

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 7

11201 RENNER BOULEVARD  
LENEXA, KS 66219

2016 JUN 26 AM 9:15

IN THE MATTER OF )

SUPERIOR RESTORATION )  
& CONSTRUCTION LLC, )

Respondent. )  
\_\_\_\_\_ )

Docket No. TSCA-07-2016-0017

**SECOND ORDER TO SUPPLEMENT THE RECORD**

Complainant, U.S. Environmental Protection Agency (EPA), Region 7, has moved for entry of a Default judgment against Superior Restoration & Construction LLC ("Respondent") for its failure to file an Answer in this matter. Complainant initiated this matter on August 16, 2016 alleging that Respondent violated Section 409 of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2689, and the federal regulations set forth at 40 C.F.R. Part 745, Subpart E.

This proceeding is governed by the Consolidated Rules of Practice, 40 C.F.R. Part 22 ("Consolidated Rules"). Section 22.17 of the Consolidated Rules provides in part:

- (a) *Default.* A party may be found to be in default: after motion, upon failure to file a timely answer to the complaint . . . Default by respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations . . .
- (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 penalty or other relief sought and state the legal and factual grounds for the relief requested.
- (c) *Default order.* When the Presiding Officer finds that default has occurred, he shall issue a default order against the defaulting party as to any or all parts of the proceeding unless the record shows good cause why a default order should not be issued. If the order resolves all outstanding issues and claims in the proceeding, it shall constitute the initial decision under these Consolidated Rules of Practice. The relief proposed in the complaint or in the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act.

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).

The Environmental Appeals Board (EAB), in *In re John A. Biewer Co. of Toledo, Inc. & In re John A. Biewer Co. of Ohio, Inc.*, RCRA (3008) Appeal Nos. 10-01 & 10-02, slip op. (EAB February 21, 2013), discussed at some length, the authority of the presiding officer under the Consolidated Rules to order a party, or an officer or agent thereof, to “produce testimony, document or other non-privileged evidence, and failing production thereof without good cause being shown to draw adverse inferences against that party.” *Id.* at 13; 40 C.F.R. § 22.4(c)(5). Additionally significant to the case at hand, was the EAB’s observation that, “. . . the Agency’s burden of persuasion as to penalty does not end with a concession of liability and a counsel’s legal memorandum in support of the penalty assessment explaining how the penalty was derived. . . .” *Id.* at 17. Recognizing that while conceded violations alone can indeed form the base range for a penalty (under RCRA penalty guidance which was applicable in that case), EAB noted the RCRA penalty guidance provides discretion to adjust a penalty up or down based on various factors. Similarly, TSCA and the Consolidated Enforcement Response and Penalty Policy for the Pre-Renovation Education Rule; Renovation, Repair and Painting Rule; and Lead-Based Paint Activities Rule (ERPP), contain several areas for upward and downward adjustments to the base penalty contained in the penalty matrices. As in *Biewer*, facts deemed admitted as a result of a default are not by themselves sufficient basis upon which the penalty is to be assessed.

On May 23, 2018, Complainant in the above-captioned matter filed a Response to Order to Show Cause and Supplement the Record (“Complainant’s Response”). As directed in the undersigned’s May 1, 2018 Order to Show Cause and Supplement the Record, Complainant submitted a Declaration of Case Review Officer Candace Bednar, “certifying her responsibility for Complainant’s penalty calculation and its compliance with applicable statutory penalty factors and civil penalty guidelines in the LBP Consolidated ERPP.” *Complainant’s Response* at 2.

As noted above, 40 C.F.R. § 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. Therefore, a conclusory allegation that the penalty was calculated in accordance with the statutory factors or penalty calculations is insufficient. These legal and factual grounds are necessary in order for the Presiding Officer to set forth her reasons for adopting the proposed penalty. *See Katzson Brothers, Inc. v. U.S. EPA*, 839 F.2d 1396, 1400 (10<sup>th</sup> Cir. 1988); *Harborlite Corporation v. ICC*, 613 F.2d 1088, 1092-1093 (D.C. Cir. 1979). The Declaration of Candace Bednar only makes a conclusory allegation that the penalty was calculated in

accordance with the statutory factors and penalty policy. Any facts in support of a proposed penalty can be established by means of an affidavit or declaration of the agency representative who calculated the proposed penalty specifying in detail how the penalty was calculated. *See, e.g., Boston Design & Construction Co., Inc.*, No. TSCA-03-2015-0258, slip op. at Exhibit F (Declaration of Annie Hoyt) and Exhibit G (Declaration of Craig Yussen) (Motion for Default Order Dec. 29, 2016); *RFN Enterprise, Inc.*, No. TSCA-03-2017-0106, slip op. at Exhibit E (Declaration of Craig Yussen) (Motion for Default Order Aug. 4, 2017). Any documents relied upon or generated in the course of that calculation can be referenced in the affidavit or declaration and attached thereto. *See, Charlie Mortillero d/b/a Charlie's Auto Wreckers*, No. CWA Docket VI-99-1622 (EPA RJO August 4, 2000) (arguments cited by counsel in legal memorandum do not constitute evidence. *Id.* at 7 (citing *British Airways v. Boeing Co.*, 585 F.2d 946, 952 (9<sup>th</sup> Cir. 1978) (legal memoranda not evidence), *cert. denied* 440 U.S. 981 (1979)).

**IT IS ORDERED:**

On or before July 20, 2018, Complainant shall submit the documentation to support the relief sought in the Motion for Default, such as an affidavit or declaration of the person calculating the proposed penalty, which will specify in detail the factual grounds for the proposed penalty. Any document relied upon should also be referenced in the affidavit/declaration and attached to the affidavit/declaration as an exhibit.

Date: June 26, 2018

Karina Borromeo  
Karina Borromeo  
Regional Judicial Officer/Presiding Officer

IN THE MATTER OF Superior Restoration & Construction, LLC, Respondent  
Docket No. TSCA-07-2016-0017

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Second Order to Supplement the Record was sent this day to the following persons in the manner indicated:

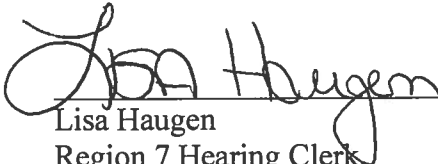
By Hand Delivery

Jared Pesseto  
Assistant Regional Counsel  
United States Environmental Protection Agency, Region 7  
11201 Renner Boulevard  
Lenexa, KS 66219

By Certified Mail, Return Receipt Requested

Mr. Cory Poulsen  
Superior Restoration & Construction LLC  
23625 West 92<sup>nd</sup> Terrace  
Lenexa, KS 66227

Mr. Cory Poulsen  
Superior Restoration & Construction LLC  
7861 Mastin Drive  
Overland Park, KS 66204

 6/26/18  
Lisa Haugen  
Region 7 Hearing Clerk