



UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:)
)
Kent Hoggan, Frostwood 6 LLC,) Docket No. CWA-08-2017-0026
and David Jacobsen)
)
Respondents.)

ORDER ON COMPLAINANT’S MOTION FOR DEFAULT AND RESPONDENT KENT HOGGAN’S MOTION FOR LATE FILING OF RESPONDENT’S INITIAL PREHEARING EXCHANGE

I. Background

This proceeding was initiated on September 27, 2017, when Complainant, the Acting Assistant Regional Administrator, Office of Enforcement, Compliance and Environmental Justice, U.S. EPA, Region 8, (“Agency”) filed a Complaint and Notice of Opportunity for Hearing (“Complaint”) against Respondents under Section 309(g)(1)(A) of the Clean Water Act, 33 U.S.C. § 1319(g)(1)(A).

A copy of the Complaint was served on Frostwood 6 LLC’s registered agent on October 2, 2017, Kent Hoggan on November 14, 2017, and David Jacobsen on November 20, 2017. Frostwood 6 LLC’s answer to the complaint was due on or before November 6, 2017; Mr. Hoggan’s answer was due on or before December 14, 2017; and Mr. Jacobsen’s answer was due on or before December 20, 2017. On December 15, 2017, the three Respondent’s jointly filed the Answer of Kent Hoggan, Frostwood 6 LLC and David Jacobsen and Request for Hearing (“Answer”), which was timely only as to Mr. Jacobsen.

On July 5, 2018, I issued a Prehearing Order in this matter, setting forth certain prehearing filing deadlines. Among the prehearing filing deadlines established, the Prehearing Order directed all parties to file Preliminary Statements by July 27, 2018; Complainant to file a Status Report by July 27, 2018, regarding the status of any settlement;¹ Complainant to file its Initial Prehearing Exchange by August 17, 2018; Respondents to file their Prehearing Exchanges by September 7, 2018; and Complainant to file its Rebuttal Prehearing Exchange by September 21, 2018. Consistent with the Prehearing Order, Complainant filed its Initial Prehearing Exchange on August 17, 2018. Respondents, however, did not timely file their Preliminary

¹ Complainant’s July 27, 2018 Status Report states that it had reached a “settlement agreement in principle for David Jacobsen,” and that the parties’ counsel were in the process of “memorializing the agreement in a finalized document for submission to the Presiding Officer.”

Statements by July 27, 2018, or their Prehearing Exchanges by September 7, 2018. Respondents jointly filed a Preliminary Statement on August 1, 2018.

On September 13, 2018, Complainant filed separately both a Motion for Default, requesting that Respondents be found in default for their failure to comply with the filing deadline for their Prehearing Exchanges, and a Motion for Stay, requesting that the filing deadline for Complainant's Rebuttal Prehearing Exchange be stayed until its Motion for Default is resolved. In the Motion for Default, Complainant proposed a penalty of \$500 be imposed upon Mr. Jacobsen and \$196,300, jointly and severally, be imposed upon Mr. Hoggan and Frostwood 6 LLC. On September 14, 2018, I granted Complainant's Motion for Stay.

The summary of events that follow could have been lifted from Shakespeare's *The Comedy of Errors* if it were instead written in the setting of a modern day administrative enforcement proceeding.

On September 24, 2018, eleven days after Complainant's Motion for Default was filed, and 17 days after the Respondents' Initial Prehearing Exchanges were due, Respondent Hoggan, though counsel, attempted to file his Initial Prehearing Exchange. This filing was not accompanied by a certificate of service nor by a motion to file out of time. On October 9, 2018, Complainant filed a Reply to Respondent Kent Hoggan's Opposition to Motion for Default ("Reply"), although Mr. Hoggan had not yet filed such Opposition with the Tribunal. Perhaps prompted by the Agency's filing, the following day, October 10, 2018, Mr. Hoggan did electronically file his Opposition to Motion for Default ("Opposition"), which was dated September 20, 2018. In addition, that day, Mr. Hoggan filed a Motion for Late Filing of Respondent's Initial Prehearing Exchange, also dated September 20, 2018. The original Certificates of Service attached to both of Mr. Hoggan's October 10th filings state that they were sent by FedEx to the Office of Administrative Law Judges' address that, the parties were notified in the Prehearing Order, only accepts postal mail.² However, Mr. Hoggan also filed Amended Certificates of Service that acknowledged that the FedEx packets were addressed incorrectly. The Certificates of Service also refer to the documents served as having been authored on September 26, 2018 and not September 20, 2018. Both of the October 10th motions also contained statements that Mr. Hoggan had shipped his Initial Prehearing Exchange on September 20, 2018, which was also not formally filed until three weeks later, on October 11, 2018, but not because it was sent to the wrong address but because the packet was incomplete in that it lacked a certification evidencing service on Complainant and because there were no proposed exhibits accompanying the Initial Prehearing Exchange narrative statement.

Respondents Frostwood 6 LLC and David Jacobsen have yet to seek leave to file their Initial Prehearing Exchanges out of time and they have not opposed the Complainant's Motion for Default. Because of the series of blunders in correctly filing documents with this office, my staff attorney contacted Respondents' counsel to inquire if he still represented Frostwood 6 LLC and David Jacobsen and whether he submitted motions for leave to file out of time and oppositions to the Motion for Default. Respondents' counsel affirmed that he continued to represent Frostwood 6 LLC and David Jacobsen but did not address whether he submitted any motions or oppositions to default on their behalf.

² To date the Tribunal still has not received either of the FedEx packets.

On October 11, 2018, the Agency filed Complainant's Response to Kent Hoggan's Motion for Late Filing.

Pending before this Tribunal are Complainant's Motion for Default and Respondent Kent Hoggan's Motion for Late Filing of Respondent's Initial Prehearing Exchange.

II. Discussion and Conclusions

A. Complainant's Motion for Default Judgment

The Agency asserts that Respondents have defaulted because they did not file their prehearing exchanges of information by the September 7, 2018 deadline. Mot. for Default at 7. The Agency argues that Mr. Hoggan's noncompliance has prejudiced not only Complainant but the Tribunal itself by adversely affecting the "Presiding Officer's ability to maintain order in administrative cases" and "frustrat[ing] the streamlined purpose of this administrative litigation." Reply at 7 (citation omitted). The Agency notes that the other two respondents, Frostwood 6 LLC and Mr. Jacobsen, have neither joined in Mr. Hoggan's filings nor responded to Complainant's Motion for Default.

Respondent Hoggan opposes the Complainant's Motion for Default on grounds that "he was waiting for critical 2017 project tax returns to be finished by his cpa, and did not have those tax returns until September 17, 2018." Opp. at 1. Mr. Hoggan notes that he submitted his initial prehearing exchange along with a Motion for Late Filing on September 20, 2018.

The Rules of Practice provide at 40 C.F.R. § 22.17(a):

[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).

Failing to adhere to procedural requirements, such as the September 7, 2018 filing deadline for the Respondents’ Prehearing Exchange, is technically grounds for a finding of default. However, Complainant will not suffer any substantive prejudice due to the late submittal of Respondent Hoggan’s prehearing exchange, particularly where, as here, Complainant’s deadline for filing a rebuttal prehearing exchange was stayed. 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 Hoggan willfully violated the Rules or Prehearing Order, or that he acted with contumacious conduct or used any willful delaying tactics. Entry of a default order is therefore not warranted. Furthermore, it appears from the documentation that Mr. Hoggan submitted with his prehearing exchange that he is the sole member and manager of Frostwood 6 LLC, and that their defenses are so intertwined that it would not serve justice to find the company in default and not the sole member/manager. The Agency has apparently reached a settlement with Mr. Jacobsen so a default order as to him would be pointless. Consequently, Complainant’s Motion for Default is denied.

Respondents and their counsel are hereby warned to strictly follow the Rules of Practice and instructions set forth in orders issued in this proceeding from this day forward, as such leniency may not be shown again in this proceeding. Respondents are also advised to follow the rules regarding filing and service of documents, and to include a certificate of service with each document filed, showing that the original document was submitted to the Headquarters Hearing Clerk by mail or electronic filing and that EPA counsel has been contemporaneously properly served with a copy.

B. Respondent Kent Hoggan’s Motion for Late Filing of Respondent’s Initial Prehearing Exchange

Section 22.7(b) of the Consolidated Rules of Practice provides that an extension of time may be granted for filing a document upon timely motion, for good cause shown, considering any prejudice to other parties.

Respondent Hoggan properly filed his Initial Prehearing Exchange with the undersigned on October 11, 2018, after failing to initially timely and properly file it with a certificate of service and proposed exhibits, but Complainant’s counsel apparently received it on September 20, 2018. The deadline for the Agency’s rebuttal prehearing exchange was stayed and a hearing has not been set. I find that the late submission of Respondent’s prehearing exchange has not prejudiced Complainant. I further find that accepting the late filed documents to provide the Respondent’s the opportunity for a hearing on the merits is good cause. Consequently, the Motion for Late Filing of Respondent’s Initial Prehearing Exchange is granted.

ORDER

1. Complainant's Motion for Default Judgment is **DENIED**.
2. Respondent Kent Hoggan's Motion for Late Filing of Respondent's Initial Prehearing Exchange is **GRANTED**.
3. Complainant shall file any Rebuttal Prehearing Exchange on or before **December 15, 2018**. Any dispositive motions shall be filed no later than 45 days after Complainant submits its Rebuttal Prehearing Exchange.

Pursuant to the procedural rules governing this proceeding, set forth at 40 C.F.R. Part 22, I am responsible for scheduling the hearing and determining an appropriate location for the hearing, consistent with 40 C.F.R. §§ 22.21 and 22.19(d). I am also responsible for regulating the course of the hearing consistent with 40 C.F.R. § 22.4. Accordingly, prehearing filing deadlines and the hearing in this matter are scheduled as follows:

Settlement Status Reports. Complainant is directed to file Status Reports as to the status of any settlement negotiations between the parties, *which shall not include any specific terms of settlement*, on or before **January 15, 2019**, and on or before **May 15, 2019**.

Supplements to Prehearing Exchange. An addition of a proposed witness or exhibit to the prehearing exchange may be filed without an accompanying motion until 60 days before the hearing is scheduled to commence. Thereafter a motion shall be required. Notwithstanding the deadline set forth in 40 C.F.R. § 22.22(a)(1), if a party fails to supplement their prehearing exchange by **February 15, 2019**, the document, exhibit, or testimony shall not be admitted into evidence unless the non-exchanging party had good cause for failing to exchange the required information and provided the required information to all other parties as soon as it had control of the information, or had good cause for not doing so. Motions to supplement the prehearing exchange filed after **April 15, 2019**, will not be considered absent extraordinary circumstances. A document or exhibit that has not been included in prehearing information exchange shall not be admitted into evidence, and any witness whose name and testimony summary has not been included in prehearing information exchange shall not be allowed to testify.

Joint Stipulations. On or before **May 3, 2019**, the parties shall file a Joint Set of Stipulated Facts, Exhibits, and Testimony. The time allotted for the hearing is limited. Therefore, the parties must make a good faith effort to stipulate as much as possible to matters that cannot reasonably be contested so that the hearing can be concise and focused solely on those matters that can only be resolved after an evidentiary hearing.

Prehearing Motions. All non-dispositive prehearing motions, such as motions for subpoenas or motions in limine, must be filed on or before **May 3, 2019**.

Prehearing Briefs. The parties may, if they wish, file prehearing briefs on or before **May 15, 2019**. If filed, Complainant's brief should specifically state each count of the Complaint and each claim therein that will be tried at the hearing and indicate which counts and

claims will not. If filed, Respondent's brief should identify each of the defenses Respondent intends to pursue at the hearing.

Prehearing Conference. A prehearing conference will be scheduled in advance of the hearing and conducted by a staff attorney.

Hearing. The hearing in this matter shall begin promptly at **9:00 a.m. on Tuesday, June 4, 2019**, and shall continue if necessary through Friday, June 7, 2019, in the Salt Lake City, Utah metropolitan area. The parties will be notified of the location and other procedures pertinent to the hearing when those arrangements are complete.

Individuals requiring special accommodations at the hearing, including wheelchair access and translation services, must contact Mary Angeles, Headquarters Hearing Clerk, at (202) 564-6281, no later than 30 days prior to the scheduled hearing, so that appropriate arrangements can be made. A staff attorney for the undersigned, Michael B. Wright, can be contacted should you have any procedural questions or questions about what to expect at the hearing, at (202) 564-3247 or wright.michaelb@epa.gov.

RESPONDENTS ARE ADVISED THAT FAILURE TO APPEAR AT THE HEARING, WITHOUT GOOD CAUSE HAVING BEEN SHOWN, MAY RESULT IN THE ENTRANCE OF DEFAULT JUDGMENT AGAINST THEM.

IF ANY PARTY DOES NOT INTEND TO ATTEND THE HEARING, OR HAS GOOD CAUSE FOR NOT BEING ABLE TO ATTEND THE HEARING AS SCHEDULED, IT SHALL NOTIFY THE UNDERSIGNED AT THE EARLIEST POSSIBLE MOMENT.

SO ORDERED.



Susan L. Biro
Chief Administrative Law Judge

Dated: November 14, 2018
Washington, D.C.

In the Matter of *Kent Hoggan, Frostwood 6 LLC, David Jacobsen, and CBM Leasing, L.L.C.*,
Respondents. Docket No. CWA-08-2017-0026

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Order on Complainant's Motion for Default and Respondent Kent Hoggan's Motion for Late Filing of Respondent's Initial Prehearing Exchange**, dated November 14, 2018, and issued by Chief Administrative Law Judge Susan L. Biro, was sent this day to the following parties in the manner indicated below.



Michael Wright
Attorney Advisor

Original by Hand Delivery to:

Mary Angeles
Headquarters Hearing Clerk
U.S. Environmental Protection Agency
Office of Administrative Law Judges
Ronald Reagan Building, Room M1200
1300 Pennsylvania Ave., NW
Washington, DC 20004

Copy by Electronic Mail to:

Lauren Hammond, Esq.
Enforcement Attorney
US EPA – Region 8 (8ENF-L)
1595 Wynkoop Street
Denver, CO 80202
Email: hammond.lauren@epa.gov
Counsel for Complainant

Copies by Electronic Mail to:

David W. Steffensen, Esq.
Law Office of David W. Steffensen, P.C.
4873 South State Street
Salt Lake City, UT 84107
Email: dave.dwslaw@me.com
*Counsel for Respondents Kent Hoggan, Frostwood 6 LLC,
and David Jacobsen*

Dated: November 14, 2018
Washington, D.C.