

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

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

COMPLAINANT’S RESPONSE TO RESPONDENT KENT HOGGAN’S MOTION FOR LATE FILING

Complainant requests the Presiding Officer deny Respondent Kent Hoggan’s Motion for Late Filing of Respondent’s Initial Prehearing Exchange because it does not demonstrate good cause, is prejudicial to Complainant, and did not result from excusable neglect.¹

I. RESPONDENT’S MOTION DOES NOT MEET THE LATE FILING STANDARD

A motion for leave to file after a deadline has passed must show good cause, a lack of prejudice, and excusable neglect for the untimeliness. Rule 22.7(b) states:

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. Any 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.

In the Matter of Degussa Engineered Carbons, LP, 2005 EPA ALJ LEXIS 73, *4 (E.P.A. Nov. 4, 2005) (emphasis in original). “Thus, Rule 22.7(b) clearly contemplates that motions for ‘extensions of time’ must be filed *before* the relevant time limit has expired.” *Id.* (same).

¹ If Respondent Kent Hoggan’s Motion for Late Filing of Respondent’s Initial Prehearing Exchange is attributed to all Respondents, then this Response applies to all Respondents as well.

Here, Mr. Hoggan's motion was filed "after the filing deadline" of September 7, 2018, so it is considered a "motion for leave to file *out of time*" rather than a motion for extension of time. *Id.* (same).² This tribunal has held that a motion for leave to file a document 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." *In the Matter of Isochem North America, LLC*, 2007 EPA ALJ LEXIS 18, *10 (E.P.A. April 25, 2007).

Part 22 Rules no longer speak to a motion for leave to file 'out of time.'³ However, Federal Rule of Civil Procedure 6(b) provides a standard for motions to file 'out of time':

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.

"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.'" *Isochem North America, LLC*, 2007 EPA ALJ LEXIS 18 at *11. In ruling on a motion for leave to file "'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

² Complainant was served with Mr. Hoggan's Prehearing Exchange on September 20, 2018, and his Motion for Late Filing on September 26, 2018. Complainant does not know why they do not appear in the docket on corresponding dates, but has contacted the Hearing Clerk about the issue.

³ The 1999 CROP amendments rejected a comment to include language allowing late-filed motions, saying it "may encourage untimeliness, and thereby adversely affect the Agency's efforts to make administrative proceedings more efficient." 64 Fed. Reg. 40,138, 40,148.

has shown that its neglect is ‘excusable.’” *Id.*

A. Mr. Hoggan lacks good cause for not filing a timely prehearing exchange.

Mr. Hoggan states he did not file a timely prehearing exchange because he was waiting on others to prepare five documents. OALJ Index Document 29 at 2, 3. This is not good cause.

Mr. Hoggan offers no explanation for why he failed to file the documents at his disposal on September 7, 2018. Similarly, Mr. Hoggan provides no justification for failing to file a timely motion for extension. Absent valid explanations, Mr. Hoggan’s failings do not constitute good cause and the Presiding Officer should deny Respondent’s Motion for Late Filing. *See In re MPD, Inc.*, 1991 EPA ALJ LEXIS 8, *6-7 (Nov. 26, 1991) (denying a motion to for extension when “Respondent made no showing at all as to why its motion was not timely filed”).⁴

In similar circumstances, the EAB and an ALJ have held that delays caused by financial professionals working for a respondent do not constitute good cause. *Cf. In re Rocking BS Ranch, Inc.*, 2010 EPA App. LEXIS 11, *20-21 (E.P.A. April 21, 2010) (upholding a decision that Respondent’s “claim that its accountant was supposed to, but did not, send a financial report to the Region” was not good cause for noncompliance “because it is the [Respondent]’s ultimate responsibility to ensure that any documentation in support of its position is properly submitted”); *In the Matter of Barry*, 2011 EPA ALJ LEXIS 17, *7-8 (E.P.A. Sept. 09, 2011) (explaining that the failure of “Respondents’ accountant” to submit “certain financial documents” was not good cause for noncompliance) *affirmed and modified on different grounds by* 2011 EPA App. LEXIS 42. Therefore, despite Mr. Hoggan’s protestations that he was waiting on documents from his accountant and lender before filing his Prehearing Exchange, this excuse does not demonstrate good cause why the Presiding Officer should allow Respondent Hoggan’s late filing.

⁴ *In re MPD, Inc* applied the review standard predating the 1999 CROP amendments.

B. Mr. Hoggan's incomplete, late Prehearing Exchange is prejudicial.

Mr. Hoggan's untimely Prehearing Exchange prejudices Complainant. Despite filing thirteen days late, Mr. Hoggan did not provide his 1040 tax return for 2017 and still has not done so, thirty-four days after the Prehearing Order's deadline. *See* Hoggan's Exchange at 2 (RX 17: "2017 Kent Hoggan 1040 Tax Return (submitted later)") (emphasis added). Rather than providing a list of "names" for the witnesses he intends to call to regarding the ability-to-pay defense, OALJ Index Document 18 at 2; 40 C.F.R. § 22.19(a)(2)(ii), Mr. Hoggan vaguely refers to two witnesses as a "Representative of PCG" and a "Representative of Cambia." Hoggan Exchange at 1-2. Similarly, he failed to provide a "*detailed* narrative statement explaining the *precise* factual and legal bases" for his ability-to-pay defense, OALJ Index Document 18 at 3 (emphasis added), and instead made three, scattered references to ability to pay. Hoggan Exchange at 4, 5. As a result, Complainant will be forced to spend additional time and resources to create the comprehensive, detailed explanation of Mr. Hoggan's financial position that Mr. Hoggan should have included in his Prehearing Exchange.

Mr. Hoggan's incomplete Prehearing Exchange adds to ongoing prejudice from Mr. Hoggan's longstanding failure to provide complete documentation for his ability-to-pay defense. Complainant has been requesting comprehensive financial information from Mr. Hoggan since 2016. *See, e.g.*, CX 23; CX 56. Yet Mr. Hoggan has not provided the documentation Complainant requested as necessary to substantiate his ability-to-pay defense, like financial information relating to Mrs. Hoggan. Mr. Hoggan's incomplete documentation necessitated Complainant's in-house expert to devote over 160 extra hours reviewing his claims, *in addition* to the hours she would normally spend reviewing a complete financial submission. For the same reasons, Complainant has also spent thousands of dollars on an outside expert to assist in the

review. Mr. Hoggan's late, incomplete Prehearing Exchange compounds the unnecessary, unreasonable, and prejudicial outlay of Complainant's limited time and resources caused by Mr. Hoggan's longstanding failure to provide complete documentation for his ability-to-pay defense.

C. Mr. Hoggan has neither argued nor demonstrated excusable neglect.

Mr. Hoggan has neither argued nor demonstrated excusable neglect for why he did not timely file a prehearing exchange by the court-ordered deadline of September 7, 2018, or alternatively, file a timely motion for extension.

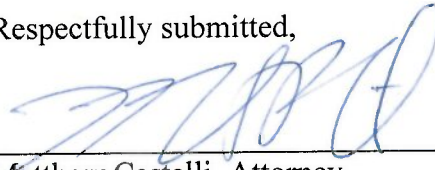
Truly extenuating circumstances beget excusable neglect. For example, a clerical mistake causing a motion to be served after a response would have been due constituted excusable neglect. *Degussa Engineered Carbons, LP*, 2005 EPA ALJ LEXIS 73 at *7-8. Similarly, Counsel responding to unexpected storm water damage to his home, submitting a motion for extension the day a filing was due, and not wishing to file before the Presiding Officer ruled on the motion also constituted excusable neglect "by a very slim margin" for a "two day delay in filing." *Isochem North America, LLC*, 2007 EPA ALJ LEXIS 18 at *13. In this case, no extenuating circumstances impeded Respondent Hoggan's ability to file a timely prehearing exchange. Having been put on notice as of the July 5, 2018 Prehearing Order that Respondent's prehearing exchange was due September 7, 2018, Respondent had over two months to prepare the prehearing exchange and/or file a motion for extension. Respondent took neither action until after the filing deadline passed, which does not evidence excusable neglect.

II. CONCLUSION

Based on the reasons above, Complainant respectfully requests the Presiding Officer deny Respondent Kent Hoggan's Motion for Late Filing of Respondent's Initial Prehearing Exchange.

10/11/18
Date

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that the foregoing COMPLAINANT'S RESPONSE TO RESPONDENT KENT HOGGAN'S MOTION FOR LATE FILING in In the Matter of Kent Hoggan, Frostwood 6 LLC, and David Jacobsen, Respondents, Docket No. CWA-08-2017-0026, dated October 11, 2018, was sent this day in the following manner to the addressees listed below:

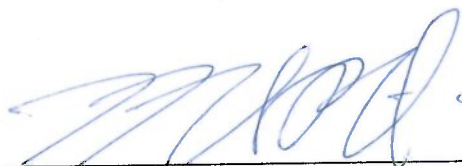
Copy by OALJ E-Filing System to:

Headquarters Hearing Clerk Mary Angeles
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Office of Administrative Law Judges
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Presiding Officer The Honorable Susan L. Biro
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Dated: October 11, 2018

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