



**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION VII**



)	
IN THE MATTER OF)	
)	Docket No. CAA-7-2000-0010
JAMES W. VAUGHN, JR.,)	
)	
Respondent)	

DECISION ON MOTION FOR DEFAULT ORDER

This decision is upon motion for issuance of a default order, which seeks assessment of a civil penalty. For the reasons stated herein, the motion is denied.

Background

This matter was initiated pursuant to section 113(d) of the Clean Air Act (“CAA”), 42 U.S.C. § 7413(d), by the filing of an administrative complaint on February 25, 2000. The complaint, issued by the Director, Air, RCRA, and Toxics Division, Environmental Protection Agency, Region VII (“Complainant”), contained one count alleging violations of four requirements of the CAA. The complaint proposed to assess a penalty of \$1,650. Complaint ¶14. According to the complaint, the penalty proposal was based, *inter alia*, on “the size of the Respondent’s business... .” Additionally, “The size of violator component calculated under the Appendix X Penalty Policy for this proposed penalty assessment is calculated by applying an adjustment factor of .1 for unknown net worth (assuming sales less than \$100,000)... .” Complaint ¶14. The complaint further states that it “was drafted based upon the best information available to Complainant, including financial information... .” Complaint ¶15.

The complaint was directed to James W. Vaughn, Jr., described in the complaint as a “person” as defined in Section 302(e) of the Act, 42 U.S.C. § 7602(e), who receives and has received for disposal at its facility at 3802 E. 78th Street, Kansas City, Missouri, among other things, appliances, including refrigerators, freezers, air conditioners, and automobiles containing air conditioner units. The record indicates that the complaint was received by Respondent, James W. Vaughn, Jr. at Respondent’s mailing address by certified U.S. mail on February 26, 2000 and that Respondent did not file an answer or other response to the complaint within the time allowed by the applicable procedural rule, 40 C.F.R. § 22.15(a). To date, Respondent has not filed an answer or other response to the complaint.

On April 17, 2000 counsel for Complainant filed a motion for a default order based on Respondent’s failure to file an answer to the complaint. The record indicates that Respondent was served with the motion and a proposed default order, and to date has not responded to the motion. The time allowed for responding to the motion under 40 C.F.R. §22.16(b) has expired.

Discussion

A default order recommending the assessment of a penalty must contain elements necessary to ensure that procedural safeguards are afforded, including a delineation of the specific factual basis for the derivation of the penalty to be assessed.¹ See Katzson Bros., Inc. v. U.S. Environmental Protection Agency, 839 F. 2d 1396 (10th Cir. 1988). A “conclusory finding” of the appropriateness of a particular penalty amount is insufficient. Id. at 1400-1401. For a default order to contain the specific factual basis

¹ “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.” 40 C.F.R. §22.17(c) (emphasis added).

for the penalty, the record must provide that basis. Here, the record contains only conclusory statements concerning the derivation of the amount of the Respondent's net worth on which the proposed penalty is based and does not contain an adequate factual basis to support a penalty order.

In this matter, Complainant's argument in support of its motion for a default order is contained in the proposed default order, rather than in the motion or statement in support of the motion. However, since the proposed order was filed with the motion, and was served on the Respondent along with the motion, I have considered the statements in the proposed order in reaching my decision.

The proposed order discusses the penalty calculation in paragraphs 12 through 14. The discussion consists primarily of recitals of the Factors considered by Complainant. However, other than acknowledging that net worth of the Respondent is unknown, there is absolutely no supporting documentation to assume that the Respondent's sales were \$100,000, the figure on which the "size of violator component" was calculated. Complainant has submitted no specific factual information concerning the Respondent's size of business or reference to amount of gross profits, tax returns, audits, financial statements, or other assessments to indicate the dollar volume of Respondent's business which would permit an independent review of the appropriateness of the penalty requested by Complainant.²

According to the penalty policy, "If EPA is unable to obtain information about either net worth or gross revenues, than [sic] the Region should use an *aggressive assumption* (emphasis added) for the size of the violator, and adjust it downward if proof of a lower number is presented during negotiations." See

²Although not mandated by the applicable rules of practice, submission of an affidavit by an individual responsible for calculating a specific penalty might assist in providing factual information necessary to show how the penalty factors have been applied to a specific case.

The United States Environmental Protection Agency's Memorandum of June 7, 1994 and attached Final Penalty Policy for Violations of 40 C.F.R. Part 82, Subpart F: Maintenance, Service, Repair, and Disposal of Appliances Containing Refrigerant which implement Section 608 of the Clean Air Act, Size of Violator. Complainant has provided no factual basis or reasoned explanation for making an assumption of \$100,000 net worth.

Because Complainant's motion and proposed order lack the factual basis necessary to support the assessment of a penalty, the motion for issuance of a default order is denied.

Dated: November 1, 2000

_____/s/_____
Karina Borromeo
Regional Judicial Officer
Region VII

IN THE MATTER OF James W. Vaughn, Jr., Respondent
Docket No. CAA-7-2000-0010

CERTIFICATE OF SERVICE

I certify that the foregoing Decision on Motion for Default Order was sent this day in the following manner to the addressees:

Copy hand delivered to
Attorney for Complainant:

Henry F. Rompage
Senior Assistant Regional Counsel
Region VII
United States Environmental Protection Agency
901 N. 5th Street
Kansas City, Kansas 66101

Copy by Certified Mail Return Receipt to:

James W. Vaughn, Jr.
3802 E. 78th Street
Kansas City, Missouri 64132

Dated: _____

Kathy Robinson
Regional Hearing Clerk