UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

2009 NOV 20 AM 10: 26

FILED
EPA REGION VIII
HEARING CLERK

IN THE MATTER OF:	)	
	)	
Fulton Fuel Company	)	**Docket No. CWA-08-2009-0006**
	)	
a Montana Corporation	)	**Proceeding under Subsection 311(b)(6) of**
	)	**the Clean Water Act, 42 U.S.C. §**
	)	**1321(b)(6)**
	)	
Respondent.	)	
	)	

SECOND ORDER TO SUPPLEMENT THE RECORD

This proceeding arises under the authority of section 311(b)(6) of the Clean Water Act, as amended by the Oil Pollution Act ("CWA" or "the Act"), 33 U.S.C. § 1321(b)(6), and 40 C.F.R. §§ 112.3, 112.7, 112.9, and 112.10. This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, and the Revocation or Suspension of Permits ("Consolidated Rules" or "Part 22"), 40 C.F.R. §§ 22.1-22.32.

On July 9, 2009, Complainant moved for the entry of a Default Order against Fulton Fuel Company ("Respondent") and the assessment of a penalty of $32,500. On August 20, 2009, an Order to Show Cause and Order to Supplement the Record was issued by this Court requesting both parties to take action by September 30, 2009. Complainant was ordered to supplement the record with additional information on the penalty calculation either through a declaration or affidavit of an Agency employee.[1] Respondent was ordered to show cause why it should not be held in default or be subject to the full amount of the proposed penalty. Complainant complied with the order. Respondent did not respond.[2]

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1 Consolidated Rule § 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.

2 The Order to Show Cause and Order to Supplement the Record was mailed by certified mail on August 20, 2009 to both addresses listed for Respondent as well as Respondent's attorney. The Orders sent to Respondent were returned unclaimed to EPA from both addresses. Respondent's attorney signed a green card indicating receipt on August 24, 2009.

Pursuant to the August 20, 2009, Order, Complainant filed Declaration of Jane Nakad ("Declaration") on September 9, 2009. Neither the Motion for Default nor the Declaration mention the use of a penalty policy in calculating the penalty in this matter. It appears the penalty was not evaluated in conjunction with the policy, "Civil Penalty Policy for Section 311(b)(3) and Section 311(j) of the Clean Water Act," dated August, 1998 ("Penalty Policy").[3] While the Penalty Policy is not explicitly used in this matter it is used implicitly in several instances.[4]

40 C.F.R. § 22.17(c) states, "the relief proposed in the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act." At this juncture, the Court does not believe the record has been established adequately to award the relief proposed by Complainant. It is Complainant's burden to present and persuade to the Presiding Officer that the relief sought is appropriate. See, 40 C.F.R. § 22.24(a). It is concerning to this Court that Complainant provided only two numbers (the ultimate penalty of $32,500 and a portion of economic benefit $8, 816) without any explanation of how the Agency derived these numbers. A rendition of the statutory factors and a sentence that the proposed penalty is consistent with the CWA statutory factors in the Declaration does not persuade this Court that the penalty is consistent with the record.

The Motion for Default and the Declaration are both lacking any explanation of economic benefit. It is understood both in the Act and the Penalty Policy that violators tend to obtain an economic benefit by avoiding or delaying necessary compliance costs, by obtaining excess profits or by obtaining a competitive advantage. These calculations can often be difficult to determine. However, the fact that no economic benefit calculation was done for the discharge and a random number with no rationale for how it was derived was provided for the Spill Prevention Control and Countermeasure (SPCC) Plan violations is troublesome for this Court. There is insufficient evidence to show that Respondent enjoyed an economic benefit and this Court cannot assign a monetary value to economic benefit.

Furthermore, there is no allocation to the other statutory factors of the approximately $23,000 remaining proposed penalty. If this matter went to hearing, Complainant would be expected to put forth all probative evidence that supports a prima facie case. This expectation is not diminished in a Motion for Default. Complainant should approach a Motion for Default as if it were going to hearing. Therefore,

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3 The Penalty Policy is considered guidance for establishing appropriate penalties for settlement of civil administrative and judicial actions and is not a penalty pleading policy. Therefore, the Agency is not required to use the policy as the basis for its penalty. The Presiding Officer is expected to consider any penalty guidelines issued under the Act (See, 40 C.F.R. § 22.27(b)); however, the policy also is not binding on this Court. See, *In Re Employer's Insurance of Wausau and Group Eight Technology, Inc.*, 6 E.A.D. 735, 761 (EAB, 1997). The policy is instructive in evaluating the statutory factors in assessing the penalty.

4 For example, both the Motion for Default and the Declaration address the violations as "moderate" which is a term of art in the Penalty Policy to address the severity of the violation. Moderate is not defined in the Act or the implementing regulation.

accomplished in writing by supplementing the record and including the information requested above.

This Court requests that the record be supplemented on two distinct issues. The first is the proposed penalty as noted above. The second issue relates to the role of Respondent's attorney, Mr. Richard L. Beatty. It is not clear from the record whether Mr. Beatty represents Respondent in this matter. Mr. Beatty has not filed a Notice of Appearance in this action. However, Mr. Beatty has accepted service for all the pleadings related to this matter. Complainant's Motion for Default also suggests that Mr. Beatty has assisted Respondent in this matter. This court requests confirmation from Mr. Beatty that he is not representing Fulton Fuel Company in this action and that Respondent is Pro Se. If Complainant has any information on this issue it shall provide it to the Court as well.

In accordance with 40 C.F.R. § 22.21(b), the Presiding Officer shall hold a hearing if the proceeding presents genuine issues of material fact. Such hearing will be scheduled, and all parties expected to attend, if the Court determines that there is insufficient evidence, after the record is supplemented, to determine the appropriate penalty.

Complainant is **ORDERED** to supplement the record by December 21, 2009. Respondent and/or Respondent's attorney, Mr. Richard Beatty is **ORDERED** to supplement the record by December 21, 2009.

SO ORDERED This 20th Day of November, 2009.

Elyana R. Sutin
Presiding Officer

CERTIFICATE OF SERVICE

The undersigned certifies that the original of the attached **SECOND ORDER TO SUPPLEMENT THE RECORD** in the matter **FULTON FUEL CO.; DOCKET NO.: CWA-08-2009-0006** was filed with the Regional Hearing Clerk on November 20, 2009.

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

William M. Fulton
Registered Agent for Fulton Fuel Co.
172 Main Street
Shelby, MT 59474

William M. Fulton
Registered Agent for Fulton Fuel Co.
Box 603
Shelby, MT 59474

And

Richard L. Beatty
Attorney at Law
153 Main Street
Shelby, MT 59474

November 20, 2009

Tina Artemis
Paralegal/Regional Hearing Clerk