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

In re:	)	
Ernie Miller Coal Stoves	)	CAA Appeal No. 00-(2)
Docket No. CAA-HQ-99-02	)	

ORDER DENYING MOTION FOR DEFAULT ORDER
AND DISMISSING COMPLAINT WITHOUT PREJUDICE

I. *Introduction*

On July 27, 1999, the U.S. Environmental Protection Agency's ("EPA" or "Agency") Office of Enforcement and Compliance Assurance filed a complaint against Ernie Miller Coal Stoves ("EMCS") of Breman, Indiana, charging that EMCS had violated the Agency's Clean Air Act new source performance standards by offering for sale approximately seventy-nine improperly labeled wood heaters and coal-only heaters. EPA proposed that a penalty of $1,351 be assessed against EMCS for these alleged violations. EMCS did not file an answer to EPA's complaint. Accordingly, on February 9, 2000, EPA filed a motion with the Environmental Appeals Board ("Board") seeking a default judgment against EMCS and imposition of the $1,351 fine. As to the fine, the motion recites that an installment payment agreement between Mr. Miller of EMCS and the Agency was entered into on September 1, 1999, providing for four equal payments of $337.75, becoming due on September 3, 1999, January 3, 2000, May 3, 2000, and August 3, 2000. As

discussed later, this fine has now been paid in full by EMCS. For the reasons set forth below, we deny EPA's motion and dismiss the complaint without prejudice.

II. *Discussion*

Under the Consolidated Rules of Practice governing these proceedings, "[a] party may be found to be in default: after motion, upon failure to file a timely answer to the complaint * * *." 64 Fed. Reg. 40,138, 40,182 (July 23, 1999) (to be codified at 40 C.F.R. § 22.17). In this case, it would appear to be a simple proposition to find EMCS in default, given the company's failure to file any answer whatsoever to EPA's complaint. However, to enter a finding of default, a reviewing body should assure itself that the complaint in question states a claim upon which relief may be granted.[1] *Cf.*, *e.g.*, *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1370 n.41 (11th Cir. 1997) ("a default judgment cannot stand on a complaint that fails to state a claim"); *Nishimatsu Constr. Co. v. Houston Nat'l Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975)

[1]The Board has jurisdiction to decide this motion under the Consolidated Rules of Practice, which specify that the Board "acts as Presiding Officer until the respondent files an answer in proceedings under these Consolidated Rules of Practice commenced at EPA Headquarters." 64 Fed. Reg. at 41,178 (to be codified at 40 C.F.R. § 22.4(a)). Because EPA's Office of Enforcement and Compliance Assurance (rather than a regional office) initiated this action, and because EMCS failed to answer the complaint, the Board has authority to rule on the motion.

("[a] default judgment is unassailable on the merits but only so far as it is supported by well-pleaded allegations, assumed to be true"). Our review of the complaint in this case reveals pleading deficiencies that are fatal to EPA's cause. In many respects, the pleading deficiencies are very similar to those we found earlier this year in another wood/coal stove case involving the same basic regulations. *See In re Mullet Repair Shop*, CAA Appeal No. 00-(2), Order Denying Motion for Default Order, Dismissing Complaint Without Prejudice (EAB, Mar. 6, 2000). We dismissed the complaint in that case because of the pleading deficiencies. That case was decided on March 6, 2000, approximately two months before the third of the four penalty installment payments in the present case became due and payable.

To understand the pleading deficiencies in the present case, a brief review of the applicable Clean Air Act regulations is necessary. On February 26, 1988, EPA promulgated new source performance standards ("NSPS") for wood- and coal-burning heaters. *See* 53 Fed. Reg. 5860 (Feb. 26, 1988) (codified at 40 C.F.R. pt. 60 subpt. AAA). The standards, called "Standards of Performance for New Residential Wood Heaters," impose a number of regulatory requirements on manufacturers and retailers of certain categories of wood- and coal-burning heaters. For instance, heaters must be properly labeled and must comply with specific

limits on emissions of particulate matter. *See* 40 C.F.R. §§ 60.532 (emissions limits), .536 (labeling requirements).

For our purposes, the critical provisions in the regulations set forth the "affected facilities" to which the heater standards apply. The standards are applicable to "each wood heater"[2] that is: (1) manufactured on or after July 1, 1988, or (2) sold at retail on or after July 1, 1990. 40 C.F.R. § 60.530(a) (1998).

The complaint sets forth in two paragraphs the key components of EMCS's alleged violations. The paragraphs state:

> 16. The regulation at 40 C.F.R. [s]ection 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

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[2]A "wood heater" is "an enclosed, woodburning appliance capable of and intended for space heating and domestic water heating" that has:

> (a) An air-to-fuel ratio in the combustion chamber averaging less than 35-to-1;
> (b) A usable firebox volume of less than 20 cubic feet;
> (c) A minimum burn rate less than 5 kg/hr; and
> (d) A maximum weight of 800 kg.

40 C.F.R. § 60.531.

meeting the requirements of [s]ection 60.536(f)(3).

17. Between February 26, 1988, and May 1, 1998, Ernie Miller Coal Stoves offered for sale approximately 79 wood heaters and coal-only heaters that were not labeled in accordance with the requirements at [s]ection 60.536(f)(3).

Complaint ¶¶ 16-17.

Upon comparison of the complaint to the regulations, several problems in the way the violations are pled emerge. The first problem is identical to one we pointed out in *Mullet* on March 6, 2000. Specifically, the problem arises from the complaint's lack of specificity regarding the nature and timing of the alleged violations, which potentially covered a period of time when no illegal activity would be possible because no standards would have applied. As we explained in *Mullet*,

> Complainant alleges that Respondent violated 40 C.F.R. § 60.538(c) when, "Between February 26, 1988, and May 1, 1998, [Respondent] offered for sale approximately 160 coal-only 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 * * * dismissing Count II without prejudice.

Mullet, Order Denying Motion for Default Order at 9-10 (footnotes omitted). Here, as in *Mullet*, the complaint alleges a February 26, 1988 starting date for EMCS's sales offers but makes no specific allegations as to whether any of the purported seventy-nine sales offers occurred after July 1, 1990.

A second pleading problem arises because the wood heater NSPS is specifically applicable only to wood heaters manufactured on or after July 1, 1988, or sold at retail on or after July 1, 1990. 40 C.F.R. § 60.530(a). Coal-only heaters,[3] which are functionally capable of burning wood and

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[3]A "coal-only heater" is "an enclosed, coal-burning appliance capable of space heating, or domestic water heating" that has all of the following characteristics:

> (a) An opening for emptying ash that is located near the bottom or the side of the appliance;
> (b) A system that admits air primarily up and through the fuel bed;
> (c) A grate or other similar device for shaking or disturbing the fuel bed or power-driven

(continued...)

thus able to meet the wood-heater definition, are wood heaters for purposes of the foregoing applicability requirements.[4] There is no allegation in the complaint, however, that the heaters (both wood and coal-only) purportedly offered for sale by EMCS were manufactured on or after July 1, 1988.[5] Instead, we are informed only that they were offered for sale sometime during the ten-year period between February 26, 1988 (the effective date of the NSPS itself) and May 1, 1998. For the NSPS to be applicable, and therefore for the complaint to be viable, the complaint would have to clearly allege that the violations pertained to heaters that were either sold (not merely offered for sale) after July 1, 1990, or that the

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[3](...continued)
mechanical stoker;
(d) Installation instructions that state that the use of wood in the stove, except for coal ignition purposes, is prohibited by law; and
(e) The model is listed by a nationally recognized safety-testing laboratory for use of coal only, except for coal ignition purposes.

40 C.F.R. § 60.531.

[4]Coal-only heaters are not required to meet the emission limits and certain other requirements applicable to wood heaters, but instead are chiefly subject to labeling requirements in the NSPS that warn against and prohibit their use as wood heaters. *See* 40 C.F.R. §§ 60.530(g), .536(f)(3).

[5]There is also no allegation in the complaint that the heaters purportedly offered for sale by EMCS were sold at retail on or after July 1, 1990. Because there is no allegation that these heaters were ever actually sold but only that they were offered for sale, the manufacturing component of the "affected facility" definition is the only relevant one in this context. *See* 40 C.F.R. § 60.530(a).

offers for sale were for heaters that were manufactured after July 1, 1988. Unfortunately, there is no legitimate way to cabin the language of the complaint in this fashion. We cannot tell from the face of the complaint whether EPA has targeted heaters that are subject to regulation under the NSPS. As a consequence, the complaint fails to state a claim upon which relief can be granted as to any or all of the seventy-nine alleged violations. Accordingly, the complaint must be dismissed.[6] *See* 40 C.F.R. § 22.20(a).

III. *Conclusion*

A. *Dismissal of Complaint*

Because of the foregoing deficiencies in pleading a claim for relief, it is our conclusion that the complaint is fatally defective. EPA has failed to allege a ***prima facie*** case of EMCS's violation of the wood heater NSPS, and thus we cannot use the complaint as the basis for a default judgment. Accordingly, the complaint is dismissed. This dismissal is without prejudice because, as the Board has stated:

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[6]We note one other pleading problem as well. The labeling regulation at 40 C.F.R. § 536(f)(3), which is cited as legal authority in ¶ 17 of the Complaint, applies only to coal-only heaters and not to wood heaters in general, whereas ¶ 17 alleges violations for both coal-only heaters and wood heaters. By separately identifying the category of "coal-only heaters," the logical implication is that the reference to "wood heaters" is to heaters that are not coal-only, but the labeling requirement does not apply to those heaters. *See* 40 C.F.R. § 536(f)(3).

> [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 In re Commercial Cartage Co.*, 5 E.A.D. 112, 118 (EAB 1994) (remanding case to presiding officer with instructions to dismiss without prejudice so that complainant may have opportunity to cure pleading deficiencies). We see no basis here for dismissing the complaint with prejudice because we have no reason to believe that EPA cannot rewrite the complaint to state a right to relief. Nor do we have any reason to believe that EMCS would be prejudiced, because it has not answered the complaint and no hearing has been held in this case.

B. *Previous Penalty Payments*

As noted earlier, the full amount of the penalty sought by the Agency has now been paid in full,[7] one-half of the

[7]We became aware of the payment when, in a motion dated June 30, 2000, the Agency asked to withdraw its motion for (continued...)

amount apparently having been paid after the decision in *Mullet* was issued. Despite the obvious relevance of our decision in *Mullet* to the facts of this case, no steps were taken by the Agency to amend the complaint in this case to bring it into conformity with *Mullet*. Doing so might have materially altered the outcome of the case, including the decision by EMCS to continue paying the installments until the penalty was paid in full.

An administrative issue arises as to the proper disposition of the payment following the complaint's dismissal. Obviously, if a complaint curing the deficiencies is not filed, the payment should be refunded to the payor (EMCS or Mr. Miller, as appropriate). On the other hand, if the Agency intends promptly to refile an enforcement action

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[7](...continued)
default filed with the Board on February 2, 2000. The Agency cites the following reasons for seeking withdrawal of the motion:

> Ernie Miller Coal Stoves [EMCS] has paid in full the proposed civil penalty described in the Motion for Default Order. Therefore, the USEPA has no reason to seek relief from the Environmental Appeals Board to ensure payment of the penalty. Accordingly, the USEPA respectfully requests that the Environmental Appeals Board allow the USEPA to withdraw its Motion for Default Order.

Upon consideration of the premises, and more specifically the reasons cited in this order dismissing the complaint without prejudice, the Agency's motion to withdraw the motion for default is denied.

against EMCS, it may be simpler for the Agency to retain the payment pending the outcome of the new proceeding. In this regard, we note that under section 22.18(a)(1) of the Consolidated Rules of Practice, a "quick resolution" procedure exists for settlement of cases if EMCS chooses not to contest the new complaint and any proposed penalty assessment. The parties could just agree that upon issuance of a new complaint, the payment already made would be credited under section 22.18(a)(1). That scenario would permit us to issue a final order under section 22.18(a)(3).

So ordered.

ENVIRONMENTAL APPEALS BOARD

Dated: 8/03/00

By: /s/
Ronald L. McCallum
Environmental Appeals Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Denying Motion for Default Order and Dismissing Complaint Without Prejudice in the matter of Ernie Miller Coal Stoves, CAA Appeal No. 00-(2), were sent to the following persons in the manner indicated:

By First Class U.S. Mail, Return Receipt Requested:

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Date: 8/04/00

/s/
Annette Duncan
Secretary