

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5

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IN THE MATTER OF: )  
)  
Hutton Auto Body )  
and )  
Tri-Village Auto Body, LLC )  
1532 Burgundy Parkway )  
Streamwood, IL 60107 )  
)  
Respondents. )  
\_\_\_\_\_ )

Docket No. RCRA-05-2005-0020  
U.S. ENVIRONMENTAL PROTECTION AGENCY  
REGION V

**DECISION AND ORDER DENYING MOTION FOR DEFAULT**

Complainant instituted this civil administrative action on September 29, 2005, pursuant to Section 3008(a) of the Solid Waste Disposal Act, as amended, also known as the Resource Conservation and Recovery Act of 1976, as amended (RCRA), 42 U.S.C. § 6928(a). The Complaint and Compliance Order filed in this matter alleges that Respondents have violated Section 3007 of RCRA by failing to submit a response to an Information Request issued to them by Complainant on March 10, 2005. Complainant now seeks a Default Order (1) finding all of the facts in the Complaint and Compliance Order admitted; (2) assessing a civil penalty in the amount of \$102,680; and (3) ordering Respondents to submit responses to the outstanding items from the Information Request.

This matter is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (Consolidated Rules) found at 40 C.F.R. Part 22. Consolidated Rules § 22.17 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; upon failure to comply with the information exchange requirements of § 22.19(a) or an order of the Presiding Officer; or upon failure to appear at a conference or hearing. 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

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 . . . .

40 C.F.R. § 22.27(b).

With regard to assessing a civil penalty for violations of its provisions, RCRA § 3008(a)(3) (42 U.S.C. § 6928(a)(3)) provides:

. . . Any penalty assessed in the order shall not exceed \$25,000 per day of noncompliance for each violation of a requirement of this subchapter. In assessing such a penalty, the Administrator shall take into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.

EPA's RCRA Civil Penalty Policy sets forth a formula for arriving at a penalty assessment that includes: (1) determining a gravity-based penalty from a penalty assessment matrix; (2) adding a "multi-day" component, as appropriate, to account for a violation's duration; (3) adjusting the sum of these two components for case specific circumstances and (4) adding to this amount the appropriate economic benefit gained through non-compliance.

The record in this matter includes a one-page document entitled "Penalty Summary Sheet Hutton Auto Body" (Attachment A to the Complaint). The Penalty Summary Sheet includes a brief description of the nature of the violation, a citation to the statute, the category of degree of harm and extent of deviation from the statutory requirement (moderate/major), the dollar amounts of the gravity-based and multi-day penalty components (\$10,316 and \$92,364, respectively) and the total penalty amount (\$102,680). The Complaint explains the basis of the mathematical calculation of the proposed civil penalty, the statutory basis for its assessment and states that "Complainant has considered the facts and circumstances of this case with specific reference to U.S. EPA's 2003 RCRA Civil Penalty Policy."

As noted above, Consolidated Rules § 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. A conclusory allegation that the penalty was calculated in accordance with the statutory factors or penalty policy is insufficient. *See Katzson Bros. Inc. v. U.S. EPA*, 839 F.2d 1396, 1400 (10<sup>th</sup> Cir. 1988). Submission of an affidavit by a person responsible for calculating the penalty, explaining how the category of harm/extent of deviation was arrived at and the underlying factual basis for the gravity-based and multi-day penalty components, is one way of establishing the factual basis for the proposed penalty. Should Complainant choose to address the service and/or pleading defect noted above and renew its motion for default, it should also explain

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

Given the serious consequences that ensue from a finding of default, such orders “are not favored and doubts are usually resolved in favor of the defaulting party.” *In re Rybound, Inc.*, 6 E.A.D. 614, 616 (1996) (citing *In re Thermal Reduction Co., Inc.*, 4 E.A.D. 128, 131 (1992)).

### 1. Service of Process

As a preliminary matter, a finding of default must include a finding that Respondents were properly served with a copy of the Complaint. Such a finding cannot be made on the basis of the record in this matter. Complainant alleges that both Respondents named in this matter, Hutton Auto Body and Tri-Village Auto Body LLC, are Illinois corporations. Consolidated Rules § 22.5(b) governs service of complaints and provides in part:

(1) *Service of complaint.* (i) Complainant shall serve on respondent, or a representative authorized to receive service on respondent’s behalf, a copy of the signed original of the complaint. . . . Service shall be made personally, by certified mail with return receipt requested, or by any reliable commercial deliver service that provides written verification of delivery.

(ii)(A) Where respondent is a domestic or foreign corporation. . . complainant shall serve an officer, partner, a managing or general agent, or any other person authorized by appointment or by Federal or State law to receive service of process.

(iii) Proof of service of the complaint shall be made by affidavit of the person making personal service, or by properly executed receipt. Such proof of service shall be filed with the Regional Hearing Clerk immediately upon completion of service.

Complainant has submitted a copy of the return receipt green card as proof of service. That green card is addressed to “Ms Bernice Hutton, Owner, Hutton Auto Body”. The signature on the green card is possibly that of Jim Hutton and it is dated October 3. The Complaint fails to allege, and there is no evidence in the record to establish, that Jim Hutton is “an officer, partner, a managing or general agent, or any other person authorized by appointment or by Federal or State law to receive service of process” on behalf of Hutton Auto Body or Tri-Village Auto Body as required by the Consolidated Rules. Thus, Complainant has failed to establish that the Complaint was properly served on Respondents and a default order cannot be issued.

### 2. Penalty Justification

The Consolidated Rules provide in pertinent part that:

the legal and factual grounds for the penalty requested.

### 3. Other Issues

Finally, the Presiding Officer notes additional issues that may impact a ruling on any subsequent motion for default. First, it appears from the record that Respondent Hutton Auto Body Inc. may be a dissolved corporation. State law may, therefore, impact its capacity to be named a party to this matter. Second, the Request for Information that is the gravamen of this administrative action was addressed only to Hutton Auto Body and not to Tri-Village Auto Body LLC. While the Complaint states that both entities are Illinois corporations and that both are the owner and operator of the facility at issue, it does not explain the relationship, if any, between the two, or on what basis Tri-Village would be responsible for complying with a Request for Information that was not addressed to it.<sup>1</sup>

### 4. Conclusion

Complainant's Motion for Default Order is denied without prejudice. Nothing in this Decision and Order shall preclude Complainant from pursuing future default proceedings as it deems appropriate.

SO ORDERED.

Dated: *January 10, 2006*

*Marcy A. Toney*  
Marcy A. Toney  
Regional Judicial Officer

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<sup>1</sup> Complainant's letter of October 21, 2005, seeking complete responses to the Information Request is addressed to "Bernice Hutton, Owner, Hutton Auto Body, also known as Tri-Village Auto Body." If Tri-Village Auto Body is simply another name for Hutton Auto Body, the Complainant should so state.

REGIONAL

In the MATTER of HUTTON AUTO BODY  
and TRI-VILLAGE AUTO BODY, LLC  
Respondents  
Docket No. RCRA-05-2005-0020

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US ENVIRONMENTAL  
PROTECTION AGENCY  
REGION V

CERTIFICATE OF SERVICE

I certify that the foregoing Order, dated January 10, 2006, was sent this day in the following manner:

Original hand delivered to:

Regional Hearing Clerk  
U.S. Environmental Protection  
Agency, Region 5  
77 West Jackson Boulevard  
Chicago, IL 60604-3590

Copy hand delivered to  
Attorney for Complainant:

Robert H. Smith  
U. S. Environmental Protection  
Agency, Region 5  
Office of Regional Counsel  
77 West Jackson Boulevard  
Chicago, IL 60604-3590

Copy by U.S. Mail First Class to:

Bernice Hutton  
Hutton Auto Body  
1532 Burgundy Parkway  
Streamwood, IL 60107

Dated: 1/10/06

By:   
Darlene Weatherspoon  
Secretary

