IN RE MOUNTAIN VILLAGE PARKS, INC.

SDWA Appeal No. 12-02

ORDER REMANDING TO PRESIDING OFFICER

Decided February 26, 2013

Syllabus

This case arises from an administrative complaint ("Complaint") U.S. Environmental Protection Agency ("EPA") Region 8 ("Region" or "Complainant") filed against Mountain Village Parks, Inc. ("Respondent" or "Mountain Village")) for alleged violations of section 1414 of the Safe Drinking Water Act ("SDWA"), 42 U.S.C. § 300g-3, the National Primary Drinking Water Regulations ("NPDWRs"), codified in 40 C.F.R. part 141, and an Amended Administrative Order ("Amended Order") the Region issued on September 29, 2009. Respondent failed to file an answer to the Complaint and the presiding officer ("PO") issued a Default Initial Decision and Order ("Default Order") finding Respondent liable for the violations alleged in the Complaint, and assessing the penalty amount of $5,000 that the Region had proposed. The Environmental Appeals Board ("Board") examined the Default Order and decided to undertake review of the PO's decision pursuant to its *sua sponte* review authority under 40 C.F.R. §§ 22.27(c), .30(b).

Held: Examination of the record revealed deficiencies in the Complaint and supporting pleadings that the PO failed to address in the Default Order, as well as deficiencies in the Default Order itself. Therefore, the Board remands the Default Order to the PO for clarification of the liability findings and determination of a penalty consistent with such findings and this decision.

- Both Complainant and the PO failed to notice a discrepancy in the dates of the reporting violations and underlying substantive violations alleged in Counts II and III of the Complaint, resulting in the assessment of a higher penalty than the liability allegations support.

- Calculation and other errors in the penalty determinations make the penalty proposed by Complainant, and adopted by the PO, inconsistent with both the record of this case and the SDWA.

    - The use of the *New Public Water System Supervision Program Settlement Penalty Policy* ("NPWSSPS Penalty Policy") to calculate the penalty in this case is inconsistent with the express terms of the policy. The policy expressly states that it is not to be used in arguing for a penalty at trial or in an administrative penalty hearing.

    - The use of a "standard increase for pleading purposes" by both Complainant and the PO to inflate the proposed penalty amount is without legal support.

The justification for a proposed civil penalty that is being adjudicated must be based on the applicable statutory penalty factors. A "standard increase for pleading purposes" is not one of the penalty criteria explicitly set forth in the SDWA, nor did the PO explain in the Default Order the basis for this increase.

- It is a presiding officer's responsibility to evaluate carefully complaints to determine both whether the facts as alleged establish liability, and whether the relief sought is appropriate. Default does not constitute a waiver of a respondent's right to have a presiding officer evaluate whether the facts as alleged establish liability or whether the relief sought is appropriate in light of the record. It is also a presiding officer's responsibility to ensure that the proposed penalty is based upon a reasoned application of the statutory penalty factors.

Before Environmental Appeals Judges Leslye M. Fraser, Catherine R. McCabe, and Kathie A. Stein.

Opinion of the Board by Judge Fraser:

I. *STATEMENT OF THE CASE*

On September 28, 2012, the Presiding Officer ("PO") for U.S. Environmental Protection Agency ("EPA") Region 8 ("Region" or "Complainant") issued a Default Initial Decision and Order ("Default Order") in the above-captioned matter. The Default Order assesses a penalty of $5,000 against Mountain Village Parks, Inc. ("Respondent" or "Mountain Village"), a public water system located in Sublette County, Wyoming, for alleged violations of section 1414 of the Safe Drinking Water Act ("SDWA"), 42 U.S.C. § 300g-3, the National Primary Drinking Water Regulations ("NPDWRs"), codified in 40 C.F.R. part 141, and an Amended Administrative Order ("Amended Order") the Region issued on September 29, 2009.

On November 7, 2012, the Environmental Appeals Board ("Board") elected to exercise *sua sponte* authority, pursuant to 40 C.F.R. §§ 22.27(c)(4), .30(b).[1] Order Electing to Exercise Sua Sponte Review (EAB Nov. 7, 2012). Examination of the record before the Board[2] has revealed deficiencies in the Complaint and

[1] Under the regulations governing the administrative assessment of civil penalties, 40 C.F.R. part 22 ("Part 22"), the Board has forty-five days after service of an initial decision to elect to exercise *sua sponte* review (i.e., review on the Board's own initiative). 40 C.F.R. §§ 22.27(c)(4), .30(b).

[2] The record of this case includes: the Administrative Order and subsequent amendment ("Amended Order"); the Complaint; the Region's Motion for Default; the Memorandum in Support of Motion for Default ("Support Memorandum"); a Declaration from Mario Mérida ("Mérida Declaration") (a representative from the Region responsible for calculating the proposed penalty); and the Default Order. A detailed description of the facts and procedural history of this case is provided in the Default Order. Only the facts necessary to understand the Board's decision are provided herein.

supporting pleadings that the PO failed to address in the Default Order, as well as deficiencies in the Default Order itself.

For the reasons set forth below, the Board remands the Default Order to the PO for clarification of the liability findings, and determination of a penalty consistent with such findings and this decision.

II. *ANALYSIS*

A. *The Complaint Establishes Four Counts of Violations For Certain Specified Timeframes*

The Complaint charges Mountain Village with four counts of violations. Specifically, the Complaint alleges that Respondent failed to: (1) prepare, distribute, and submit to EPA Consumer Confidence Reports ("CCR") for 2007, 2009 and 2012 in violation of the Amended Order, the SDWA, and 40 C.F.R. §§ 141.152-155, *see* Complaint ("Compl.") ¶¶ 12-13, at 4; (2) monitor for, and collect samples of, lead and copper between January 1 and June 30, 2011, in violation of the Amended Order, the SDWA, and 40 C.F.R. § 141.86(c)-(d), *id.* ¶¶ 14-15, at 5; (3) report to EPA non-compliance with the NPDWRs, specifically "the 2007, 2009, and 2010 CCR violations, and the lead and copper sampling violations for the period(s) of January 1-June 30, 2011 and July 1-December 31, 2011, in violation of the Amended Order, the [SDWA,] and 40 C.F.R. § 141.31(b)," *id.* ¶¶ 16-17, at 5; and (4) report to EPA total coliform non-compliance for February 2012 in violation of the Amended Order, the SDWA, and 40 C.F.R. § 141.21(g)(1), *id.* ¶¶ 18-20, at 5.

B. *There are Deficiencies in the Complaint, Supporting Pleadings, and the Default Order*

1. *The Liability Allegations are Insufficient to Support the Penalty Amount in the Default Order*

Count III charges Respondent with failure to report non-compliance with the NPDWRs. Compl. ¶¶ 16-17, at 5. In order to establish a "failure to report violation,"[3] a complainant must demonstrate that: (1) there is a requirement to

[3] Complainant bears the burden of establishing a prima facie case of liability and of the appropriateness of the relief sought. *See* 40 C.F.R. § 22.24(a) ("The complainant has the burdens of presentation and persuasion that the violation occurred as set forth in the complaint and that the relief sought is appropriate. Following complainant's establishment of a prima facie case, respondent shall have the burden of presenting any defense to the allegations set forth in the complaint and any response or evidence with respect to the appropriate relief.").

report the violation; (2) a reportable violation occurred; and (3) the respondent failed to report such violation.

In this case, Count III alleges, *inter alia*, that Respondent failed to report "the lead and copper sampling violations for the period(s) January 1-June 30, 2011[,] *and July 1-December 31, 2011*." *Id.* ¶ 17, at 5 (emphasis added). Count II (the "failure to monitor lead and copper violation") alleges that Respondent "failed to collect lead and copper samples between *January 1 and June 30, 2011*." *Id.* ¶ 15, at 5 (emphasis added).

While Count II alleges a failure to monitor lead and copper for the period of January 1 to June 30, 2011, it does not allege a violation for the period of July 1 to December 31, 2011. Specifically, the Complaint does not allege that Respondent had an obligation to monitor for lead and copper during the period of July 1 to December 31, 2011, and that it failed to monitor during such period. Therefore, the Count III allegation of "a failure to report a violation" for the period July 1 to December 31, 2011 is defective on its face.

Complainant appears not to have noticed the discrepancy in the dates of the reporting violations and underlying substantive violations alleged in Counts II and III. The Memorandum in Support of the Motion for Default ("Support Memorandum"), which provides Complainant's rationale for assessing a $5,000 penalty, uses a twelve-month period to calculate the gravity and economic benefit components[4] of the proposed penalty for Count II instead of the shorter six-month period. Support Memorandum at 9 (stating that "[t]he Complaint also alleges that Respondent failed to monitor for lead and copper for a total of 12 months * * *.").

The PO also failed to notice this defect, which resulted in the assessment of a higher penalty than the liability allegations support.

[4] Penalties are typically calculated by adding a gravity and an economic benefit component. *See generally* U.S. EPA, General Enforcement Policy # GM-21, *Policy on Civil Penalties*, at 8 (Feb. 16, 1984); U.S. EPA, General Enforcement Policy # GM-22, *A Framework for Statute-Specific Approaches to Penalty Assessments*, at 2 (Feb. 16, 1984) ("GM-22"). The economic benefit component is a reflection of the economic gain obtained, or savings realized, by the violator as a result of expenditures that were delayed or completely avoided during the period of noncompliance. *See* GM-22 at 6-10. In the context of SDWA violations, the gravity component reflects the seriousness of the violation and population at risk. *See generally* SDWA § 1414(b), 42 U.S.C. § 300g-3. Other appropriate factors also may be considered. *Id.*

2. *The Proposed Penalty is Clearly Inconsistent with the Record and the SDWA*

In default cases, presiding officers are required to order the relief proposed in the complaint or motion for default, unless the requested relief is clearly inconsistent with the record of the proceeding or the applicable statute. 40 C.F.R. § 22.17(c). As explained in more detail below, there are calculation and other errors in the penalty determination that make the penalty proposed by Complainant, and adopted by the PO, inconsistent with both the record of this proceeding and the SDWA.

a. *The Penalty Determination Contains Calculation and Other Errors*

Relying on Mario Mérida's Declaration, the PO assessed a final penalty of $5,000 as Complainant proposed. Default Order at 6-7. There are several apparent calculation and other errors in the penalty assessment as proposed by Complainant, as well as in the PO's penalty analysis.[5] The Board, however, only fully addresses those that are most significant and relevant to the PO's penalty assessment.

First, the use of the *New Public Water System Supervision Program Settlement Penalty Policy* ("NPWSSPS Penalty Policy") to calculate the penalty in this case[6] is inconsistent with the express terms of the policy. This policy explicitly states that it is used to calculate "the minimum penalty for which [the Agency] would be willing to settle a case," and that "[t]he development of the penalty amount to plead in an administrative or judicial complaint is developed indepen-

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[5] For example, the Support Memorandum and Mérida's Declaration, both of which explain the Region's rationale for the proposed penalty, are not entirely consistent with one another. In calculating the total proposed penalty, Mérida's Declaration only mentions the gravity component for Count I. Mérida's Declaration ¶¶ 13-17. The Support Memorandum, for its part, explicitly mentions the gravity components for Counts I, II, III and IV. Support Memorandum at 8-9. In addition, the adjusted gravity components identified in these two documents are slightly different. According to Mérida's Declaration, the adjusted gravity component is $3,890.21, while the adjusted gravity component in the Support Memorandum is $3,815.07. *Compare* Mérida's Declaration ¶ 17 *with* Support Memorandum at 9. The PO's penalty analysis seems to follow Mérida's Declaration, without addressing or resolving the aforementioned discrepancies. Default Order at 6-7. For example, in calculating the total gravity component, the PO appears only to have considered the penalty proposed for Count I. Nowhere in her Default Order does the PO mention the gravity amount for Counts II through IV. *Compare* Default Order at 7 (identifying $696.94 as the "initial gravity component") *with* Support Memorandum at 9 (proposing $694.64 for Count I, $233.69 for Count II, and $58.42 for Counts III and IV).

[6] *See* Support Memorandum at 8 (stating that "EPA uses the 'Public Waters System Supervision Program Settlement Penalty Policy' to apply the statutory penalty factors in a fair and consistent manner;" Default Order at 6 (stating that the PO "evaluated the statutory factors, in conjunction with the [NPWSSPS] Penalty Policy, to create gravity and economic benefit components to the penalty").

dent of this policy * * * ." Office of Ground Water and Drinking Water, U.S. EPA, WSG81, *New Public Water System Supervision Program Settlement Penalty Policy*, at 13 (May 25, 1994). The policy further states that "the Agency will not use this settlement Penalty Policy in arguing for a penalty at trial or in an administrative penalty hearing." *Id*. While the Board recognizes the broad discretion a presiding officer has to assess penalties,[7] the Board also has declined to adopt a presiding officer's penalty justification that relies on a policy document that expressly states that the policy should not be used in litigation. *In re Bollman Hat Co.*, 8 E.A.D. 177, 189-190 (EAB 1999). This does not preclude a presiding officer from reviewing relevant settlement penalty policies for their instructive value. In those instances, however, the penalty assessment must be justified on the basis of the applicable statutory factors, not on the settlement policy, especially when the penalty policy clearly states that it is not to be applied in litigated cases. While the PO in this case recognized that the NPWSSPS Penalty Policy is a settlement policy, it is clear that both Complainant and the PO relied on the settlement penalty policy to justify the proposed penalty,[8] not just for its instructive value, as the PO suggests.[9]

Second, even assuming that the penalty the PO assessed was based solely on an evaluation of the facts of the case and the statutory factors, the PO's penalty analysis is defective in its calculations. For example, there is a difference of $81.62 between the amount the PO identifies on page 7 of the Default Order as the total gravity component (i.e., $3,890.21) and the amount that results from multiplying the initial gravity component and the other factors the PO identifies in the same paragraph (i.e., $3,808.59).[10]

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[7] *See, e.g., In re City of Marshall*, 10 E.A.D. 173, 188 (EAB 2001) (noting the highly discretionary nature of penalty assessment); *In re Chempace Corp.,* 9 E.A.D. 119, 135 & n.23 (EAB 2000) (stating that presiding officers have broad discretion on the issue of penalty assessment). This broad discretion must be exercised within the context of the regulations, which require that presiding officers: "consider any civil penalty guidelines issued under the Act;" explain in the initial decision the specific reasons for increasing or decreasing a proposed penalty; and, in default cases, "not assess a penalty greater than that proposed by complainant." 40 C.F.R. § 22.27(b). Of course, any penalty guidelines considered must be applicable by their terms to the case being decided.

[8] *See supra* note 6.

[9] *See* Default Order at 6 n.2 (stating that the "policy is instructive in determining the penalty in that it incorporates the statutory factors").

[10] According to the Default Order, the PO increased the "initial gravity component" by: (1) 1.4163 (based on population served and duration of each violation); (2) 1.5 (based on degree of willfulness/negligence); and (3) 2.572307 (based on history of noncompliance). Default Order at 7. This would render a penalty in the amount $3,808.59, not $3,890.21 (i.e., $696.94 x 1.4163 x 1.5 x 2.572307 = $3,808.59). The Board, however, is not entirely sure if this is what the PO intended since Mérida's approach was sightly different and the PO appears to have relied on Mérida's Declaration. *Compare* Default Order at 7 ("This raised the gravity to $3,890.21") *with* Mérida's Declaration ¶ 17 ("Adding the adjustment factors, the adjusted gravity component of the penalty in this matter is

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In addition, the economic benefit of noncompliance that the PO used to calculate the total penalty should have been adjusted downward. The PO used the amount Complainant proposed as the economic benefit (i.e., $259). *See* Support Memorandum at 9; Default Order at 7. That amount, however, assumes that the "failure to monitor lead and copper violation" spanned over a period of twelve months. Because Complainant only established a violation period of six months for this count, the proposed economic benefit should have been adjusted downward to reflect the correct period of violation.[11]

3. *There is No Stated Legal Basis for the "Standard Increase for Pleading Purposes" Fee Included in the Penalty*

Another flaw with the penalty analysis is the use of a "standard increase for pleading purposes" to inflate the proposed penalty amount. Both the Complainant and the PO added this "fee" to the penalty calculation without any stated substantiation. Support Memorandum at 9; Default Order at 7. The basis for this fee is not clear from the Default Order or any of Complainant's pleadings. The legitimacy of this fee is further put into question as the amount Complainant proposed in the Support Memorandum, the amount in Mérida's Declaration, and the amount the PO adopted slightly differ from one another. According to Complainant's Support Memorandum, the amount of this proposed fee is $925.93.[12] According to Mérida's Declaration, the amount of this proposed fee is $850.79,[13] while the amount

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$3,890.21."). If the PO's intention was to indicate that the $696.94 came from using the 1.4163 factor in the NPWSSPS Penalty Policy, and that the total gravity was calculated by increasing the $696.94 amount by 1.5 and 2.572307, as appears to be Mérida's approach, *see* Mérida's Declaration ¶¶ 16-17, that is not reflected in the Default Order. Such an approach, however, would have rendered a penalty in the amount of $2,689.11 not $3,890.21. Notably, Mérida's Declaration does not explain the difference between these two figures. *See id.*

[11] The $259 figure also includes the economic benefit associated with the CCR violation (Count I). Support Memorandum at 9. On remand, the PO needs to determine the appropriate adjustment for the economic benefit component, as the Board cannot determine on the record before us how much of the $259 is for Count I and how much is for Count II.

Similarly, the gravity amounts for Counts II and III, *see supra* note 5, would have to be calculated to reflect the correct period of violation.

[12] The Board determined this amount by subtracting the "adjusted gravity amount" and the economic benefit component specified on page 9 of the Support Memorandum from the total proposed penalty. *See* Support Memorandum at 9 (i.e., [$5,000 – ($3,815.07 + $259.00) = $925.93]).

[13] The Board determined this amount by subtracting the "adjusted gravity component" and the economic benefit component identified in Mérida's Declaration, from the total proposed penalty. Mérida's Declaration ¶¶ 17-19 (i.e., [$5,000 – ($3,890.21 + $259.00) = $850.79]).

in the Default Order varies between $850.79 and $932.41.[14]

The justification for a proposed civil penalty that is being adjudicated must be based on the applicable statutory penalty factors. 40 C.F.R. § 22. 27(b) ("If the Presiding Officer determines that a violation has occurred and the complaint seeks a civil penalty, the Presiding Officer shall determine the amount of the recommended civil penalty based on the evidence in the record and in accordance with any penalty criteria set forth in the Act."). In fact, presiding officers are required to "explain in detail in the initial decision how the penalty to be assessed corresponds to *any penalty criteria set forth in the Act*.[15] " *Id.* (emphasis added). A "standard increase for pleading purposes" is not one of the penalty criteria explicitly set forth in the SDWA, and the PO does not explain why this may be an appropriate factor applicable in this case. *See, e.g.*, SDWA § 1414(b), 42 U.S.C. § 300g-3(b) (identifying "the seriousness of the violation, the population at risk, and other appropriate factors" as the criteria to determine an appropriate penalty).[16]

III. *CONCLUSION*

A presiding officer's role "is not to accept without question the Region's view of the case, but rather to determine an appropriate penalty as required by 40 C.F.R. § 22.27. As part of [a PO's] evaluation, the [PO] must ensure that in the pending case the Region has applied the law and Agency's policies consistently and fairly." *See In re John A. Biewer Co. of Toledo, Inc.*, 15 E.A.D. 772, 782 (EAB 2013). While in default cases a respondent waives its right to contest all the factual allegations in the complaint, the presiding officer's role in adjudicating default cases remains the same. It is a presiding officer's responsibility to evaluate carefully complaints to determine both whether the facts as alleged establish liability, and whether the relief sought is appropriate. *See* 40 C.F.R. § 22.17(c);

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[14] As noted above, the amount identified in the Default Order as the gravity amount (i.e., $3,890.21) is different from the amount that results from multiplying the factors the PO identified (i.e., $3,808.59). Therefore, the "standard increase for pleading purposes" the PO applied will vary depending upon the gravity amount one selects.

[15] As noted above, *see supra* note 7, presiding officers are also required to consider any *applicable civil penalty* guidelines issued under the Act. 40 C.F.R. § 22.27(b).

[16] It is not clear whether the Region and the PO added the "standard increase for pleading purposes" fee to increase the "bottom-line settlement" amount that results from the use of a settlement penalty policy, as opposed to a policy on civil penalties for litigation. *See generally* NPWSSPS Penalty Policy at 13; Office of Enforcement and Compliance Monitoring, *Guidance on the Distinctions Among Pleadings, Negotiating, and Litigating Civil Penalties for Enforcement Cases under the Clean Waters Act* (Jan. 19, 1989). If the NPWSSPS Penalty Policy was indeed the basis of the fee, the fee is inappropriate on that basis alone as the NPWSSPS Penalty Policy is inapplicable to this case per the discussion above.

cf. In re Landmark Real Estate Mgmt. Inc., TSCA Appeal No. 11-01 (EAB Mar. 28, 2011) (Order Remanding to Regional Judicial Officer) (Board remanded default order to regional judicial officer for clarification and justification of the penalty as the default order failed to explain clearly the penalty). This responsibility is particularly important in the context of a Default Order. Default by a respondent constitutes an admission of all of the facts alleged in the complaint, and as noted above, a waiver of the respondent's right to contest such factual allegations. 40 C.F.R. § 22.17(a). Default, however, does not constitute a waiver of a respondent's right to have a presiding officer evaluate whether the facts as alleged establish liability or whether the relief sought is appropriate in light of the record. It is also a presiding officer's responsibility to ensure that the proposed penalty is based upon a reasoned application of the statutory penalty factors.[17]

IV. *ORDER*

For all the foregoing reasons, the Board hereby remands the Default Order to the PO for clarification of the liability findings, and determination of a penalty consistent with such findings and this decision.

So ordered.

[17] The Board also reminds presiding officers of the importance of using correct legal terminology in their decisions, and encourages presiding officers to carefully review their decisions before issuance. The misuse of legal terminology, such as stating that respondent failed to comply with the *complaint*, or referring to the presiding officer as the "court," should be avoided.