

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

2009 AUG 20 PM 1:53

IN THE MATTER OF:)
)
Fulton Fuel Company)
)
a Montana Corporation)
)
)
Respondent.)
_____)

FILED
EPA REGION VIII
HEARING CLERK

Docket No. CWA-08-2009-0006

ORDER TO SHOW CAUSE AND ORDER TO SUPPLEMENT THE RECORD

Complainant, U.S. Environmental Protection Agency (EPA) Region 8, has moved for entry of a Default Order against Respondent, Fulton Fuel Company, for its failure to file an Answer in this matter.

Complainant initiated this administrative action on February 19, 2009, alleging that Respondent violated Section 311(b)(6) of the Clean Water Act, as amended by the Oil Pollution Act (CWA), 33 U.S.C. § 1321(b)(6), and 40 C.F.R. §§ 112.3, 112.7, 112.9, and 112.10 for the discharge of approximately 10 barrels of oil into navigable waters and adjoining shorelines and for failure to prepare and implement a Spill Prevention, Control and Countermeasure (SPCC) plan. Respondent was served with a copy of the Complaint on February 23, 2009.¹ Respondent has failed to file an Answer as required by 40 C.F.R. § 22.15. See Complainant's Memorandum in Support of Motion for Default (Memo in Support). On July 9, 2009, Complainant moved for the entry of a Default Order against Fulton Fuel Company and the assessment of a penalty of \$32,500.

¹ 40 C.F.R. § 22.5(b)(1) requires complainant to serve a copy of the signed original of the complaint on respondent or a representative authorized to receive service on respondent's behalf. Where respondent is a domestic corporation, complainant shall serve "an officer, partner, a managing or general partner, or any other person authorized by appointment or by Federal or State law to receive service of process." 40 C.F.R. § 22.5(b)(1)(ii)(A). Respondent declined accepting service; however, Respondent's attorney, Mr. Richard L. Beatty, accepted service of the Complaint. No receipt showing proof of service was returned to the Agency. Complainant made further attempts to re-send the Complaint without success. On May 22, 2009, the Complaint was hand delivered and served on Respondent by the Montana Toole County Sheriff, Donna Matoon. (See, Montana District Court Return of Service). Complainant has demonstrated that it has complied with these service requirements.

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 a 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).


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 (10th 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.

Complainant has submitted its Memo in Support, which includes a general narrative explanation of the penalty sought in this matter. However, the Memo in Support is lacking sufficient information on how the Agency arrived at a penalty of \$32,500. While on its face, the Memo in Support appears to demonstrate that the Agency took into account the facts and appropriate policy factors to calculate its proposed penalty, a declaration of the Agency representative responsible for calculation of the penalty should be submitted to demonstrate Agency compliance with the statutory factors and any Agency policies that were used.² In the instant case, there is no mention of how the penalty was calculated. For example, Complainant provides no information, including monetary values, on what the Agency believes the economic benefit and gravity are in this matter. Furthermore, the Memo in Support vaguely implies a penalty policy was used in determining the \$32,500 penalty; however, there is no explicit mention of the use of a penalty policy. Complainant is hereby ORDERED to supplement the record with respect to its penalty calculation **on or before September 30, 2009**.

Furthermore, based on the record and Complainant's Memo in Support, Respondent has not attempted to contact the Agency to resolve this matter. In view of the gravity and consequences of a default, Respondent is ORDERED, on or before **September 30, 2009**, to show cause why it should not be held in default and to answer the Complaint. **Failure on the part of Respondent Fulton Fuel Company to file a timely response to this Order could subject it to assessment of the full amount of the proposed civil penalty of \$32,500.**

SO ORDERED this 20th day of August, 2009.



Elyana R. Sutin
Regional Judicial Officer

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).

CERTIFICATE OF SERVICE

The undersigned certifies that the original of the attached **ORDER TO SHOW CAUSE AND ORDER TO SUPPLEMENT THE RECORD** in the matter of **FULTON FUEL COMPANY, SHELBY, MONTANA, DOCKET NO.: CWA-08-2009-0006** was filed with the Regional Hearing Clerk on August 20, 2009.

Further, the undersigned certifies that true and correct copies of the documents were delivered to Marc D. Weiner, Senior Enforcement Attorney, U. S. EPA – Region 8, 1595 Wynkoop Street, Denver, CO, 80202-1129. True and correct copies of the aforementioned document were placed in the United States mail certified/return receipt requested on August 20, 2009, to:

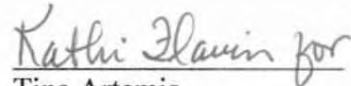
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August 20, 2009


Tina Artemis
Paralegal/Regional Hearing Clerk