

BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:

Astro Auto Wrecking, LLC,

Federal Way, Washington,

Respondent.

DOCKET NO. CWA-10-2021-0097

SHOW CAUSE ORDER

1. INTRODUCTION

1.1 This case is brought under the authority of Section 309(g) of the Clean Water Act (“CWA”), 33 U.S.C. § 1319(g). The Director of the Enforcement and Compliance Assurance Division of the United States Environmental Protection Agency (“EPA”), Region 10 (“Complainant”), filed a complaint (“Complaint”) alleging that Astro Auto Wrecking, LLC (“Respondent”), failed to comply with terms and conditions of Industrial Stormwater General Permit number WAR011869 (“ISGP”), issued by the state of Washington, in violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a). To address these alleged violations, Complainant proposes the assessment of a Class II civil penalty against Respondent as authorized by Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B). Respondent has not filed an answer to the Complaint.

1.2 Complainant has now filed Complainant’s Motion for Default Judgement (“Motion”), together with a Memorandum in Support of Complainant’s Motion for Default (“Memo”),

explaining that the failure of Respondent to answer to the Complaint provides the basis for a default order. Complainant obtained an initial stay of the Motion to allow Complainant and Respondent an opportunity to negotiate a resolution of the claims in this matter, but the parties were unable to reach a settlement. Complainant therefor requests issuance of a default order that includes a finding of liability for violations of the CWA and the assessment of a civil penalty in the amount of \$35,400. Respondent has not filed a response to the Motion.

1.3 This proceeding is governed by 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 (“Rules”), 40 C.F.R. Part 22. The undersigned Regional Judicial Officer has authority as the Presiding Officer at this stage of the proceeding to rule on the Motion. 40 C.F.R. §§ 22.4(b), 22.16(c), 22.17(a)-(c).

2. PENALTY

2.1 Complainant proposes the assessment of a civil penalty in the amount of \$35,400. Motion at 1; Memo at 11-12. As allowed by the Rules, Complainant has set forth this specific proposal as part of its Motion rather than in the Complaint. *Id.*; 40 C.F.R. §§ 22.14(a)(4)(ii), 22.17(b).

2.2 Complainant provides a narrative explanation in the Memo describing how Complainant considered the requisite statutory criteria in Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3), when determining the requested penalty amount. Memo at 12-18. However, Complainant does not include a supplemental affidavit or declaration from an enforcement officer or equivalent which provides an analysis and calculation demonstrating how the proposed penalty

amount comports with the Interim Clean Water Act Penalty Policy issued by EPA on March 1, 1995 (“Penalty Policy”). EPA has determined that the Penalty Policy “applies to all CWA civil and judicial administrative actions filed after the effective date” of the Penalty Policy. Penalty Policy at 3.

2.3 In considering the amount of a recommended penalty, the Rules provide that the undersigned Presiding Officer is to do so “in accordance with any civil penalty guidelines” issued by EPA under the CWA. 40 C.F.R. § 22.27(b). To assist in that consideration, it is important to have a detailed analysis from Complainant which demonstrates how the proposed penalty amount was calculated as prescribed by the Penalty Policy.

2.4 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 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 form the base range for a penalty (under RCRA penalty guidance which was applicable to that case), the EAB noted the RCRA penalty guidance provides discretion to adjust a penalty up or down based on various

factors. Similarly, the Penalty Policy contains several areas for upward and downward adjustments to the base penalty contained in the penalty matrices. As in *Biewer*, facts deemed admitted because of a default in the instant case are not by themselves sufficient basis upon which a penalty amount is to be assessed.

2.5 The Rules provide that when a motion for default requests the assessment of a penalty, the movant must “state the legal and factual grounds for the relief requested.” 40 C.F.R. § 22.17(b). These legal and factual grounds are necessary for the undersigned Presiding Office to set forth reasons for adopting the proposed penalty. *See Katzson Brothers, Inc. v. US. EPA*, 839 F.2d. 1396, 1400 (10th Cir. 1988); *Harborlite Corporation v. ICC*, 613 F.2d. 1088, 1092-1093 (D.C. Cir. 1979). Any facts in support of a proposed penalty can be established by means of an affidavit or declaration specifying in detail how the proposed penalty was calculated according to the Penalty Policy. *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 on or generated during that calculation can be referenced in the affidavit or declaration and attached thereto. *See, Charlie Mortil/ero dlb/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 (9th Cir. 1978) (legal memoranda not evidence), *cert. denied* 440 U.S. 981 (1979).

3. ORDER

3.1 Complainant shall submit an affidavit or declaration from the individual who calculated the proposed penalty in accordance with the Penalty Policy, which details factual grounds and otherwise supports the requested relief for assessment of a proposed penalty. Any document relied upon in that submission shall be referenced in the affidavit or declaration and attached thereto as an exhibit.

3.2 Complainant shall file and serve the required submission in accordance with the Rules. Respondent shall have 20 days from service of the submission to provide a response.

SO, ORDERED

RICHARD Digitally signed by
MEDNICK RICHARD MEDNICK
Date: 2023.02.27
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Richard Mednick

Regional Judicial Officer

Presiding Officer

U.S. Environmental Protection Agency
Region 10