

9/25/95

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of)	
)	
Jay Harcrow,)	Docket No. UST6-91-031-AO-1
)	
Respondent)	

RULING ON DEFAULT MOTION
and
ORDER SCHEDULING HEARING

In a motion dated January 23, 1995 the Complainant seeks an order pursuant to the EPA Rules of Practice, 40 C.F.R. §22.17, finding Respondent in default. In the alternative, Complainant requests an order deeming Respondent's claim of inability to pay waived, and that the ability to pay a penalty be established as a fact for the purposes of this proceeding.

The Presiding Officer's Prehearing Order in this proceeding, dated November 4, 1993, required the parties to submit their Prehearing Exchanges on April 25, 1994. The Prehearing Order specifically required Respondent to furnish supporting financial documents with its Prehearing Exchange "if Respondent intends to take the position that it is unable to pay the proposed penalty." Both parties filed their Prehearing Exchanges on that date. In its Prehearing Exchange, Respondent stated that payment of the proposed penalty would have an adverse effect on his ability to continue to do business, and that his "tax returns are being prepared and will be forwarded upon receipt." On February 14, 1995, Respondent did finally provide copies of his tax returns and other financial documents with his Response to Complainant's Motion for a Default Order. Respondent stated that he had been in the process of gathering the necessary financial information evidencing his defense of inability to pay.

Although Respondent submitted the relevant documents late, this is insufficient reason to impose the drastic remedy of a default order or to strike the defense of inability to pay in the circumstances of this proceeding. Due to their harshness, default orders are not favored by the law, and as a general rule cases should be decided on the merits whenever possible. Eitel v. McCool, 782 F2d 1470, 1471-72 (9th Cir. 1986). The Respondent here has shown his good faith in defending this proceeding by timely filing his Answer and main Prehearing Exchange, which raise several defenses. The continuing passage of time since his late filing of the financial documents has removed any possibility of prejudice to the Complainant in prosecuting its case on this issue.

Therefore, Complainant's Motion for a Default Order or, alternatively, for an order essentially striking Respondent's defense of inability to pay, is denied. On the issue of ability to pay, Respondent will, however, be limited at the hearing to offering into evidence only those documents it has now provided with his Response of February 14, 1995.

Order Setting Proceeding for Hearing

The hearing in this proceeding will be held beginning at 9:00 a.m. on December 14, 1995 in Little Rock, Arkansas, continuing if necessary on December 15, 1995. The Regional Hearing Clerk shall make arrangements to obtain appropriate hearing accommodations and services of a reporter to transcribe the proceedings. The undersigned's office shall be notified upon completion of these arrangements. When a hearing facility is acquired, a further order will issue advising the parties of the location and addressing other pertinent matters associated with the proceeding.



Andrew S. Pearlstein
Administrative Law Judge

Dated: September 20, 1995
Washington, D.C.

IN THE MATTER OF JAY HARCROW, INC., Respondent
IF&R Docket No. UST-6-91-031-AO-1

CERTIFICATE OF SERVICE

I certify that the foregoing Order Ruling on Default Motion and Scheduling Hearing, dated Sept. 25, 1995, was sent in the following manner to the addressees listed below:

Original by Pouch Mail to:

Lorena Vaughn
Regional Hearing Clerk
U.S. EPA, Region 6
1445 Ross Avenue
Dallas, TX 75202-2733

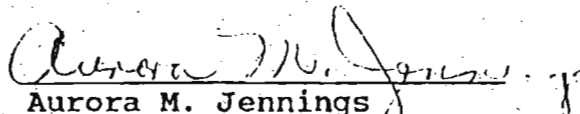
Copy by Certified Mail, Return
Receipt Requested to:

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Aurora M. Jennings
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Dated:

Sept 25, 1995
Washington, DC