

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8

2012 APR -5 AM 8: 53

IN THE MATTER OF:)
)
Rick Nelson, Owner)
Fort Devils Tower)
Devils Tower, WY 82714)
)
Respondent)
_____)

Docket No. SDWA-08-2011-0021

FILED
EPA REGION VIII
READING IN ERK

ORDER TO SUPPLEMENT THE RECORD

On February 23, 2012, Complainant, U.S. Environmental Protection Agency (EPA) Region 8, filed a Motion for Default Order (Motion) against Respondent, Rick Nelson, seeking a finding of default for failure to file an answer to the February 14, 2011, complaint filed in this action. The Motion and the attached Memorandum in Support of Complainant's Motion for Default (Memo in Support) requests a \$2,000 penalty be imposed.

Complainant filed its Motion pursuant to Section 22.17 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits (Consolidated Rules). That section provides in pertinent part that, "[a] party may be found in default...after motion, upon failure to file a timely answer to the complaint." 40 C.F.R. § 22.17.

The Complaint alleges Respondent violated the Safe Drinking Water Act (SDWA), 42 U.S.C. § 1414(g), by failing to comply with an order issued by EPA. Respondent was served with a copy of the complaint on or about April 26, 2011.¹ (Memo in Support at 5). Respondent has failed to file an answer as required by 40 C.F.R. § 22.15. On February 23, 2012, Complainant moved for the entry of a Default Order against Rick Nelson and the assessment of a penalty of \$2,000. Pursuant to the Consolidated Rules, "[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). Therefore, after March 14, 2012, it was appropriate for this court to address Complainant's Motion.

Section 22.17(b) of the Consolidated Rules provides:

(b) *Motion for default.* A motion for default may seek resolution of all or part of the proceeding. Where the motion requests the assessment of a penalty or the imposition of other relief against a defaulting party, the movant must specify the

¹ An answer was required to be filed within 30 days of service of the Complaint, or about May 26, 2011.

penalty or other relief sought and state the legal and factual grounds for the relief requested.

In addition, the Consolidated Rules provide in pertinent part that:

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 upon the evidence in the record and in accordance with any civil penalty criteria in the Act. The Presiding Officer shall consider any civil penalty guidelines issued under the Act. The Presiding Officer shall explain in detail in the initial decision how the penalty to be assessed corresponds to any penalty criteria set forth in the Act If the respondent has defaulted, the Presiding Officer shall not assess a penalty greater than that proposed by complainant in the complaint, the prehearing information exchange or the motion for default, whichever is less.

40 C.F.R. § 22.27(b).

As noted above, Consolidated Rules Section 22.17(b) provides that when a motion for default requests the assessment of a penalty, the movant must state the legal and factual grounds for the penalty requested. 40 C.F.R. § 22.17(b). In addition, Section 22.16(a) requires a party to submit "...any affidavit, certificate, other evidence..." supportive of the relief requested. 40 C.F.R. § 22.16(a). Complainant, through legal counsel, has submitted its Memo in Support, which includes a narrative explanation of the penalty sought in this matter. Legal counsel's brief recital in the Memo in Support of the statutory factors considered does not constitute evidence that is part of the record. See, *In re Hutton Auto Body and Tri-Village Auto Body, LLC*, RCRA-05-2005-002 (EPA RJO Jan. 10, 2006); *In re Water Protection, Inc.*, FIFRA-04-2003-3024 (EPA RJO May 1, 2004); *In re Mario Loyola*, Docket No. CWA-02-2000-3604 (EPA RJO, Feb. 16, 2005). Conclusory findings of the appropriateness of a particular penalty amount are insufficient. See, *Katzson Bros., Inc. v. U.S. EPA*, 839 F.2d 1396, 1400-1401 (10th Cir. 1988). Furthermore, a declaration of the agency representative responsible for calculation of the penalty should be submitted to accurately put evidence in the record.² This court cannot move forward with evaluating the penalty without additional information.

² Any facts in support of a proposed penalty should be established by means of an affidavit or declaration of the agency representative who conducted the penalty calculation. Any documents relied upon or generated in the course of that calculation can be referenced in the affidavit (or declaration) and attached thereto. See *In re Mortillero*, No. VI-99-1622, slip op. at 6, (EPA RJO Aug. 4, 2000)(arguments by counsel in a legal memorandum do not constitute evidence. *Id.* at 7.), citing *British Airways Board v. Boeing Company*, 585 F.2d 946,952 (9th Cir. 1978) (legal memoranda not evidence); *cert denied*, 440 U.S. 981 99 S.Ct. 1790 (1979).

Complainant is hereby ORDERED to supplement the record with respect to its proposed penalty **on or before April 30, 2012**. A declaration or affidavit shall address the factual basis and any supporting documents for the penalty, including any economic benefit, days of violation, etc.

SO ORDERED this 5th day of April, 2012.

A handwritten signature in black ink, appearing to read 'Elyana R. Sutin', written over a horizontal line.

Elyana R. Sutin

Regional Judicial Officer

CERTIFICATE OF SERVICE

The undersigned certifies that the original of the attached **ORDER TO SUPPLEMENT THE RECORD**, in the matter of **RICK NELSON, OWNER, FORT DEVILS TOWER; DOCKET NO.: SDWA-08-2011-0021** was filed with the Regional Hearing Clerk on April 5, 2012.

Further, the undersigned certifies that a true and correct copy of the document was delivered via e-mail to Jean Belille, Enforcement Attorney, U. S. EPA – Region 8, 1595 Wynkoop Street, Denver, CO 80202-1129. True and correct copies of the aforementioned document was placed in the United States mail certified/return receipt requested on April 5, 2012, to:

Rick Nelson, Owner
Fort Devils Tower
601 Highway 24
Devils Tower, WY 82714

And e-mailed to:

Honorable Elyana R. Sutin, Regional Judicial Officer
U. S. Environmental Protection Agency – Region 8
1595 Wynkoop Street
Denver, CO 80202-2466

April 5, 2012


Tina Artemis
Paralegal/Regional Hearing Clerk