

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 8

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IN THE MATTER OF: )  
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Dockmaster, Inc. )  
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Respondent. )  
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Docket No. CWA-08-2011-0002  
Proceeding under Section 301(a) and  
404 of the Clean Water Act,  
33 U.S.C. § 1311(a) and 1344

EPA REGION VIII  
HEARING CLERK

**ORDER TO SUPPLEMENT THE RECORD**

On August 10, 2011, Complainant filed a Motion for Assessment of Penalty on Default (Motion) against Respondent 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). The Motion seeks a default order against Respondent for a civil penalty of \$10,000.<sup>1</sup>

Consolidated Rule 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). In addition, Section 22.16(a) requires a party to submit "...any affidavit, certificate, other evidence..." supportive of the relief requested. 40 C.F.R. § 22.16(a). Complainant, through legal counsel, has submitted its Memorandum in Support (Memo in Support), which includes a narrative explanation of the penalty sought in this matter. Legal counsel's recital in the Memo in Support of the statutory factors considered does not constitute evidence that is part of the record. See, *In re Hutton Auto Body and Tri-Village Auto Body, LLC*, RCRA-05-2005-002 (EPA RJO Jan. 10, 2006); *In re Water Protection, Inc.*, FIFRA-04-2003-3024 (EPA RJO May 1, 2004); *In re Mario Loyola*, Docket No. CWA-02-2000-3604 (EPA RJO, Feb. 16, 2005). Conclusory findings of the appropriateness of a particular penalty amount are insufficient. See, *Katzson Bros., Inc. v. U.S. EPA*, 839 F. 2d 1396, 1400-1401 (10<sup>th</sup> Cir. 1988). Furthermore, a declaration of the agency representative responsible for calculation of the penalty should be submitted to accurately put evidence in the record.<sup>2</sup>

<sup>1</sup> On March 8, 2011, this Presiding Officer issued a Default Initial Decision and Order (Order) on liability only against Respondent. (2011 EPA RJO LEXIS 20 (RJO Elyana R. Sutin, March 8, 2011). The Environmental Appeals Board (EAB) elected not to review the case *sua sponte* and that Order became final April 25, 2011 pursuant to 40 C.F.R. § 22.27.

<sup>2</sup> 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 (9<sup>th</sup> Cir. 1978) (legal memoranda not evidence); *cert denied*, 440 U.S. 981 99 S.Ct. 1790 (1979).

Furthermore, the Memo in Support states “ Dockmaster gained an economic benefit from its violations, because it avoided any payments for transporting and disposing of the dredged and/or fill material... EPA has not quantified Dockmaster’s avoided costs.” Memo in Support at 9. The Memo in Support also indicates that EPA has discretion, pursuant to Agency guidance, to not seek economic benefit in a penalty. Memo in Support at 9. What is not clear is whether EPA is asking the court to not impose an economic benefit component of the penalty since EPA chose not to calculate this factor.

Complainant is hereby ORDERED to supplement the record with respect to its proposed penalty **on or before September 30, 2011**. A declaration or affidavit shall address the factual basis and any supporting documents for the penalty. If the Agency is not alleging any economic benefit, it should so state this and ask the court to determine an appropriate penalty based on the other Clean Water Act statutory factors.

SO ORDERED this 18<sup>th</sup> day of August, 2011.



Elyana R. Sutin  
Regional Judicial Officer

## CERTIFICATE OF SERVICE

The undersigned certifies that the original of the attached **ORDER TO SUPPLEMENT THE RECORD** in the matter of **DOCKMASTER, INC.; DOCKET NO.: CWA-08-2011-0002**. The documents were filed with the Regional Hearing Clerk on August 18, 2011.

Further, the undersigned certifies that a true and correct copy of the documents were delivered to, Margaret "Peggy" Livingston, 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 August 18, 2011, to:

Glenda Walton  
Dockmaster, Inc.  
517 Cleveland St., SW  
Polson, MT 59860

And e-mailed to:

Honorable Elyana R. Sutin  
Regional Judicial Officer  
U. S. Environmental Protection Agency – Region 8  
1595 Wynkoop Street (8RC)  
Denver, CO 80202-1129

August 18, 2011

  
Tina Artemis  
Paralegal/Regional Hearing Clerk