UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
	)	
Feeders Grain and Supply, Inc.	)	Docket No. FIFRA-07-2001-0093
	)	
	)	
	)	
Respondent	)	

ORDER DENYING MOTION FOR DEFAULT

On July 24, 2002, Complainant filed a Motion For Default in the above-stated proceeding. As grounds for the Motion, Complainant states that Respondent failed to comply with the pre-hearing exchange requirements mandated by the Pre-Hearing Order dated March 26, 2002. Specifically, Respondent's Pre-Hearing Exchange was due by June 28, 2002. Respondent did not request an extension in which to file its pre-hearing exchange and did not actually file its pre-hearing exchange until July 8, 2002. As a result, Complainant now seeks issuance of a Default Order for failing to properly comply with the directives in the Pre-Hearing Order. In a response to the Complainant's Motion filed on August 16, 2002, Respondent stated that it was unable to timely file its pre-hearing exchange due to other pending state and federal court matters in the state of Iowa.

The Consolidated Rules of Practice provide at 40 C.F.R. Section 22.17(a) that: "A party may be found in default: after motion, upon failure to file a timely answer to the complaint; upon failure to comply with the information exchange requirements of Section 22.19(a) or an order of the Presiding Officer; or upon failure to appear at a hearing". In addition, Section 22.17(c) provides that "[f]or good cause shown, the Presiding Officer may set aside a default order." Thus, pursuant to the Rules of Practice, the Administrative Law Judge has discretion in applying Section 22.17(a), and even upon a finding of default, need not issue the order if the record shows good cause. *J.M. INCHAUSTEGUI, formerly d.b.a. UNI-KEM INTERNATIONAL, INC.*, Docket No. RCRA-6-2000-007 (ALJ, February 28, 2002). As discussed below, under the circumstances of this case, a default order is unwarranted.

A default judgment is a harsh and disfavored sanction, reserved only for the most egregious behavior. *See, Malter International, EPA Docket No. EPCRA-3-2000-0010, EPCRA 3-2000-0011 (ALJ, August 14, 2001); Gard Products, Inc., EPA Docket No. FIFRA-98-005 (ALJ, July 2, 1999); Lacy v. Sitel Corp., 227 F. 3d 290 (5th Cir. 2000).* "A default judgment is appropriate where the party against whom the judgment is sought has engaged in 'willful violations of court rules, contumacious conduct, or intentional delays.'" *Forsythe v. Hales,*

255 F.3d 487,490 (8th Cir. 2001) (quoting Ackra Direct Mktg. Corp. v. Fingerhut Corp. 86 F.3d 852, 856 (8th Cir. 1996). However, "default judgment is not an appropriate sanction for a 'marginal failure to comply with time requirements'"*Ackra Direct Mktg. Corp., supra, at 856 (quoting United States v. Harre, 983 F.2d 128, 130(8th Cir. 1993)).*

Administrative Law Judges have broad discretion in ruling upon motions for default. *See, Gard Products, Inc., supra.* Issuance of such an order is not a matter of right, even where a party is technically in default. *See, Donald L. Lee and Pied Piper Pest Control, Inc., EPA Docket No. FIFRA-09-0796-92-13 (ALJ, November 9, 1992); Lewis v. Lynn, 236 F.3d 766 (5th Cir. 2001).* This broad discretion is informed by "the type and the extent of any violations and by the degree of actual prejudice to the [party seeking default]." *Lyon County Landfill, EPA Docket No. 5-CAA-96-011 (ALJ, September 11, 1997).*

Assuming *arguendo* that Respondent is in default because of its failure to either timely file its pre-hearing exchange or a statement that it elects "only to conduct cross-examination of complainant's witnesses and to forgo the presentation of direct and/or rebuttal evidence....before the date for filing its pre-hearing exchange"(Pre-Hearing Order at 2), a default order is inappropriate. First, the record neither evinces bad faith nor continued dilatory conduct. Respondent filed an Answer to the Complaint, engaged in Alternative Dispute Resolution (ADR) discussions, filed a Pre-Hearing Exchange, albeit untimely, and responded to Complainant's Motion for Default.

Second, the Complainant neither alleged any prejudice resulting from Respondent's failure to timely file the Pre-Hearing Exchange, nor does it appear from the record that Complainant suffered prejudice by Respondent's late filing. As to the issue of any perceived prejudice to Complainant, Respondent notes that all the documents that were a part of its Pre-Hearing Exchange have been previously presented to Complainant.

Under the circumstances of the instant case, Respondent's delinquent Pre-Hearing Exchange filing is insufficient to justify the harsh and disfavored sanction of the default order, especially where it does not appear that Complainant has suffered actual prejudice. This approach is consistent with other instances in which Administrative Law Judges have denied motions

for default. *See, Malter, International, supra (*no finding of default despite Respondent's delinquent Pre-Hearing Exchange filing); *Gard Products, Inc., supra* (no finding of default because the EPA did not demonstrate that it had suffered prejudice and the record did not denote bad faith or continued dilatory conduct); *Lyon County Landfill, supra* (Respondent's *de minimis* default was mitigated by the lack of any actual prejudice to the EPA).

Having so concluded, Respondent is well advised to strictly comply with any future administrative orders as well as the Rules of Practice for the duration of this proceeding, lest he run the very tangible risk of sanction for even the slightest divergence, barring a cogent justification for such noncompliance. Although the Court is disinclined to find bad faith to support this default motion, any additional misconduct will be conjoined with Respondent's pre-existing conduct and addressed accordingly.

Order

Accordingly, for the reasons stated, Complainant's Motion for Default is **DENIED.**

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Stephen J. McGuire
United States Administrative Law Judge

August 27, 2002
Washington, D.C.