalty assessment. As to Complainant's request not to admit the Respondent's Prehearing Exchange, ruling on admission into evidence of the documents in

Respondent's Prehearing Exchange is premature at this point in the proceeding.

A default order under the Rules, however, does not require the assessment of a penalty. The Rules provide at 40 C.F.R. § 22.17(c) as follows, in pertinent part:

> 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.

Thus, a default order may be issued as to Respondent's liability only. *See*, 64 Fed. Reg. 40137, 40155 (July 23, 1999)(Section 22.17 "will allow Presiding Officers to find a party liable in default, without necessarily determining the appropriate relief in the same order"). Such a default order would be appropriate in this matter, even considering Respondent's technical problems and belief that the due date for its prehearing exchange was July 16, because Respondent failed to file it or to file a motion for extension of time by July 16. Respondent's counsel's statement that "other professional commitments" made it "impossible" for him to submit a prehearing exchange by July 16 is neither specific nor does it explain his failure to file a motion for extension of time by that date.

However, it is not necessary to find Respondent in default, and to deem the facts alleged in the Complaint as admitted under Rule 22.17(a), because Respondent in its Response the expressly admits allegations of liability. Respondent asserts as follows:

> It is apparent from both Respondent's Prehearing Exchange and Answer to the Complaint that the core factual issue in this matter: that coverage was not obtained on or before December 29, 1998, under the multi sector general permit ("MSGP") issued by the Environmental Protection Agency ("EPA"), is uncontested. Respondent failed to renew its storm water NPDES permit on or before December 29, 1998. Accordingly, once liability for a violation is established, * * * *
> Relief requested by EPA in its default motion is inconsequential in relation to admission of the core factual averments of the Complaint. These were never denied by Respondent.

Response at 5, 7. In its Prehearing Exchange statement (¶ 3(J)), Respondent "acknowledge[s] that it failed to renew its storm water NPDES permit in 1998," and asserts (at 7) that direct evidence will be "limited to testimony that will permit proper application of penalty assessment criteria . . . " and that it proposes to cross examine Complainant's witnesses "only with regards to penalty assessment matters."

Respondent expressly concedes that its defense denying applicability of the Clean Water Act, related regulations and NPDES and MSGP permits "is not proper in the instant matter" and no evidence will be presented thereon. Respondent's Prehearing Exchange statement ¶ 3(A). Respondent also states that no basis exists to support its First, Second, Third, Fourth, Sixth, and Tenth Affirmative Defenses. *Id.* ¶¶ 3(B), (C), (D), (E), (F), (I). The Fifth, Seventh, and Eighth

Affirmative Defenses are relevant only to the assessment of a penalty. The Ninth Affirmative Defense, asserting that EPA has not complied with the consultation requirement with the Commonwealth of Puerto Rico provided for on Section 309(g)(1) of the Clean Water Act, is refuted by a letter, dated August 3, 2000, from EPA and addressed to Mr. Roberto Ayala, Director of the Environmental Quality Board, Puerto Rico. Complainant's Prehearing Exchange Exhibit 2. Respondent does not mention the Ninth Affirmative Defense or that letter in its Prehearing Exchange.

In this situation, where Respondent admits or indicates that it does not contest issues as to its liability, and states that it will not pursue affirmative defenses on the issue of liability, Respondent has not raised any genuine issues of material fact requiring a hearing. Thus, an accelerated decision may be rendered under the Rules as to Respondent's liability. The Rules provide, at 40 C.F.R. § 22.20(a) as follows, in pertinent part:

> The Presiding Officer may at any time render an accelerated decision in favor of a party as to any or all parts of a proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue exists and a party is entitled to judgment as a matter of law.

Complainant has supported the factual allegations in the Complaint with the documents in its Prehearing Exchange. Specifically, Complainant has established that Respondent's facility is classified in the Standard Industrial Classification Code 2891, manufacture of adhesives and sealants, which constitutes engaging in "industrial activity." 40 C.F.R. § 122.26(b)(14)(ii). A discharge from such a facility, through a conveyance that is used for collecting and conveying storm water that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant, constitutes "storm water discharge associated with industrial activity." 40 C.F.R. § 122.26(b)(14). Complainant has established that Respondent's facility discharged storm water associated with industrial activity, and that the discharge was through a conveyance which is a "point source," within the meaning of Section 502(14) of the Clean Water Act. Such a discharge is a "discharge of a pollutant" and which requires a NPDES permit. Clean Water Act §§ 402(p), 502(12), 502(16); 40 C.F.R. §§ 122.2, 122.26(a)(1)(ii), 122.26(b)(14). Complainant has established that Respondent is a "person" and an owner or operator of the point source which discharged the storm water into "navigable waters, " as defined in Sections 502(5) and 502(7) of the Clean Water Act. In addition, Complainant has established that Respondent did not have a NPDES permit from December 30, 1998 to July 25, 2000. Complainant's Prehearing Exchange, Exhibits 3 through 6, 20.

Section 301(a) of the Clean Water Act states, "Except as in compliance with this section and sections . . . [402 and 404 of the Clean Water Act], the discharge of any pollutant by any person is unlawful." Section 402 of the Clean Water Act authorizes issuance of NPDES permits. Section 308(a) of the Clean Water Act provides, in pertinent part,

> Whenever required to carry out the objective of this chapter, including . . . carrying out . . . [section 402 of the Clean Water Act] . . .

> (A) the Administrator shall require the owner or operator of any point source to (i) establish and maintain such records, (ii) make such reports, (iii) install, use and maintain such monitoring equipment or methods . . . (iv) sample such effluents . . . and (v) provide such other information as he may reasonably require . . . .

Pursuant thereto, the Administrator of EPA has promulgated the regulations at 40 C.F.R. § 122.26, requiring an NPDES permit for certain storm water discharges, including those associated with industrial activity.

Accordingly, there are no genuine issues of material fact as to Respondent's liability, and Complainant is entitled to judgment as a matter of law as to Respondent's liability for violating Sections 301(a) and 308(a) of the Clean Water Act, 33 U.S.C. §§ 1311(a) and 1318(a), by Respondent's failure to seek NPDES permit coverage for its facility's storm water discharges associated with industrial activity, and for its storm water discharges associated with industrial activity without an NPDES permit, from December 30, 1998 to July 25, 2000. The issue of a penalty to assess for these violations remains in controversy.

ORDER

1. Complainant's Motion for Default is **DENIED.** Complainant's request to strike Respondent's Prehearing Exchange from the record is **DENIED.**

2. Respondent is liable for violating Sections 301(a) and 308(a) of the Clean Water Act, 33 U.S.C. §§ 1311(a) and 1318(a), as alleged in the Complaint, by Respondent's failure to seek NPDES permit coverage for its facility's storm water discharges associated with industrial activity, and for its storm water discharges associated with industrial activity without an NPDES permit, from December 30, 1998 to July 25, 2000.

3. Complainant shall have until **August 20, 2001** to file its Rebuttal Prehearing Exchange.

Susan L. Biro
Chief Administrative Law Judge

Dated: August 10, 2001
Washington, D.C.