UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4

In the Matter of:	)	
	)	DOCKET NO.: FIFRA-04-2011-3020
UNITED GLOBAL TRADING, INC.	)	
	)	
Respondent.	)	
	)	
	)	

ORDER DENYING COMPLAINANT'S MOTION FOR DEFAULT ORDER AND DIRECTING REGIONAL HEARING CLERK TO FORWARD CASE TO CHIEF ADMINISTRATIVE LAW JUDGE

By Motion for Default (Motion) filed October 30, 2012, pursuant to Section 22.17 of the Consolidated Rules of Practice Governing the Assessment of Civil Penalties and the Revocation or Suspension of Permits (Consolidated Rules), 40 C.F.R. § 22.17, Complainant, Director of the Air, Pesticide an Toxics Management Division, U.S. Environmental Protection Agency (EPA), Region 4, seeks issuance of a default judgment. Specifically, Complainant seeks a default order assessing a civil penalty of $55,900 against Respondent, United Global Trading, Inc., for alleged violations of Section 12 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C.
§ 136j. Complainant alleges that Respondent violated FIFRA by distributing or selling four shipments of a pesticide that had not been registered with EPA, that was misbranded and which Respondent imported into the United States without filing a Notice of Arrival into the United States.

I. Background

On May 10, 2011, EPA filed a Civil Complaint and Notice of Opportunity for Hearing (Complaint) with the Region 4 Hearing Clerk, and served a copy on Respondent by Certified Mail, Return Receipt requested. *See* Exhibit A to Motion. The return receipt green card was signed on May 16, 2011, by Mr. Rajmati Paldano. *See* Exhibit B to Motion. Mr. Paldano is President of Respondent United Global Trading, Inc. In accordance with section 22.15(a) of the Consolidated Rules, 40 C.F.R. § 22.15(a), an Answer was due on or before June 15, 2011, 30 days after service of the Complaint.

According to an Affidavit submitted by Dawn Johnson, of the EPA Region 4 Pesticide Program, on June 15, 2011, the deadline for filing Respondent's Answer, Mr. Paldano telephoned her asking what he "should do regarding the Complaint." *See* Affidavit of Dawn Johnson, Exhibit C to Motion. Ms. Johnson explains that she informed Mr. Paldano that he needed to file an Answer with the Regional Hearing Clerk as instructed in the Complaint. Ms. Johnson indicates that on that same date Mr. Paldano faxed to her a letter that, as she concludes, "he apparently intended to be Respondent's Answer to the Complaint." Johnson Aff. ¶ 5. The document is attached to Complainant's Motion as Exhibit D. Ms. Johnson goes on to indicate that she attempted to contact Mr. Paldano to remind him that he needed to file the Answer directly with the Regional Hearing Clerk. However, she was neither able to reach Mr. Paldano nor leave a message for him.

Thereafter, on June 27, 2011, Mr. Paldano contacted Keri N. Powell, Esq., EPA's attorney on the matter, and informed her that he had attempted to fax his Answer to EPA but the transmission had been unsuccessful. *See* Affidavit of Keri N. Powell, ¶¶ 6-7, Exhibit E to Motion. Ms. Powell's Affidavit goes on to explain the following sequence of events: Ms. Powell invited Mr. Paldano to join Ms. Johnson and her on a teleconference to take place on June 30, 2011. During the teleconference, Ms. Powell told Mr. Paldano that Respondent had not filed an Answer with the Regional Hearing Clerk as required. Mr. Paldano stated he would file the Answer by certified mail later that day. The parties went on to discuss the proposed penalty which included discussion of the fact that the penalty could be reduced to reflect Respondent's cooperation. Mr. Paldano then indicated that within two or three weeks from the time of the call, he would provide the previous three years tax returns to support his inability to pay claim. However, the teleconference was the last contact between Respondent and EPA. Powell Aff. ¶¶ 9-13. Sometime following that call Ms. Powell attempted to contact Respondent at a phone number he provided during the call but no one answered or returned her phone message. Powell Aff. ¶ 16.

Respondent has not filed a response to Complainant's Motion for Default.

II. Applicable Procedural Rule

Section 22.17(a) of the Consolidated Rules, provides in part:

> (a) *Default.* A party may be found to be in default: after motion, upon failure to file a timely answer to the complaint; upon failure to comply with the information exchange requirements of § 22.19(a) or an order of the Presiding Officer; or upon failure to appear at a conference or hearing. 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. . .
>
> (b) *Motion for Default.* A motion for default may seek resolution of all or part of the proceeding. Where the motion requests the assessment of a penalty or the imposition of other relief against a defaulting party, the movant must specify the penalty or other relief sought and state the legal and factual grounds for the relief requested.
>
> (c) *Default order.* 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. If the order resolves all outstanding issues and claims in the proceeding, it shall constitute the initial decision under these Consolidated Rules of Practice. The relief proposed in the complaint or in the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act. For good cause shown, the Presiding Officer may set aside a default order.

40 C.F.R. § 22.17

III. Discussion

Default orders have long been considered a harsh remedy not favored by the courts; therefore, cases should be decided on their merits whenever possible. *See 10A Wright, Miller & Kane, Federal Practice and Procedure 3d,* § 2681, at 10-12 (1998). *Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986); *Lacy v. Sitel Corp.*, 227 F.3d 290 (5th Cir. 2000); and *Enron Oil Corp. v. Diakuhara*, 10 F. 3d 90, 95-97 (2nd Cir. 1993). With varying outcomes, generally this principle has been recognized and applied in environmental administrative cases as well. *See In re Four Strong Builders, Inc.*, 12 E.A.D. 762, 766(EAB 2006), noting: "Default is generally disfavored as a means of resolving Agency enforcement proceedings;" *In re JHNY, Inc.*, 12 EAD 372, 384 (EAB 2005); *In re Thermal Reduction Co.*, 4 E.A.D. 128, 131 (EAB 1992).

A second underlying principle guiding this proceeding is the concept of providing some leeway to a respondent appearing *pro se* when considering the possibility of finding that respondent is in default. As noted ". . . concerns regarding the protection of a litigant's rights are heightened when the party held in default appears *pro se*. A party appearing without counsel is afforded extra leeway in meeting the procedural rules governing litigation, and trial judges must make some effort to protect a party so appearing from waiving a right to be heard because of his or her lack of knowledge." *Enron Oil Corp.*, 10 F.3d at 96.

Cases involving motions for default against parties appearing *pro se* at times focus upon whether a responsive document is sufficiently clear as to what is being admitted or denied, *e.g., In re Matter of Mardaph II, LLC, Mardaph III, LLC, and Vinnie Wilson*, Docket No. TSCA-05-2008-0019, Order Denying Complainant's Motion for Default and Establishing Briefing Schedule (RJO, March 19, 2000). However, in the matter at hand, Complainant, by his own admission, clearly understood that Respondent agreed with the statement of facts set forth in paragraphs 5 though 9 of the Complaint; specifically agreed with all the facts stated from counts 1 to 9; and, specifically admitted that a supplier sent the pesticide at issue to Respondent and that Respondent sold the pesticide to customers. See Complainant's Motion p. 2. Complainant is neither contending that the document Mr. Paldano submitted provided insufficient notice of Respondent's position regarding allegations raised, nor for that matter, that any prejudice was suffered as a result.

However, the question at hand - whether to accept a document as an Answer that was not served correctly with the Agency employee authorized to receive service - is not unprecedented. The facts presented *In re Matter of Billmax and Upright Wrecking,* Docket No. 5-CAA-029-98, (ALJ, Feb. 1999) were almost identical to those before me.[1] In that Clean Air Act matter, Upright Wrecking, one of two Respondents, sent via facsimile to Complainant's counsel a document marked "Answer to Complaint" within the time period for filing an Answer. The letter was, as in the case at hand, signed by the President of the Respondent company admitting to the "charges," providing assurance the violations would not reoccur and claiming financial hardship ("[t]he file we received . . . would be the end of our company. . . "). Agency counsel in that matter also deemed and so notified Respondent that the letter did not constitute an Answer based upon the procedural requirement to file an Answer with the Regional Hearing Clerk. Upright Wrecking then sent a second letter to Complainant's counsel.

[1] Part 22 of the Consolidated Rules of Practice, 40 C.F.R. Part 22, was revised on July 23, 1999, shortly after the Billmax Properties order was issued. However, changes to the default provisions at Section 22.17(a), 40 C.F.R. § 22.17(a), would have no impact on the specific issue in this matter.

including the requirement to attach a Certificate of Service. However, Upright wrecking has sent a timely written response to the Complaint, admitting the violations and claiming inability to pay the proposed penalty. It has repeatedly expressed its intent to avoid a default, and has showed some intent to try to settle the matter. . . .In these circumstances, a default order assessing the proposed penalty against Upright Wrecking is unwarranted."

Similarly, before me is an unrepresented Respondent, whose President and Agent for Service contacted an employee of EPA Region 4's Pesticide Program, then sent, via facsimile, a letter referencing the docket number for the FIFRA matter (albeit incorrectly referred to as US District Court Docket No.) a) within the thirty day period from receipt of the Complaint as required by the Consolidated Rules; b) addressed to both the Regional Hearing Clerk as well as Complainant's counsel Ms. Powell; c) admitting the violations and claiming inability to pay the penalty; and d) requesting a hearing to resolve the matter. Furthermore, Respondent thereafter re-initiated contact with another EPA representative by telephoning Ms. Powell, explaining that his facsimile transmission of the letter to EPA was unsuccessful. Reflecting an early intent on appearing in the proceeding, Mr. Paldano then participated in the scheduled settlement teleconference on Respondent's behalf, with both Ms. Powell and Ms. Johnson.

IV. Conclusion

Respondent's mistake was defective filing in that he sent his document via facsimile to the incorrect fax machine. However, outweighing what was a technical filing deficiency, Respondent, appearing without benefit of counsel, made a timely and clear response to the Complaint; initiated contact with the Agency; and then took additional steps to properly file his response. Therefore, I conclude that, in these circumstances, as in those presented in *Billmax Properties*, a default order assessing the proposed penalty against United Global Trading, Inc. is unwarranted.[2]

Complainant's Motion for Default Order is **hereby denied**.

Respondent's June 15, 2011, letter serves as Respondent's Answer to the Complaint. Therefore, the Regional Hearing Clerk is directed to forward copies of all documents filed in this proceeding to the Chief Administrative Law Judge for further proceedings in accordance with Part 22 of the Consolidated Rules of Practice, 40 C.F.R. Part 22.

SO ORDERED.

Date: April 2, 2013

Susan B. Schub

Susan B. Schub
Regional Judicial Officer

[2] Note is taken that distinguishable from Upright Wrecking, United Global Trading, Inc. did not respond to the Motion. Although Respondent's failure to respond waived its right to object to granting the Motion, pursuant to 40 C.F.R. §22.16, it did not serve to invalidate what I find to be a timely response to the Complaint.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of the foregoing Order Denying Complainant's Motion for Default Order and Directing Regional Hearing Clerk to Forward Case to Chief Administrative Law Judge, in the Matter of United Global Trading, Inc., Docket No. FIFRA-04-2011-3020, on the parties listed below in the manner indicated:

Certified Mail –
Return Receipt Requested:
United Global Trading, Inc.
8841 NE 102nd Street
Medley, Florida 33178
Attn: Augustine Paldano

Mr. Augustine Paldano
Registered Agent
United Global Trading, Inc.
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Fort Lauderdale, Florida 33326

Via Intra-Office Mail:
Keri Powell, Esq.
Office of Environmental Accountability
U.S. Environmental Protection Agency
Region 4
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Atlanta, Georgia 30303

Dawn Johnson
Air, Pesticides and Toxics Management Division
U.S. Environmental Protection Agency, Region 4
61 Forsyth Street, SW
Atlanta, Georgia 30303

Date: 4-2-13

Patricia A. Bullock
Regional Hearing Clerk
U.S. Environmental Protection
Agency, Region 4
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