



UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
Martex Farms, Inc.,) Docket No. FIFRA-02-2005-5301
)
RESPONDENT)
_____)

ORDER GRANTING EXTENSION OF TIME

Complainant in this case filed “Complainant’s Motion for Findings of Fact and Conclusions of Law and Complainant’s Motion for Partial Accelerated Decision as to Liability” and memorandum in support thereof (“Motion for Accelerated Decision”) on July 25, 2005 by hand-delivering the Motion to the Hearing Clerk and serving a copy of the Motion upon Respondent’s counsel by Federal Express. Respondent subsequently filed a “Motion Requesting an Extension of Time to File Opposition to Complainant’s Motion [for Partial Accelerated Decision]” (“Motion for Extension”). Respondent’s Motion is dated August 11, 2005 and was filed with the Hearing Clerk on August 12, 2005.¹ Respondent’s Motion requests an extension of time “not to exceed fifteen (15) days,” and states that Complainant opposes the Motion for Extension at 1. However, on August 15, 2005, Complainant filed a “Withdrawal of Opposition,” stating that “Complainant hereby withdraws its opposition ... and has no objection to Respondent’s request for an extension of time in which to file its reply to Complainant’s Motion for [Partial Accelerated Decision].”

¹Respondent sent its Motion for Extension to the Hearing Clerk, this Tribunal, and Complainant’s counsel by Federal Express on August 11, 2005. (Although Respondent’s Motion merely states that it was “sent” to the Hearing Clerk, the Hearing Clerk has confirmed to this Tribunal that Respondent’s Motion was “sent” via Federal Express). This 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). Therefore, Respondent’s Motion was “filed” on August 12, 2005 when it was *received* by the Hearing Clerk, and not on August 11, 2005 when it was “sent” to the Hearing Clerk.

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 for Accelerated Decision was hand-delivered to the Hearing Clerk (and thus “filed”), and was also sent to Respondent’s counsel by overnight delivery (and thus “served”) on July 25, 2005. Therefore, Respondent’s response was due to be *filed* 15 days thereafter on August 9, 2005. (See Rule 22.7(a) regarding “computation” of the 15 days). Respondent did not file a “response” to Complainant’s Motion for Accelerated Decision by August 9, 2005 and has yet to do so. Further, Respondent’s present “Motion for Extension of Time,” having been filed on August 12, 2005, was filed after the expiration of the 15 day deadline to file a “response” to a written motion.

As Respondent’s Motion points out, 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.” 40 C.F.R. § 22.7(b); Motion for Extension at 2 (emphases added). That Rule goes on to state, however, that “[a]ny 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 two days *after* the filing deadline for a response to Complainant’s Motion for Accelerated Decision, 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*.”

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.² 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 Extension of Time states that:

Despite all efforts made to timely respond, the appearing party has not completed its review of the multiple issues and put in plain words the relevant facts raised in Complainant’s motion, and needs additional time to adequately address the same... [T]he receipt of various documents has been haphazard... The time extension sought herein will not prejudice [Complainant]. On the contrary, it may partially heal any hardship suffered by the Respondent in addressing this Complaint due to the untimely receipt of documents.

Motion for Extension at 1-2. Respondent does not provide specific facts as to the “documents” allegedly not “received” by Respondent in a “timely” manner. Nevertheless, where the underlying motion to which a party seeks to respond is dispositive as to liability, more caution

²Where 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).”

may be warranted in ruling on motions for extensions of time or for leave to file out of time, in order to ensure that the parties have fair opportunity to present their arguments, which may in some situations outweigh the need for finding “excusable neglect.” This Tribunal finds that, under the circumstances of this case, good cause exists for a 15-day extension, and that no undue prejudice to Complainant will result in the granting of a 15-day extension. This finding is particularly appropriate in the present case, as Complainant has stated that it “has no objection” to Respondent’s requested extension.

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

Good cause exists for the granting of the Motion for Extension, in that 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 for Accelerated Decision. Therefore, Respondent is hereby **ORDERED** to file its response to Complainant’s July 25, 2005 Motion for Accelerated Decision no later than **fifteen (15) days from the date of issuance of this Order**, 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: August 16, 2005
Washington, D.C.