

2/14/96

JM

UNITED STATES OF AMERICA
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
B.F. Goodrich Company,) Docket No: 5-TSCA-95-009
)
Respondent)

**ORDER TO SHOW CAUSE WHY THE COMPLAINANT
SHOULD NOT BE FOUND IN DEFAULT AND THE COMPLAINT
DISMISSED WITH PREJUDICE**

By order dated August 5, 1995, the undersigned issued an order establishing procedures and deadlines. The parties were given time to resolve this matter by settlement. If a settlement could not be reached by December 5, 1995, the parties were directed to file their initial prehearing exchanges on January 5, 1996. To keep me apprised of the parties' settlement efforts, the Complainant was required to file by November 21, 1995, a statement as to the status of settlement discussions.

Review of the files show that the Complainant never submitted the required status report. The Complainant also failed to submit its prehearing exchange. No motions were ever filed by the Complainant requesting an extension of the deadlines.

In this proceeding the Federal government charges the Respondent with violations of the Toxic Substance Control Act, 15 U.S.C. § 2615(a), and the EPA regulations issued thereunder. The EPA levied these charges against the Respondent in a Complaint filed January 20, 1995. If the case could not be settled, the August 5 order required the EPA to produce, by way of a prehearing exchange, its list of witnesses and copies of documents intended to be produced at trial to prove its allegations. It failed to do so.

The EPA's own rules acknowledge Complainant's responsibility and burden in this matter. "The Complainant has the burden of going forward with and of proving that the violation occurred as set forth in the Complaint and that the proposed civil penalty ... is appropriate." 40 C.F.R. § 22.24. The EPA's rules further provide that "[a] party may be found to be in default ... after motion or sua sponte, upon failure to comply with a prehearing or hearing order of the Presiding Officer ... Default by the Complainant shall result in dismissal of the complaint with prejudice." 40 C.F.R. § 22.17(a).

The Respondent was also required to submit an initial prehearing exchange on January 5, 1996. However, Respondent's failure to file does not carry similar consequences. The Respondent retains its statutory right to present rebuttal evidence and/or to pursue its case through cross-examination.¹

On or before March 5, 1996, the Complainant is directed to show cause why its complaint should not be dismissed with prejudice for failure to comply with the August 5, 1995 order. Respondent's answer, if any, to the Complainant's response shall be filed on or before March 19, 1996.



Jon G. Lotis
Chief Administrative Law Judge

Dated: February 14, 1996
Washington, D.C.

¹ In its Answer to the Complaint, the Respondent exercised its right to request a hearing in accordance with § 554 of the Administrative Procedure Act (APA). 15 U.S.C. § 2615(a)(2)(A). If the parties cannot settle, APA § 554(c)(2) calls for a hearing under APA § 556. "A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts." 15 U.S.C. § 556(d). Thus, the Respondent has the right to defend itself against the EPA charges by way of direct evidence, rebuttal evidence or through cross-examination of the EPA's witnesses. It is entitled to elect any or all three means to pursue its defense.

IN THE MATTER OF B.F. GOODRICH COMPANY, Respondent
Docket No. 5-TSCA-95-009

CERTIFICATE OF SERVICE

I certify that the foregoing Order To Show Cause Why The Complainant Should Not Be Found In Default And The Complaint Dismissed With Prejudice, dated February 14, 1996, was sent in the following manner to the addressees listed below:

Original by Regular Mail to:

Regional Hearing Clerk
U.S. Environmental Protection
Agency, Region 5
77 West Jackson Boulevard
Chicago, IL 60604

Copies by Regular Mail to:

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Dated: February 14, 1996
Washington, D.C.