

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:)
)
MR. MARCELINO ALVAREZ) **DOCKET NO. CWA-02-2004-3400**
(TERRAZAS DE BORINQUEN, S.E.),)
)
RESPONDENT.)

ORDER FINDING RESPONDENT IN DEFAULT

By Motion dated April 2, 2004, Respondent, through his counsel, requested an extension of time until April 15, 2004 to file a prehearing exchange. Because Respondent's Motion does not comply with the procedural rules that apply to this proceeding, 40 C.F.R. part 22 (Rules), and because Respondent failed to submit a prehearing exchange, Respondent is hereby found in default.

As to noncompliance with the Rules, first, the caption on Respondent's Motion is not the correct caption in this case. The Respondent named in this action on the Complaint was "Mr. Marcelino Alvarez, President, Terrazas de Borinquen, S.E." The Motion omits the name of Respondent Mr. Marcelino Alvarez, which is a unilateral amendment of the complaint by the Respondent.^{1/} A respondent cannot amend a complaint, as the Rules provide that only "the *complainant* may amend the complaint . . ." 40 C.F.R. § 22.13(c)(emphasis added). By changing the caption on the case, Respondent delayed timely consideration of his Motion by this Tribunal.

Second, the Rules applicable to this proceeding require that motions for extension of deadlines be filed *prior to the deadline* expiring so they can be responded to by the opposing party and/or granted or denied by this Tribunal in a timely manner. *See*, 40 C.F.R. § 22.7(b). By prior Order, Respondent was required to file its prehearing exchange on or before March 26, 2004. Respondent filed its Motion for extension of the deadline on April 2, 2004, almost a week later.

As to the failure to submit a prehearing exchange, although this Tribunal's Prehearing Order explicitly advised Respondent that the pendency of settlement negotiations is not a basis for failing to timely comply with the prehearing exchange requirements, Respondent nevertheless did not

^{1/} The omission of Respondent's name in the caption could not reasonably be taken as a mere scrivener's error.

comply with the prehearing exchange requirements imposed upon him for just that reason and in his motion proffers the pendency of such discussions as good cause for not complying.^{2/}

Section 22.17 of the Rules provides, in pertinent part:

A party may be found in default . . . upon failure to comply with the information exchange requirements of § 22.19(a) or an order of the Presiding Officer; . . . Default by the respondent constitutes, for the purpose 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.

* * *

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 . . . shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act.

For failing to comply with the Rules applicable to this proceeding and the Prehearing Order of the Presiding Officer, as enumerated above, Respondent is hereby found in **DEFAULT**. However, based upon the representations in the Respondent's Motion regarding settlement, entry of an Order of Default shall be **STAYED** until **April 15, 2004** to allow Respondent until that date to execute a Consent Agreement and Final Order (CAFO), and send to this Tribunal by facsimile a copy of the first page and the signature page of a CAFO signed by Respondent, representing that this matter has been settled.

Susan L. Biro
Chief Administrative Law Judge

^{2/} In his Motion, Respondent represents that the Complainant's counsel did not object to the extension requested. Whether or not opposing counsel objects is simply immaterial to Respondent's requirement to abide by the Rules governing this action. The Prehearing Order explicitly advised Respondent that "[t]he mere consent of the other parties to the relief sought does not assure that the motion will be granted and no reliance should be placed on the granting of an unopposed motion." Respondent also represents that it is a "small partnership with limited resources" as a justification for requesting the extension. No additional resources would have been expended by Respondent and its counsel to timely and appropriately comply with the Rules of this case.

Dated: April 12, 2004
Washington, D.C.