

6/2/99

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

|                           |   |                          |
|---------------------------|---|--------------------------|
| IN THE MATTER OF:         | ) |                          |
|                           | ) |                          |
|                           | ) |                          |
| Vanderbilt Chemical Corp. | ) | Docket No. RCRA-4-99-002 |
|                           | ) |                          |
|                           | ) |                          |
| Respondent                | ) |                          |

ORDER DENYING COMPLAINANT'S MOTION FOR DEFAULT JUDGMENT  
AND GRANTING RESPONDENT'S MOTION TO FILE AMENDED  
PREHEARING EXCHANGE STATEMENT

Resource Conservation and Recovery Act-By motion dated April 9, 1999, Complainant, the United States Environmental Protection Agency (EPA), moved pursuant to 40 C.F.R. Section 22.16 and 22.17 for default judgment in the above-stated proceeding. Complainant asserts as grounds for its motion that Respondent, Vanderbilt Chemical Corporation, did not comply with the court's pre-hearing order of December 14, 1998, or 40 C.F.R. Section 22.19(b), as its prehearing exchange was incomplete and did not allow Complainant to offer an adequate rebuttal. On April 27, 1999, Respondent filed a Response to Complainant's Motion for Default and Motion for Leave to File Amended Prehearing Exchange Statement stating that default judgment would be inappropriate under the facts of the case and requested that Complainant's Motion for Default Judgment be denied. **Held:** Complainant's Motion for Default Judgment is **Denied**, and Respondent's Motion to File Amended Prehearing Exchange Statement is **Granted**.

Before: Stephen J. McGuire  
Administrative Law Judge

Date: June 2, 1999

Appearances:

For Complainant:

Judy K. Marshall  
Associate Regional Counsel  
U.S. EPA, Region 4

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For Respondent: Christopher R. Fitzpatrick, Esq.  
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### Discussion

By Pre-hearing Order dated December 14, 1998, Complainant was required to file its pre-hearing exchange on February 19, 1999, and Respondent to file its pre-hearing exchange on March 19, 1999. Complainant was further allowed to file any necessary rebuttal pre-hearing exchange by April 9, 1999. Thereafter, Complainant's pre-hearing exchange was filed on February 18, 1999.

On March 19, 1999, Respondent filed a Motion for Extension of Time to File Respondent's Prehearing Exchange Statement. Respondent's motion was granted and Respondent was given until March 26, 1999, in which to file its Prehearing Exchange. Thereafter, the undersigned granted Complainant's request for an extension of time until April 14, 1999, for Complainant to submit a Rebuttal Prehearing Exchange.

In its Motion for Default, Complainant asserts that the Prehearing Order of December 14, 1998, and 40 C.F.R. Section 22.19(b), require that each party submit copies of all documents and exhibits intended to be introduced into evidence. Respondent's Prehearing Exchange, filed March 26, 1999, listed ten (10) exhibits which Respondent intends to offer into evidence. However, Complainant asserts that it did not receive copies of the exhibits with Respondent's Prehearing Exchange. Respondent also did not file copies of the exhibits with the Regional Hearing Clerk when it filed its Prehearing Exchange.

Further, Complainant asserts that Respondent had stated in its Prehearing Exchange under Exhibit 1 that the Exhibit (a notebook containing information regarding waste determinations), would be supplied to EPA on or before March 31, 1999. EPA asserts, that to date, it has not received a copy of Exhibit 1. Respondent's failure to submit Exhibit 1 in a timely manner, Complainant argues, does not comply with the Prehearing Order and does not allow Complainant to offer a rebuttal.

Complainant states that it informed Respondent on April 6, 1999, that it had not received copies of the exhibits listed in Respondent's Prehearing Exchange (Attachment 2). In addition, Complainant states that except for Exhibit 10, Respondent's description of its list of exhibits is vague in that it does not describe the date or type of document, so that Complainant cannot determine which exhibits, if any, have been previously provided to Complainant.

For the reasons stated above, Complainant moves for an Order for default judgment in favor of Complainant pursuant to 40 C.F.R. Section 22.17(a). In the alternative, pursuant to 40 C.F.R. Section 22.04(c)(5), Complainant requests that the undersigned draw an inference against Respondent for its failure to produce documents or other nonprivileged evidence.

On April 27, 1999, Respondent filed its Response to Complainant's Motion for Default Judgment and also filed a Motion for Leave to file an Amended Prehearing Exchange Statement. In its Response, Respondent argues that it filed a Prehearing Exchange which substantially complied with the requirements of the December 14, 1998, Prehearing Order. However, Respondent concedes that its Prehearing Exchange did not include copies of the exhibits noted.

In its defense, Respondent asserts that its Prehearing Exchange listed three categories of exhibits. The first category consisted of the notebook referred to as Exhibit 1 in the Prehearing Exchange, which EPA had not previously seen. Respondent asserts that the notebook was not discovered and made available to Respondent's counsel to review until shortly before the Prehearing Exchange was due. Respondent states that it did not receive the notebook until April 7, 1999, as it took a great deal of time and effort to locate and examine documents potentially relevant to the case from various locations at Respondent's facility.

Respondent states that the notebook was very large and did not copy well and contained many illegible entries. Respondent further states that these difficulties were communicated to counsel for EPA by telephone and E-Mail correspondence on or about April 9, 1999. Ultimately, Respondent concluded that the notebook did not contain information relating to the time period at issue in the Complaint and thus was not relevant to issues in this case. For this reason, Respondent submitted, with the filing of its Response to Complainant's Motion for Default, an Amended Prehearing Exchange that does not include the notebook as an

exhibit. Respondent asks that its Amended Prehearing Exchange be entered as Complainant will not be prejudiced by its admission.

The second category of exhibits consisted of a series of slides developed using Microsoft Power Point and displayed to EPA during an informal settlement conference in Atlanta. These slides, Respondent states, were presented to EPA in hard copy form during that conference. Such slides were listed as Exhibits 2 through 9 in Respondent's Prehearing Exchange. Respondent argues that these documents were discussed at length during the settlement conference and that EPA was generally aware of the information they contain.

Respondent states that the reason these documents were not included with the Prehearing Exchange is that undersigned counsel thought-mistakenly as it turns out-that copies of the documents were left with EPA at the end of the settlement conference (See note, "previously provided to EPA", attached as Exhibit A). However, Respondent had requested that EPA keep the information contained in the documents confidential as they contained proprietary information (See, letter attached as Exhibit B). Because of this confidentiality request, EPA elected to return copies of these documents at the end of the settlement conference.

Respondent asserts that the third and final category of exhibits consisted of two hazardous waste manifests documenting the off-site shipment of two waste streams at issue in the Complaint. These manifests were identified by their manifest numbers in Respondent's Prehearing Exchange and listed as Exhibit 10. Respondent states that these exhibits had already been provided to EPA as they were attached to its Answer filed on November 12, 1998. Thus, Respondent asserts that these documents have been in EPA's possession and EPA was not prejudiced by Respondent's not providing them again in its Prehearing Exchange.

Under the present facts, Default judgment against the Respondent would be inappropriate. The law is clear that Default judgments are not favored and are not to be lightly entered for procedural error. See, *In the Matter of Asbestos Abatement Services*, Docket No. CAA-031 (June 23, 1997). In cases where Default judgment has been entered against a respondent, they have typically dealt with instances where respondent failed to file an answer to a complaint, failed to file any prehearing statement at all, or completely failed to comply with orders of an Administrative Law Judge. See, *In the Matter of Corporacion para el Desarrollo Economico y Futuro de la Isla Nena, et al.*, Docket


No. CWA-II-97-61 (February 3, 1998); In the Matter of Fred J. Kronauge, Docket No. 5-CAA-95-01 (August 26, 1997); Microsoft Systems International Holdings, S.A. et al., Docket No. FIFRA-9 (March 26, 1997).

In the instant case, Respondent has substantially complied with its prehearing procedural obligations. It filed an Answer to the Complaint which responded to the allegations in order to frame the issues for hearing. Further, it submitted a timely Prehearing Exchange that substantially complied with the December 14, 1998, Prehearing Order. EPA had seen and was at least generally familiar with Exhibits 2-9 listed in the Prehearing Exchange and was already in possession of Exhibit 10, and thus is found not to be prejudiced by the delay in obtaining copies of these exhibits.

The facts further show that Respondent attempted to communicate with EPA why the Exhibits in question were not provided. In addition, the fact that Respondent met with EPA in an informal settlement conference in Atlanta, shows Respondent's good faith in making an effort to discuss the issues involved in this case and to attempt to provide a basis for the parties to discuss the possibility of settlement.

Order

Accordingly, Complainant's Motion for Default is **Denied**, and Respondent's Motion to file an Amended Prehearing Exchange is **Granted**. Complainant however, will be allowed additional time to file a supplement to its Rebuttal Prehearing Exchange. Given the fact that Respondent filed its Motion for Leave to File its Amended Prehearing Exchange on April 27, 1999, Complainant should have had adequate time to review Respondent's exhibits. If necessary, Complainant shall be allowed 14 days after receipt of this Order to file a supplement Rebuttal Prehearing Exchange. Thereafter, this case will be set on the court's docket for evidentiary hearing.

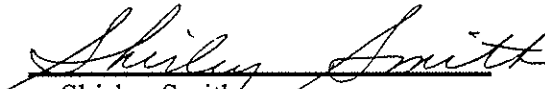
  
Stephen J. McGuire  
Administrative Law Judge

Washington, D.C.

**NAME OF RESPONDENT: Vanderbilt Chemical Corp.**  
**DOCKET NUMBER: RCRA- RCRA-4-99-002**

**CERTIFICATE OF SERVICE**

I hereby certify that the original of this Order Denying Complainant's Motion For Default Judgment And Granting Respondent's Motion To File Amended Prehearing Exchange Statement are sent to the counsel for the complainant and counsel for the respondent on June 2, 1999.

  
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Legal Staff Assistant  
To Judge Stephen J. McGuire

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