UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
THORO PRODUCTS CO.,	)	[CERCLA/EPCRA] Docket No.
	)	EPCRA VIII-90-04
Respondent	)	

ORDER DENYING MOTION FOR DEFAULT JUDGMENT AND GRANTING MOTION FOR EXTENSION OF TIME TO FILE PREHEARING EXCHANGE AND SETTING FURTHER PROCEDURES

This proceeding was initiated by a five-count complaint issued by the United States Environmental Protection Agency (EPA), Region VIII, pursuant to Section 325 of the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA), 42 U.S.C. Section 11045, and pursuant to Section 109 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, (CERCLA), 42 U.S.C. Section 9609. The complaint alleges, inter alia, that the Respondent violated Sections 304, 311 and 312 of EPCRA, 42 U.S.C. Sections 11004, 11021 and 11022, and Section 103 of CERCLA, 42 U.S.C Section 9603, by failure to comply with the emergency notification and reporting requirements mandated by the cited statutes. The violations are alleged to have occurred on March 22, 1990, following the release from Respondent's cleaning products facility of a hazardous substance (chlorine) in quantities greater than the Reportable Quantity (RQ) established by CERCLA and EPCRA.[1] For the alleged violations, Complainant proposed civil penalties totaling $84,500.

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[1]See 40 C.F.R. Part 302, Designation, Reportable Quantities, and Notification; Table 302.4, 40 C.F.R. Section 302.4, and 40 C.F.R Part 355, Appendix A.

Respondent timely filed an answer in which it denied the substantive allegations contained in the complaint, and requested a hearing in the matter pursuant to Section 22.15(c) of the Consolidated Rules of Practice (Rules), 40 C.F.R. Section 22.15(c). Thereafter, by letter dated August 27, 1990, the undersigned Presiding Officer issued instructions establishing certain prehearing requirements and dates for a prehearing exchange. That letter provided, inter alia, that "[t]he parties will be expected to make this prehearing exchange unless prior to the due date an extension of time has been obtained pursuant to 40 C.F.R. Section 22.07(b)." Prior to the date the prehearing exchange was to take place, counsel for Respondent advised that he was unable to continue and was withdrawing from the case.[2] Replacement counsel was readily retained and, upon entering the case, immediately requested, without opposition, an extension of time until November 30, 1990 to comply with established prehearing requirements. This request was granted by my Order dated October 30, 1990. Shortly after agreeing to represent Respondent in this matter, the replacement counsel also withdrew from the case citing as the reason "irreconcilable differences with Thoro Products Company."[3]

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[2]Letter of Withdrawal, dated September 20, 1990, Re: Thoro Products Co., [CERCLA/EPCRA] Docket No. EPCRA-VIII-90-04, from J. Kemper Will, Esq., Englewood, CO, counsel for Respondent, to undersigned Presiding Officer.

[3]Letter of Withdrawal, dated November 19, 1990, Re: Thoro Products Co., [CERCLA/EPCRA] Docket No. EPCRA-VIII-90-04, from Melanie S. Kelly, Esq., John Faught & Associates, Denver, CO, counsel to Respondent, to undersigned Presiding Officer.

On November 30, 1990, the date set for prehearing exchange, R.E. Newman, president of Thoro Products Co., (Respondent) forwarded a letter to the undersigned Presiding Officer confirming counsel's withdrawal. Respondent's letter, treated herein as a motion for an extension of time, requested an additional 45 days beyond November 30, 1990, in which to retain counsel and to comply with the revised date for prehearing exchange. Copies of Respondent's November 30, 1990 letter were sent the same day by Registered Mail, Return Receipt Requested, to Complainant and the Region VIII Hearing Clerk. Complainant responded to the request for an extension of time by urging that it be denied on the grounds that: (1) it was untimely; (2) Respondent failed to show good cause for the requested extension; (3) Complainant would be prejudiced if the extension were granted; and (4) Respondent failed to provide notice to Complainant in advance of filing the motion. Complainant's response was accompanied by a Motion for Default Judgment pursuant to 40 C.F.R. Section 22.17 and a proposed Order. The basis for the motion and order was Respondent's failure to comply with the Rules, viz., Sections 22.05(a)(2) and 22.07.(b), and failure to comply with the Presiding Officer's Order of October 30, 1990. The motion seeks entry of a default judgment in favor of Complainant and against Respondent, including the assessment of civil penalties, as proposed in the complaint, totaling $84,500.

I. Complainant's Motion for Default Judgment

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

> A party may be found to be in default . . . after motion or sua sponte, upon failure to comply with a prehearing . . . order of the Presiding Officer . . . .

By delaying the filing of its request for an extension of time until the date for prehearing exchange, i.e., November 30, 1990, Respondent failed to comply with the Presiding Officer's Order of October 30, 1990.

Section 22.17(a) of the Rules offers no specific requirements or criteria to guide me in deciding whether to enter a default order. Such a decision lies within my judicial discretion. In deciding whether to issue such an order here, I will look to the administrative precedent in cases before my fellow Judges at EPA and to the practice under the Federal Rules of Civil Procedure (Fed. R. Civ. P.) for guidance. The Fed. R. Civ. P. do not govern the procedure in administrative agencies which enjoy "wide latitude" to fashion their own rules of Procedure.[4] While the Fed. R. Civ. P. are not applicable to the proceeding, consideration of the practice and precedent thereunder is not inappropriate where the applicable section of the Consolidated Rules of Practice (Section 22.17) embodies concepts somewhat analogous to those in the Fed. R. Civ. P. It has been held under Rule 55 of the Fed. R. Civ. P. that "the default judgment must normally be viewed

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[4] In the Matter of Katzson Brothers, Inc., FIFRA Appeal No. 85-2 (Final Decision, November 13, 1985), citing Oak Tree Farm Dairy, Inc. v. Block, 544 F. Supp. 1351, 1356, n. 3 (E.D.N.Y. 1982). See also, South Central Bell Tel. Co. v. Louisiana Public Serv. Comm'n, 570 F. Supp. 227, 232 (D.C. La. 1983), aff'd 744 F.2d 1107 (5th Cir. 1984) and Federal Communications Comm. v. Pottsville Broadcasting Co., 309 U.S. 134, 143 (1940).

as available only when the adversary process has been halted because of an essentially unresponsive party. In that instance, the diligent party must be protected lest he be faced with interminable delay and continued uncertainty as to his rights."[5]

However, a diligent party is not entitled to a default order as a matter of right even when the unresponsive party is technically in default. In view of their harshness, default orders are not favored by the law as a general rule and cases should be denied upon their merits whenever reasonably possible.[6]

Under Rule 55 of the Fed. R. Civ. P. disposition of a request for default judgment lies within the court's sound discretion. Consideration is given to whether the party seeking the default judgment has suffered any prejudice and,

> [w]here a defendant's failure to plead or otherwise defend is merely technical, or where the default is de minimis, the court should generally refuse to enter a default judgment. On the other hand, where there is a reason to believe that defendant's default resulted from bad faith in his dealings with the court or opposing party, the district court may properly enter default and judgment against defendant as a sanction.[7]

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[5]H.F. Livermore Corp. v. Aktiengesellschaft Gebruder Loepfe, 432 F.2d 689, 691 (D.C. Cir. 1970) (per curiam).

[6]Eitel v. McCool, 782 F.2d 1470, 1471-72 (9th Cir. 1986); Wilson v. Winstead, 84 F.R.D. 218, 219 (E.D. Tenn. 1979). See generally Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d Sections 2681-2685, pp. 398-429.

[7]6 Moore's Federal Practice Para. 55.05 [2] (1990).

As Judge Head observed in a recent ruling on a Motion for Default Order:

> Administrative decisions under the environmental statutes are generally consistent with Federal court precedent on the issue of default judgments. Several administrative default judgments have been granted, where, in contrast to this proceeding, there was either no response to a motion for default, no response to either the complaint or the motion for default, or Respondent willfully failed to comply with prehearing exchange orders. On the other hand, a motion for default order was denied where a respondent submitted a prehearing exchange fourteen days after it was due, and there was "no contumacy, bad faith, or supine indifference shown by respondent," In re Cavedon Chemical Co., Inc., Docket No. TSCA-89-H-20, Order issued February 16, 1990.[8]

Although the Respondent's belated action in filing the motion for an extension of time failed to meet the specific requirements of my prehearing letter, Respondent's efforts without benefit of counsel to guide it through the labyrinth of procedural requirements, are not totally undeserving of some measure of consideration. We need not pause to speculate on the reasons why different counsel on two separate occasions decided to withdraw from representing Respondent. The Respondent was responsible for the failure to comply with Section 22.07(b) of the Rules, which failure resulted in the concomitant breach of the requirements of my prehearing letter. However, Complainant has adduced no convincing evidence to suggest that Respondent's actions in this

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[8] In re Testor Corporation, Docket No. V-W-90-R-16, Order Denying Motion for Default and Setting Further Procedures issued January 16, 1991 at 3 [footnotes omitted].

regard have been deliberately unresponsive or contumacious. Rather they appear directly attributable to the obvious difficulties experienced by Respondent in securing permanent counsel to continue in this proceeding. Absent any untoward conduct clearly prejudicial to Complainant's case, in the interest of equity and fairness, Respondent is no less entitled to counsel at this juncture of the proceeding than at the beginning.

When the circumstances in the instant case are considered in light of the precedent cited above and when the substantial amount of penalty proposed in the complaint is taken into account, it must be concluded that Complainant's Motion for Default should be and hereby is denied.

II. Respondent's Motion for an Extension of Time

Section 22.07(b) of the Rules, in pertinent part, provides:

> Extensions of time. The . . . Presiding Officer . . . may grant an extension of time for the filing of any...document . . . (1) upon timely motion of a party to the proceeding, for good cause shown, and after consideration of prejudice to other parties, or (2) upon his own motion. Such a motion by a party may only be made after notice to all other parties, unless the movant can show good cause why serving notice is impracticable. The motion shall be filed in advance of the date on which the . . . document . . . is due to be filed, unless the failure of a party to make timely motion for extension of time was the result of excusable neglect.

As a result of Respondent's failure to file the motion in advance of the date on which the prehearing exchange was due to be filed, viz., November 30, 1990, or to establish that such failure was the result of excusable neglect, Respondent was not in full

compliance with the requirements of Section 22.07(b). In addition, it appears that Respondent failed to give Complainant proper and timely notice of its request for an extension of time to file the prehearing exchange.

Section 22.05(a)(2) of the Rules, in pertinent part, provides:

> A certificate of service shall accompany each document filed or served. Except as otherwise provided, a party filing documents with the Regional Hearing Clerk, after the filing of the answer, shall serve copies thereof upon all other parties and the Presiding Officer.

Although Respondent failed to file a certificate of service, the November 30, 1990 letter did show that copies were sent to Counsel for EPA and the Regional Hearing Clerk as follows:

> "cc: Wendy I. Silver, Esq., via Certified Mail, Return
> Return Receipt Requested
> Joanne McKinstry, via Certified Mail,
> Return Receipt Requested."

Respondent also would appear to be in technical violation of Section 22.05(a)(2).

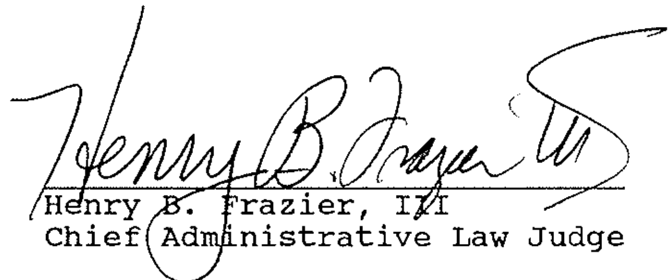
Respondent's failure to comply with the letter of the applicable sections of the Rules is not fatal to its request for an extension of time. I conclude that the extenuating circumstances precipitated by the withdrawal of Respondent's counsel in this matter constitutes excusable neglect under Section 22.07(b) of the Rules. Beyond Complainant's bald assertion that it will be prejudiced if Respondent's request is granted, there has been no showing that the requested extension of time will have an adverse effect on Complainant's case. Therefore, no credence will be given to that assertion by Complainant. Finding insufficient reason to

rule otherwise, I am constrained to find, based on the recited record of this case,[9] that due process compels the granting of an extension of time in order to permit Respondent to retain counsel in this matter.

Accordingly, Respondent's motion for an extension of 45 days from November 30, 1990, to file prehearing exchange is hereby retroactively granted.[10]

Finally, in view of the granting by this Order of Respondent's Motion for an Extension of Time to File Prehearing Exchange, the revised date of December 10, 1990 for the parties to reply to statements or allegations in the prehearing exchange, contained in my Order of October 30, 1990, is hereby further extended to March 20, 1991.

SO ORDERED.



Henry B. Frazier, III
Chief Administrative Law Judge

Dated: March 6, 1991
Washington, DC

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[9]Supra pp. 2-3.

[10]This extension of time expired on January 14, 1991. During the interim, Respondent retained as new counsel the law firm of Gersh & Danielson of Denver, CO, and on January 14, 1991 timely filed its prehearing exchange pursuant to Section 22.19(b) of the Rules and this Order.

IN THE MATTER OF THORO PRODUCTS CO., Respondent,
[CERCLA/EPCRA] Docket No. EPCRA VIII-90-04

Certificate of Service

I hereby certify that this Order Denying Motion for Default Judgment and Granting Motion for Extension of Time to File Prehearing Exchange and Setting Further Procedures, dated MAR 06 1991, was mailed this day in the following manner to the below addressees:

Original by Regular Mail to:

Joanne McKinstry
Regional Hearing Clerk
U.S. EPA, Region 8
999 18th Street, Suite 500
Denver, CO 80202-2405

Copy by Certified Mail,
Return Receipt Requested &
Copy by Regular Mail to:

Attorney for Complainant:

Wendy I. Silver, Esquire
Office of Regional Counsel
U.S. EPA, Region 8
999 18th Street, Suite 500
Denver, CO 80202-2405

Attorney for Respondent:

Luke J. Danielson, Esquire
Laurie K. Rotterman, Esquire
Gersh & Danielson
1775 Sherman Street, Suite 1875
Denver, CO 80203

Doris M. Thompson
Secretary

Dated: MAR 06 1991