BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In Re:	)	
Mullet Repair Shop Docket No. CAA-HQ-99-01	)	Docket No. CAA-00-(1)

ORDER DENYING MOTION FOR DEFAULT ORDER, DISMISSING COMPLAINT WITHOUT PREJUDICE

For the reasons set forth below, Complainant's Motion for a Default Order ("Motion") is denied, and the Complaint is dismissed without prejudice to the filing of a new complaint that cures the filing deficiencies discussed below.

I. *PROCEDURAL BACKGROUND*

The Complaint in this matter was filed on July 27, 1999, by John B. Rasnic, Director, Manufacturing, Energy and Transportation Division, Office of Compliance, Office of Enforcement and Compliance Assurance, United States Environmental Protection Agency ("Complainant"). The Complaint alleged that Mullet Repair Shop ("Respondent") had violated Sections 113(a)(3)(A) and (d) of the Clean Air Act ("CAA"), as amended, 42 U.S.C. §§ 7413(a)(3)(A) and (d), and implementing regulations at 40 C.F.R. §§ 60.538(b) and (c). More specifically, the Complaint alleges that Respondent violated 40

C.F.R.§ 60.538(b) by manufacturing and offering for sale wood heaters and combination wood/coal heaters between February 26, 1988, and May 1, 1998. The Complaint further alleges that Respondent violated 40 C.F.R. § 60.538(c) by offering for sale coal-only heaters between February 26, 1988, and May 1, 1999, that were not properly labeled. Complainant proposes a total penalty for the two Counts of $6,788.

Respondent was served with the Complaint on August 2, 1999.[1] Respondent did not answer the Complaint within the 30 days provided by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties ("CROP"), at 40 C.F.R. § 22.15(a) (64 Fed. Reg. 40817 (July 23, 1999)).[2] Complainant's Motion, dated January 11, 2000, was filed with the Environmental Appeals Board[3] on February 9, 2000.

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[1]A properly executed return receipt was attached to the Complainant's Motion. See p.4, *infra*.

[2]Revisions to the CROP, 40 C.F.R. Part 22, became effective on August 23, 1999 for proceedings commenced prior to that date, unless to do so would cause substantial injustice. The revised rules expanded from 20 days to 30 days the time during which an Answer must be filed. Citations to the CROP are to the revised rules, unless otherwise specified.

[3]Under 40 C.F.R. § 22.4(a), the Environmental Appeals Board serves as Presiding Officer in those proceedings under the CROP commenced at "EPA Headquarters" until the respondent files an answer. Where, as here, no Answer was filed, the Board serves as Presiding Officer for purposes of considering Complainant's Motion.

II. *FINDINGS OF FACT*

The following facts are set forth in the Complaint and Complainant's Motion. The Respondent, Mullet Repair Shop, is a sole proprietorship owned by Mr. Enos Mullet. Respondent is a "manufacturer" and a “commercial owner” within the meaning of 40 C.F.R. Part 60, Subpart AAA, Section 60.531. Respondent manufactured new residential wood heaters and coal-only heaters, as defined in Section 60.531. On June 6, 1997, EPA issued a Section 114 letter requesting information from Respondent regarding the manufacture and sale of wood heaters and coal-only heaters. In a letter dated July 30, 1997, Richard K. Muntz, P.C., an attorney at law, acting on behalf of Mr. Enos Mullet, responded to the Section 114 letter, providing much of the information requested by EPA. On March 31, 1998, Complainant issued a Notice of Violation to Respondent informing Respondent that it was in violation of one or more wood heater regulations at 40 C.F.R. Part 60, Subpart AAA. In a letter dated May 1, 1998, Richard K. Muntz, P.C. , responded to the Notice of Violation, citing the Respondent’s inability to pay a “substantial penalty.” In support of this claim, partial tax returns were provided for years 1994 through 1997.[4]

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[4]Complainant has not provided with its Motion copies of the Section 114 letter, the Notice of Violation, or Respondent’s letters in reply.

In a letter dated June 1, 1999, EPA requested a waiver from the United States Department of Justice ("DOJ") of the twelve-month limitation on the EPA's authority to initiate an administrative case against the Respondent. CAA, Section 113(d). On July 1, 1999, DOJ concurred on EPA's waiver request. The Complainant filed the Complaint in this action on July 27, 1999, alleging violations of the regulations at 40 C.F.R. Part 60, subpart AAA, and proposing a total penalty of $6,788.[5] The Complaint in this action was served upon the Respondent by certified mail on August 2, 1999. In late August 1999, the Respondent's attorney contacted Robert C. Marshall, Jr., who manages the Wood Heater Program for EPA, to discuss amelioration of the penalty. The possibility of making installment payments over a one-year period was discussed. Mr. Mullet's attorney said he would call Mr. Marshall within one week, if Mr. Mullet wanted to pursue this option. Mr. Mullet's attorney did not contact Mr. Marshall again with regard to this matter.

The Complaint contains two counts. Count I provides, in pertinent part:

> 18. The regulation at 40 C.F.R. Section 60.538(b) prohibits the advertising for sale, offer for

[5]The title of the Complaint incorrectly identifies the Respondent as Mulle*tt* Repair Shop, rather than Mullet Repair Shop. (emphasis added). However, the body of the Complaint correctly identifies and describes Respondent as Mullet Repair Shop.

> sale, or sale of an affected facility by a manufacture[r] that: (1) does not have affixed to it a permanent label pursuant to Section 60.536; and (2) has not been tested as required by Section 60.533(n).

19. Between February 26, 1988, and May 1, 1998, Mullet Repair Shop manufactured and offered for sale approximately 70 wood heaters or combination wood/coal heaters that are affected facilities as defined under Section 60.531.

Count II provides, in pertinent part:

21. The regulation at 40 C.F.R. Section 60.538(c) prohibits the advertising for sale, offer for sale, or sale of a coal-only heater by a commercial owner on or after July 1, 1990, that does not have affixed to it a permanent label meeting the requirements of Section 60.536(f)(3).

22. Between February 26, 1988, and May 1, 1998, Mullet Repair Shop offered for sale approximately 160 coal-only heaters that were not labeled in accordance with the requirements at Section 60.536(f)(3).

II. ***CONCLUSIONS OF LAW***

The Complaint in this action was lawfully and properly served upon the Respondent, in accordance with 40 C.F.R. § 22.5(b)(1). Section 22.15(a) requires the Respondent to file an Answer to the Complaint within thirty (30) days of the service of the Complaint. To date, the Respondent has failed to file an Answer to

the Complaint.

Under 40 C.F.R. Section 22.15(d), the Respondent's failure to admit, deny, or explain any material factual allegation contained in the Complaint constitutes an admission of the allegation. Under 40 C.F.R. Section 22.17(a), the Respondent's failure to file an Answer to the Complaint may be deemed a default by the Respondent. Such "[d]efault by respondent constitutes, for purposes of the pending action only, an admission of all *facts* alleged in the complaint and a waiver of respondent's right to a hearing on such factual allegations." 40 C.F.R. § 22.17(a) (emphasis added). Under 40 C.F.R. Section 22.17, the Respondent's failure to file a timely Answer to the Complaint is grounds for the entry of a Default Order against the Respondent assessing civil penalties for the violations alleged in the Complaint.

Because Respondent’s failure to answer is grounds for a default judgment, the facts as presented by Complainant are accepted as unchallenged. Where a respondent has failed to file an answer, the Presiding Officer “shall issue a default order against the defaulting party * * * unless the record shows good cause why a default order should not be issued.” 40 C.F.R. § 22.17(c). However, even though all of Complainant's factual assertions are presumed true, a motion

for default judgment must also "specify the penalty or other relief sought and state the legal and factual grounds for the relief requested." 40 C.F.R. § 22.17(b). For the reasons discussed below, due to deficiencies in the Complaint, Complainant has failed to set forth adequate legal grounds in its Motion in this matter. We find pleading deficiencies in the Complaint that warrant our dismissal of the Complaint without prejudice, and accordingly Complainant's Motion is denied for good cause.

A. *Deficiency of Count I*

The paragraphs applicable to Count I of the Complaint, while deemed admitted under 40 C.F.R. § 22.17 because Respondent failed to answer the Complaint, are not sufficient to find a violation in this case. Complainant does not allege all facts necessary to establish a ***prima facie*** case for Count I. There are three critical elements that Complainant must allege in order for the Presiding Officer to find a violation under 40 C.F.R. § 60.538(b).[6] First, Complainant must, and

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[6]The cited regulation, 40 C.F.R. § 60.538(b) provides:

> No manufacturer shall advertise for sale, offer for sale, or sell an affected facility that –
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> (1) Does not have affixed to it a permanent label pursuant to § 60.536, and
>
> (2) Has not been tested when required by § 60.533(n).

did here, allege that Respondent was a manufacturer. *See* Complaint ¶ 11. Second, Complainant must allege that Respondent either advertised for sale, offered for sale, or sold "affected facilities" as defined by the regulation. Here, Complainant alleged that Respondent offered for sale 70 "affected facilities." *See* Complaint ¶ 19. Third, for Respondent's alleged sales activity to be unlawful, the affected facilities offered for sale must not have been labeled and tested as prescribed by sections 60.536 and 60.533(n), respectively. Complainant failed to allege that the 70 affected facilities offered for sale were not labeled and tested as required by the regulation. Without this allegation, Complainant has not alleged a *prima facie* case establishing a violation of 40 C.F.R. § 60.538(b) by Respondent. In light of this pleading deficiency, Count I of the Complaint is dismissed.

This dismissal is without prejudice. The dismissal is without prejudice because, as this Board has stated:

> [D]ismissal with prejudice under the Agency's rules should rarely be invoked for the first instance of a pleading deficiency in the complaint; instead, it should be reserved for repeat occasions or where it is clear that a more carefully drafted complaint would still be unable to show a right to relief on the part of the complainant.

In re Asbestos Specialists, Inc., 4 E.A.D. 819, 830 (EAB 1993); *see also In re Commercial Cartage Co., Inc.*, 5 E.A.D. 112, 118 (EAB

1994) (remanding case to Presiding Officer with instructions to dismiss without prejudice so that complainant has opportunity to cure pleading deficiencies). We see no basis here for dismissing the Complaint with prejudice since we have no reason to believe that Complainant cannot rewrite the Complaint to state a right to relief. Nor do we have any reason to believe that Respondent would be prejudiced since it has not answered the Complaint and no hearing has occurred in this case.

B. *Deficiency of Count II*

The paragraphs applicable to Count II of the Complaint, while deemed admitted, are not sufficient to permit a finding of violation. There is a discrepancy between the alleged time period during which the alleged activity occurred, and the date when the regulations became effective. Complainant alleges that Respondent violated 40 C.F.R. § 60.538(c)[7] when, "Between February 26, 1988, and May 1, 1998, [Respondent] offered for sale approximately 160 coal-only

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[7]The cited regulation, 40 C.F.R. § 60.538(c) provides, in pertinent part that:

> *On or after July 1, 1990*, no commercial owner shall advertise for sale, offer for sale, or sell an affected facility that does not have affixed to it a permanent label pursuant to 40 C.F.R. § 60.536(b), (c), (e), (f)(1), (g)(1) or (g)(2).

(emphasis added).

heaters that were not labeled in accordance with the requirements at Section 60.536(f)(3)." Complaint ¶ 22. While the regulation, by its terms, clearly makes unlawful such activity occurring on or after July 1, 1990, Complainant has alleged that Respondent's actions took place beginning in February 26, 1988. Thus, there are approximately two and one-half years of possible alleged sales offers that occurred prior to the effective date of the regulation. Those sales offers are not subject to the regulation specified by Complainant. Because the record before us neither expressly states that there were sales after July 1, 1990, nor includes sufficient documentation, or specificity, as to the actual number of sales offers that Respondent allegedly conducted on or after July 1, 1990, we are also dismissing Count II without prejudice.[8]

IV. *CONCLUSION*

For these reasons, we are dismissing the Complaint without prejudice to the filing of a new complaint that cures the filing deficiencies identified above. Accordingly, we also deny

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[8]We note that the time period during which Respondent allegedly violated section 60.538(b) and (c) begins with the date the regulations were promulgated, February 26, 1988, and ends with the date that Respondent's counsel responded to the Notice of Violation (May 1, 1998). Complainant has not provided, in the Complaint, any specific dates of Respondent's allegedly unlawful sales offers.

Complainant's Motion for Default Order for good cause, having dismissed the Complaint without prejudice.

SO ORDERED.

ENVIRONMENTAL APPEALS BOARD

Date: 3/6/2000

By: /s/
Edward E. Reich
Environmental Appeals Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order in the matter of Mullet Repair Shop, CAA Docket No. 00-1, were sent to the following persons in the manner indicated:

By Certified Mail
Return Receipt Requested:

Enos Mullet
Mullet Repair Shop
7705 E. 450 N.
Shipshewana, IN 46565

By Interoffice Mail:

John B. Rasnic
Director
Manufacturing, Energy & Transportation
Division (2223A)
United States Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue
Washington, DC 20460

Dated: 3/6/2000

/s/
Annette Duncan
Secretary