UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
FOUR QUARTERS WHOLESALE, INC.,	)	Docket No. FIFRA-9-2007-0008
	)	
Respondent.	)	

ORDER DENYING COMPLAINANT'S MOTION FOR DEFAULT

I. Background and Arguments of the Parties

On May 9, 2007, the United States Environmental Protection Agency, Region 9, ("Complainant" or "EPA"), initiated this action against Four Quarters Wholesale, Inc. ("Respondent") for violations of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), arising from the alleged sale and/or distribution of unregistered pesticides to individuals and businesses in California and other states throughout the Region. After unsuccessful attempts at settlement through alternative dispute resolution, a Prehearing Order was issued on November 8, 2007 establishing, *inter alia*, filing deadlines for the parties' Prehearing Exchanges. On the basis that the parties had reached a settlement, the Complainant's Motion for Modification of the Prehearing Exchange Schedule was granted and the parties were ordered to file a concurrent exchange on or before January 7, 2008. Another extension was granted upon Complainant's subsequently filed motion, the parties having reported that they were close to settling this matter. The deadline was then reset to January 25, 2008.

Complainant filed its Prehearing Exchange in a timely manner on or about January 25, 2008. However, Respondent did not file its Prehearing Exchange with the Regional Hearing Clerk by the due date. Instead, Respondent's Prehearing Exchange was served on Complainant's counsel and was not filed with the Regional Hearing Clerk until January 31, 2008. Complainant filed a Rebuttal Prehearing Exchange and Motion for Default Order (collectively, "Motion") on February 14, 2008.

In its Motion, Complainant points out that in its Prehearing Exchange, Respondent failed to respond to certain requests contained in the Prehearing Order, numbered 3(A) through 3(G) therein. These provisions required Respondent, in its Prehearing Exchange, to provide detailed narrative statements and supporting documents as to the factual and/or legal basis for denials and assertions set forth in the Answer. Complainant argues that, by failing to include these narrative statements in its Prehearing Exchange, Respondent thereby waived presentation of these arguments. Furthermore, Complainant alleges there is no meaningful disagreement between the parties with respect to Respondent's liability for the alleged violations or with respect to the proposed penalty. The "sole issue," Complainant states, is "Respondent's insistence that it

receive money from a separate civil action against the purported supplier of the alleged pesticides . . . before it executes a Consent Agreement and Consent Order . . . to resolve this case." Motion at 1. Further,

In support of granting default under these circumstances, Complainant Motion cites to the Rules of Practice which provide at 40 C.F.R. § 22.19(g) that where a party fails to provide information within its control, the presiding judge may infer that the information is adverse to the party, exclude the information from evidence, or issue a default order. Complainant alleges it suffers prejudice because Respondent has obtained the benefit of Complainant's proper exchange without equitably providing its own. Thus, Complainant requests an order excluding Respondent from presenting the underlying arguments that are the focus of requests 3(A) through (G) of the Prehearing Order, or in the alternative, directing Respondent to provide answers while preserving Complainant's right to rebut the responses. Additionally, since Respondent did not answer requests 3(D) and 3 (G) of the Prehearing Order, Complainant requests that an inference be made that the penalty is uncontested and, as reduced for Respondent's limited ability to pay, be assessed at $33,276.

Complainant also requests that its choice of location for the hearing, San Francisco, California, be determined as the location for hearing on the basis that Respondent waived its opportunity to choose the location by failing to respond to the Prehearing Order's request to state a preferred location for the hearing.

Finally, Complainant moves for Respondent to be held in default for failure to file its Prehearing Exchange in a timely manner. Complainant argues that absent a showing of "good cause," Respondent should be found in default because of its failure to provide any explanation on the record for the delay, and further because Respondent ignored the explicit instructions of the Prehearing Order.

On February 28, 2008, Respondent filed a "Declaration of Kenneth I. Gross, Esq. In Response to Motion for Default Order," along with "Respondent's Prehearing Exchange [Amended]" ("Amended Prehearing Exchange") requesting that Complainant's Motion be denied. The Amended Prehearing Exchange contains the remaining information requested by the Prehearing Order. Respondent's counsel states in his Declaration that he filed the incomplete exchange because he was following the requirements of the Code of Federal Regulations rather than those of the Prehearing Order, and "simply forgot" about the latter. Counsel stated that he immediately prepared the Amended Prehearing Exchange as soon as he learned of the discrepancy, and that no new arguments are raised of which Complainant is not aware. Finally, Respondent argues that there is genuine disagreement as to liability because, in Respondent's view, credible defenses are at issue.

Complainant filed a "Reply to Declaration of Kenneth I Gross, Esq., in Response to Motion for Default Order and Respondent's Prehearing Exchange [Amended]" on March 3, 2008. In its Reply, Complainant maintains that Respondent should be found in default because it has still failed to show good cause and a reasonable explanation for filing a Prehearing Exchange six days late and for failure to comply with the prehearing exchange requirements. If a default

order is not issued, nor an exclusion or inference against the Respondent's arguments underlying the requests of paragraphs 3(A) through 3(G) of the Prehearing Order, then in the alternative, Complainant requests revisions in the Prehearing Order schedule, allowing Complainant to re-submit a rebuttal prehearing exchange in response to Respondent's Amended Prehearing Exchange, and an extension of the deadline for dispositive motions regarding liability.

II. Discussion and Conclusions

The Rules of Practice provide at 40 C.F.R. § 22.17(a) that "[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 the 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." The Rules further provide that "[w]hen 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." 40 C.F.R. § 22.17(c).

Default and exclusion are harsh and disfavored sanctions, reserved only for the most egregious behavior. 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 *Fingerhut Corp. v. Ackra Direct Mktg. Corp.*, 86 F.3d 852, 856 (8th Cir. 1996). Default judgment "is not an appropriate sanction for a marginal failure to comply with the time requirements [and] . . . should be distinguished from dismissals or other sanctions imposed for willful violations of court rules, contumacious conduct, or intentional delays." *Time Equipment Rental & Sales, Inc. v. Harre*, 983 F. 2d 128, 130 (8th Cir. 1993)(12 day delay in filing answer did not warrant entry of default). Moreover, Administrative Law Judges have broad discretion in ruling upon motions for default. Issuance of such an order is not a matter of right, even where a party is technically in default. *See, 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 Complainant." *Lyon County Landfill*, EPA Docket No. 5-CAA-96-011, 1997 EPA ALJ LEXIS 193 * 14 (ALJ, Sept. 11, 1997).

Respondent *is* technically in default for its failure to meet the January 25, 2008 filing deadline for its Prehearing Exchange or a motion requesting an extension of the deadline. However, Complainant will not suffer any substantive prejudice due to Respondent filing his initial prehearing exchange six days late and submitting the Amended Prehearing Exchange on February 28, 2008, particularly where, as here, Complainant will be provided additional time to file an amended rebuttal prehearing exchange. The Presiding Judge is charged with the responsibility not only to avoid delay, but also to conduct a fair and impartial proceeding. 40 C.F.R. § 22.4(c). It does not appear that Respondent willfully violated the Rules or Prehearing Order, or that it acted with contumacious conduct or using any willful delaying tactics. Entry of a default order is therefore not warranted. Exclusion of evidence or drawing an adverse inference similarly are not warranted in the circumstances of this case. However, Respondent is hereby

advised to strictly follow the Rules of Practice and instructions set forth in orders issued in this proceeding from this day forward in that such leniency may not be shown again in this proceeding.

The Rules of Practice provide at 40 C.F.R. § 22.35 that "the hearing shall be held in the county, parish, or incorporated city of the residence of the person charged, unless otherwise agreed in writing by all parties." Respondent in its Amended Prehearing Exchange requests that the hearing be held in Los Angeles, California where Respondent and the witnesses are located. Accordingly, Respondent's request will be granted, and therefore, Complainant's motion for a determination that the hearing be held in San Francisco is denied.

As to Complainant's request that the penalty amount be deemed uncontested and set at $33,276, Respondent in its amended Prehearing Exchange sets forth arguments in mitigation of the penalty. Given these issues, the penalty is still considered in controversy at this point and Complainant's motion for an inference of an uncontested penalty amount is denied.

ORDER

1. The Complainant's Motion for Default Judgement against Respondent is **DENIED**. Complainant's requests for exclusion of arguments and for drawing adverse inferences are **DENIED**.

2. Complainant's motion for an inference of an uncontested penalty amount is **DENIED**.

3. Complainant's motion for a determination that the hearing be held in San Francisco is **DENIED**.

4. Complainant's request to submit an amended rebuttal prehearing exchange is **GRANTED.** Complainant shall file any amended rebuttal prehearing exchange on or before **March 28, 2008.** Any dispositive motions shall be filed no later than **30 days** after Complainant submits its amended Rebuttal Prehearing Exchange.

Susan L. Biro
Chief Administrative Law Judge

Dated: March 18, 2008
Washington, D.C.

In the Matter of Four Quarters Wholesale, Inc., Docket No. FIFRA-09-2007-0008

CERTIFICATE OF SERVICE

I certify that the foregoing **Order Denying Complainant's Motion For Default**, dated March 18, 2008, was sent this day in the following manner to the addressees listed below.

Maria Whiting-Beale
Legal Staff Assistant

Dated: March 18, 2008

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