



UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
Degussa Engineered Carbons, LP,) Docket No. CAA-05-2004-0044
)
RESPONDENT)
_____)

ORDER GRANTING RESPONDENT’S MOTION FOR EXTENSION OF TIME

Complainant in this case filed “Complainant’s Motion to Strike Respondent’s Affirmative Defenses” and memorandum in support thereof (“Motion to Strike”) on October 6, 2005. Respondent subsequently filed “Respondent’s Motion for an Extension of Time [to File a Response to Complainant’s Motion to Strike]” (“Motion for Extension”). Respondent’s Motion for Extension is dated October 27, 2005 and was filed on October 28, 2005.¹ Respondent also sent a copy of its Motion to this Tribunal “by first-class U.S. mail” on October 27, 2005, which copy was received by this Tribunal on November 1, 2005.² Respondent’s Motion requests an extension of fifteen (15) days from October 26, 2005 (*i.e.*, until November 10, 2005) to file a Response to Complainant’s Motion to Strike, explaining that Respondent “was not served with a copy of Complainant’s Motion [to Strike] until October 26, 2005 due to Complainant’s clerical mistake in the mailing process.”³ Motion for Extension at 1. Respondent’s Motion further states

¹This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits at 40 C.F.R. Part 22 (“Rules”). Pursuant to Rule 22.5(a), “[a] document is *filed* when it is *received* by the appropriate [Hearing] Clerk.” 40 C.F.R. § 22.5(a) (emphasis added). Respondent sent its Motion for Extension to the Regional Hearing Clerk by Federal Express on October 27, 2005. Therefore, Respondent’s Motion was “filed” on October 28, 2005 when it was *received* by the Regional Hearing Clerk, and not on October 27, 2005 when it was “sent” to the Regional Hearing Clerk via Federal Express.

²The parties are strongly encouraged to submit to this Tribunal *by facsimile* additional “courtesy copies” of any and all pleading filing with the Regional Hearing Clerk and served by mail.

³Respondent does not elaborate upon the specific nature of the alleged “clerical mistake.”

that “Complainant has expressed to Respondent its agreement to an extension of time for Respondent to file a response.” *Id.*

Rule 22.16(b) states that “[a] party’s response to any written motion must be *filed* within 15 days after *service* of such motion... Any party who fails to respond within the designated period waives any objection to the granting of the motion.” 40 C.F.R. § 22.16(b) (emphasis added). Rule 22.7(c) explains that:

Service of the complaint is complete when the return receipt is signed. *Service of all other documents* is complete *upon mailing* or when placed in the custody of a reliable commercial delivery service. Where a document is served by first class mail or commercial delivery service, but *not by overnight or same-day delivery*, *5 days shall be added* to the time allowed by these [Rules] for the filing of a responsive document.

40 C.F.R. § 22.7(c) (emphasis added).

Complainant’s Motion to Strike was hand-delivered to the Hearing Clerk, and thus “filed,” on October 6, 2005. Complainant’s Motion was also sent to Respondent “by certified mail” (and thus “*served*”) on October 6, 2005. Therefore, Respondent’s response was due to be *filed* 20 days thereafter on October 26, 2005.⁴ Respondent did not file a “response” to Complainant’s Motion to Strike by October 26, 2005, and has yet to do so. Further, Respondent’s present Motion for Extension, having been filed on October 27, 2005, was filed after the expiration of the 20-day deadline to file a “response” to Complainant’s Motion.

Rule 22.7(b) states that:

The ... Presiding Officer may grant an extension of time for filing any document: upon *timely* motion of a party to the proceeding, for good cause shown, and after consideration of prejudice to other parties; or upon its own initiative. Any motion for an extension of time shall be filed sufficiently *in advance of the due date* so as to allow other parties reasonable opportunity to respond and to allow the Presiding Officer ... opportunity to issue an order.

40 C.F.R. § 22.7(b) (emphases added). Thus, Rule 22.7(b) clearly contemplates that motions for “extensions of time” must be filed *before* the relevant time limit has expired. Since Respondent’s Motion for Extension in the present case was not filed until one day *after* the filing deadline for a response to Complainant’s Motion to Strike, Respondent’s Motion (despite its caption) is not a “motion for an *extension* of time,” but rather a “motion for leave to file *out of time*.”

⁴Since Complainant’s Motion was sent to Respondent not by “overnight or same day delivery,” but rather by “certified mail,” Respondent’s Response was due 15 days *plus an additional 5 days* from the date of service. *See also*, Rule 22.7(a) regarding “computation” of time.

A motion for leave to file a responsive motion out of time filed after expiration of the deadline may impose a heavier burden upon the movant than a motion for an extension of time filed before the expiration of the deadline. Although the Part 22 Rules of Practice do not speak to a motion for leave to file “out of time,” the Federal Rules of Civil Procedure (“FRCP”) do address this distinction.⁵ Specifically, FRCP 6(b) (“Enlargement”) states:

When ... an act is required or allowed to be done at or within a specified time, the court *for cause shown* may at any time in its discretion (1) with or without motion or notice order the period enlarged *if request therefor is made before the expiration of the period* originally prescribed or as extended by a previous order, or (2) *upon motion made after the expiration of the specified period* permit the act to be done *where the failure to act was the result of excusable neglect*.

FRCP 6(b) (emphases added). Thus, in ruling upon a motion for an “extension of time” made prior to expiration of the deadline, this Tribunal considers the possible prejudice to other parties and whether the movant has shown “good cause.” In ruling on a motion for leave to file a response “after the expiration of the specified period” (*i.e.*, “out of time”), FRCP 6(b) would require consideration of the additional factor of whether the movant has shown that its neglect is “excusable.” That being said, this Tribunal must “assure that the facts are fully elicited, adjudicate all issues and avoid delay,” and is empowered to “take all measures necessary for the ... efficient, fair and impartial adjudication of issues.” 40 C.F.R. §§ 22.4(c) and (c)(10).

Respondent’s Motion for an Extension of Time states that:

Complainant’s certification notwithstanding, Respondent’s counsel was not served with a copy of Complainant’s Motion [to Strike] until October 26, 2005 due to Complainant’s clerical mistake in the mailing process... Complainant has expressed to Respondent its agreement to an extension of time for Respondent to file a response.

Motion for Extension at 1. Respondent does not provide specific facts as to the “clerical mistake in the mailing process.” Nevertheless, in light of Complainant’s “agreement to an extension of

⁵Where the Consolidated Rules of Practice at 40 C.F.R. Part 22 do not address a particular issue, federal rules and decisions may be looked to for guidance. As stated by the Environmental Appeals Board in *Patrick J. Neman, D/B/A The Main Exchange*, 5 E.A.D. 450, 455, n.2 (EAB 1994): “When a procedural issue arises that is not addressed in Part 22, the Board has the discretion to resolve the issue as it deems appropriate. 40 C.F.R. § 22.01(c). In the exercise of this discretion, the Board finds it instructive to examine analogous federal procedural rules and federal court decisions applying those rules. *See In re Wego Chemical & Mineral Corporation*, TSCA Appeal No. 92-4, at 13 n. 10 (EAB, Feb. 24, 1993) (although the Federal Rules of Civil Procedure do not apply to Agency proceedings under Part 22, the Board may look to them for guidance); *In re Detroit Plastic Molding*, TSCA Appeal No. 87-7, at 7 (CJO, Mar. 1, 1990) (same) .”

time,” this Tribunal finds that, under the circumstances of this case, good cause exists for an extension of 15 days from October 26, 2005 (the date on which Respondent received a copy of Complainant’s Motion), and that no undue prejudice to Complainant will result in the granting of such an extension.

Therefore, Respondent’s Motion for an Extension of Time is hereby **GRANTED**, as set forth below:

Good cause in the form of excusable neglect exists for the granting of the Motion for an Extension. The interests of full factual elicitation and issue adjudication are best served in this case by allowing Respondent additional time to file a response to Complainant’s Motion to Strike Respondent’s Affirmative Defenses. Therefore, Respondent is hereby **ORDERED** to file its response to Complainant’s October 6, 2005 Motion to Strike Respondent’s Affirmative Defenses no later than **November 10, 2005**, with a copy contemporaneously sent to the undersigned by **facsimile and by mail**.

FAILURE TO SUBMIT THE RESPONSE IN A TIMELY MANNER MAY RESULT IN ENTRY OF AN ORDER OF DEFAULT WITHOUT FURTHER NOTICE.

Susan L. Biro
Chief Administrative Law Judge

Dated: November 4, 2005
Washington, D.C.