

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8

2015 JUN 30 AM 10:41

IN THE MATTER OF:)
)
Mackay Investments, LLC)
Jackson Hole Campground)
Teton County, WY)
PWS ID #WY5600520)
)
Respondent)
_____)

FILED
EPA REGION VIII
HEARING CLERK

Docket No. SDWA-08-2013-0058

ORDER TO SUPPLEMENT THE RECORD AND ORDER TO SHOW CAUSE

On May 19, 2015, Complainant, U.S. Environmental Protection Agency (EPA) Region 8, filed a Motion for Default (Motion) against Respondent, Mackay Investments, LLC, seeking a finding of default for failure to file an answer to the September 18, 2013, complaint filed in this action. The Motion and the attached Memorandum in Support of Complainant's Motion for Default (Support Memorandum) requests a \$6,949.38 penalty be imposed.

Complainant filed its Motion pursuant to Section 22.17 of 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 (Consolidated Rules). That section provides in pertinent part that, "[a] party may be found in default . . . after motion, upon failure to file a timely answer to the complaint." 40 C.F.R. § 22.17.

The complaint alleges Respondent violated the Safe Drinking Water Act (SDWA), 42 U.S.C. § 1414(g), by failing to comply with an order issued by EPA. A United States mail return receipt, commonly referred to as a "green card," filed with the Regional Hearing Clerk indicates that the complaint was served on Mr. Jamie Mackay, Registered Agent for Respondent, on September 27, 2013.¹ Support Memorandum at 3. Respondent failed to file an answer as required by 40 C.F.R. § 22.15. On May 19, 2015, Complainant moved for the entry of a Default Order against Mackay Investments, LLC and the assessment of a penalty of \$6,949.38. Pursuant to the Consolidated Rules, "[a] party's response to any written motion must be filed within 15 days, after service of such motion . . . Any party who fails to respond within the designated period waives any objection to the granting of the motion." 40 C.F.R. § 22.16(b). Therefore, after June 18, 2015, it was appropriate for me to address Complainant's Motion.

¹ An answer was required to be filed within 30 days of service of the Complaint, on or about October 28, 2013.

Section 22.17(b) of the Consolidated Rules provides:

(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.

In addition, the Consolidated Rules provide 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 Section 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. 40 C.F.R. § 22.17(b). For the following reasons, Complainant's description of the penalty calculation in this case is insufficient, and more information is needed in order for me to determine whether the proposed penalty corresponds to the applicable penalty criteria.

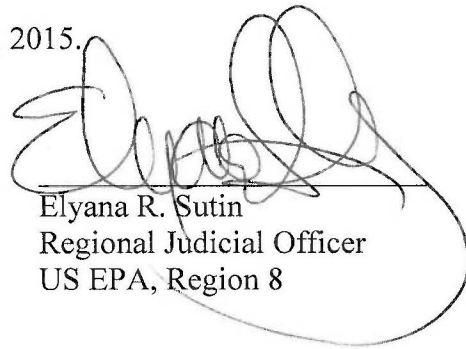
First, Complainant needs to explain how it reached its estimate of \$5 in avoided System operator work costs for the public notice violation. Without providing the analysis that went into this calculation, I cannot determine whether the amount is an adequate representation of the Respondent's avoided costs.

Second, Complainant uses a history of non-compliance/degree of cooperation factor of 8, based on "the number of informal and formal enforcement contacts the System has had related to the violations cited in the original Order and penalty Complaint, and identifying the factor associated with that number of contacts." Declaration of Mario Merida para. 16, at 7. It is unclear what the basis for this formula is and how Mr. Merida arrived at the factor listed in the penalty calculation. Complainant must clearly explain how it calculated the history of non-compliance/degree of cooperation factor as well as provide the justification for using that calculation.

Finally, in regards to the “other unique circumstances” factor of the penalty calculation, the description in the body of the Support Memorandum is inconsistent with the description in the attached Declaration of Mario Merida (Merida’s Declaration). The Support Memorandum identifies the “significant amount of time and effort [EPA has spent] in an attempt to resolve this matter[,]” as well as the need to “deter similar violations by other systems in the future” as the unique circumstances of this case. Support Memorandum at 15. However, Merida’s Declaration describes the unique circumstances as the “initial use of [this] penalty calculation approach” and applies a factor of -0.4 in order to adjust for this initial use. Declaration of Mario Merida para. 18, at 8. It is not clear what the basis is for decreasing the penalty due to the initial use of a calculation. Due to the discrepancy between the Support Memorandum and Merida’s Declaration, and a lack of basis for the decrease in penalty, I cannot determine whether the use of other unique circumstances is appropriate. Thus, Complainant must clarify the discrepancy and provide a justification for decreasing the penalty due to the initial use of a calculation. Complainant is hereby ORDERED to supplement the record by providing the information requested above on or before **July 15, 2015**.

In view of the gravity and consequences of a default, Respondent is ORDERED, on or before **July 15, 2015**, to show cause why it should not be held in default and to answer the Complaint. Respondent should state for the record what “good cause” exists, if any, for its failure to respond to the Complaint. **Failure on the part of Respondent to file a timely response to this Order could subject it to the assessment of the full amount of the proposed civil penalty of \$6,949.38.**

It is so ORDERED this 30th day of June, 2015.



Elyana R. Sutin
Regional Judicial Officer
US EPA, Region 8

CERTIFICATE OF SERVICE

The undersigned certifies that the original of the attached **ORDER TO SUPPLEMENT THE RECORD AND ORDER TO SHOW CAUSE** in the matter of **MACKAY INVESTMENTS, LLC; DOCKET NO.: SDWA-08-2013-0058** was filed with the Regional Hearing Clerk on June 30, 2015.


Further, the undersigned certifies that a true and correct copy of the documents was delivered via email to Mia Bearley, Enforcement Attorney, U. S. EPA – Region 8, 1595 Wynkoop Street, Denver, CO 80202-1129. True and correct copies of the aforementioned document was placed in the United States mail certified/return receipt requested on June 30, 2015, to:

Jamie Mackay, Registered Agent
Mackay Investments, LLC.
2780 N. Moose Wilson Road/P. O. Box 1827
Wilson, WY 83014

Emailed to:

Honorable Elyana R. Sutin
Regional Judicial Officer
U. S. Environmental Protection Agency
1595 Wynkoop Street (8RC)
Denver, CO 80202

June 30, 2015


Tina Artemis
Paralegal/Regional Hearing Clerk