

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

In the Matter of:)
)
Wisconsin Plating Works of Racine, Inc.)
Racine, Wisconsin)
Respondent.)
_____)

Docket No. CAA-05-2008-0037

Honorable Judge Susan Bro
Presiding Administrative Law Judge

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PROTECTION AGENCY

**COMPLAINANT'S MOTION FOR
PARTIAL ACCELERATED DECISION ON PENALTY**

Complainant, through its undersigned attorney, files this Motion for Partial Accelerated Decision on the Issue of Penalty pursuant to the authority of Section 22.20 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*, 40 C.F.R. § 22.20. As indicated below, Complainant requests that this Honorable Court issue an Order that Complainant followed the Clean Air Act Stationary Source Civil Penalty Policy when calculating the preliminary deterrence amount of the proposed penalty in this matter and that the preliminary deterrence amount of the proposed penalty is reasonable. Complainant's counsel contacted Respondent's counsel by email on June 8, 2009, in advance of this filing, to find out if Respondent opposed the relief requested but has not received a response.

I. The Statutory and Regulatory Provisions

The Administrator of EPA may assess a civil penalty for which a person is liable under Section 113 of the Clean Air Act ("CAA"), 42 U.S.C. § 7413, by administrative order. A person is liable under Section 113 of the CAA for, among other things, failing to comply with regulations promulgated by the Administrator of EPA.

Section 113(e) of CAA, 42 U.S.C. § 7413(e), provides as follows:

In determining the amount of any penalty to be assessed under this section ... the Administrator or the court, as appropriate, shall take into consideration (in addition to such other factors as justice may require) the size of the business; the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence ..., payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation.

The Administrator has instructed, by promulgated rule, that in any complaint issued under her authority:

[t]he dollar amount of the proposed civil penalty shall be determined in accordance with any criteria set forth in the Act [that is, the subject environmental statute] relating to the proper amount of a civil penalty and with any civil penalty guidelines issued under the Act.

40 C.F.R. § 22.14(c).

The Administrator has also stated 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 on the evidence in the record and in accordance with any penalty criteria set for in the Act. The Presiding Officer shall consider any civil penalty guidelines issued under the Act.

40 C.F.R. § 22.27(b). Therefore, the determination of the amount of civil penalty proposed in the Complaint in this case should be based upon an analysis of the known evidence, in consideration of any civil penalty guidelines issued under the Clean Air Act.

II. The CAA Stationary Source Civil Penalty Policy

To assist and provide guidance to those involved in her penalty assessment process under the cited provisions of the CAA, the Administrator issued The Clean Air Act Stationary Source

Civil Penalty Policy, dated October 25, 1991, updated by the January 17, 1992, May 9, 1997 and September 21, 2004 memoranda, which reflects the factors enumerated in Section 113(e) of the Clean Air Act (“CAA Penalty Policy”). CAA Penalty Policy at 2 (Exhibit 7 in Complainant’s Initial Prehearing Exchange). Part of the purpose of the CAA Penalty Policy is “to provide consistent application of the Agency’s civil penalty authorities.” CAA Penalty Policy at 1. The Environmental Appeals Board (“EAB”) in *JHNY, Inc.*, 12 E.A.D. 372, 395 (EAB 2001), stated that:

The Clean Air Act Stationary Source Civil Penalty Policy (“CAA Penalty Policy”) has been designed as guidance to facilitate the consistent application of the statutory penalty factors by courts and the EPA Administrator. CAA Penalty Policy at 1. The CAA Penalty Policy establishes two bases for calculating a penalty amount in EPA civil administrative actions. These are: (1) a minimum deterrence amount, which in turn consists of (a) a gravity component, reflecting the violation's seriousness, and (b) an economic benefit component, capturing the economic benefit that the respondent gained through its noncompliance; and (2) a set of adjustment factors to modify upwards or downwards the gravity component. These adjustment factors are based on a respondent's wilfulness or negligence, degree of cooperation, history of compliance, the environmental damage caused by the violation, and the respondent's ability to pay the penalty. *Id.* at 15-22.

The gravity component is further subdivided into measurement factors, such as the actual or potential harm of the violation, the length of time, size of the violator, and the “importance of the requirement to the regulatory scheme,” which the Penalty Policy defines as the “importance of the requirement to achieving the goals of the Clean Air Act and its implementing regulations.” *Id.* The Penalty Policy assigns recommended dollar values commensurate with the degree to which a factor is reflected in a particular violation and the violation's nature. *Id.* at 9-15. For example, for the “importance of the requirement to the regulatory scheme” factor, the CAA Penalty Policy assigns a range of dollar values for different violations of CAA requirements (e.g., operating and maintaining pollution control equipment, monitoring, and recordkeeping) according to the harm the particular violation causes to the regulatory scheme. *Id.* At 12-13.

JHNY, Inc., 12 E.A.D. 372, 395 (EAB 2001).

III. The Standard for Accelerated Decision

The Presiding Officer, upon motion of any party or *sua sponte*, may at any time render an accelerated decision in favor of the complainant or the respondent as to all or any part of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as she may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law, as to all or any part of the proceeding. 40 C.F.R. § 22.20(a). *See also, BWX Technologies, Inc.*, 9 E.A.D. 61, 74-75 (EAB 2000); *In the Matter of Four Corners Wholesale, Inc.*, Docket No. FIFRA-9-2007-008 (May 29, 2008); *In the Matter of Clarksburg Casket Co.*, Docket No. EPCRA-III-165 (June 6, 1997); *In the Matter of Borden Chemicals and Plastics*, Docket No. EPCRA-003-1992 (Feb. 18, 1992); *In the Matter of Urschel Laboratories, Inc.*, RCRA Docket No. V-W-89-R-35 (April 25, 1991). The standard set forth at 40 C.F.R. § 22.20(a) is comparable to the standard for summary judgment under Federal Rule of Civil Procedure 56. *See, In re CWM Chemical Services*, TSCA Appeal 93-1 (EAB May 15, 1995); *In the Matter of Arizona Environmental Container Corp.*, Docket No. EPCRA-09-2007-0028 (Oct. 16, 2008).

The moving party has the burden of showing there is no genuine issue of material fact. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). A “material” issue is one which “affects the outcome of the suit,” *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1985). The party opposing the motion must demonstrate that the issue is “genuine” by referring to probative evidence in the record, or by producing such evidence. *Clarksburg Casket Company*, 8 E.A.D. 496, 502 (EAB 1999); *Green Thumb Nursery*, 6 E.A.D. 782, 793 (EAB 1997).

IV. Argument

Therefore, to prevail on its Motion for Partial Accelerated Decision, Complainant must demonstrate no genuine issue of material fact exists that it followed the CAA Penalty Policy when calculating the preliminary deterrence amount of the proposed penalty in this matter and that the preliminary deterrence amount of the proposed penalty is reasonable under that Policy, and that it is entitled to judgment as a matter of law pursuant to 40 C.F.R. § 22.20(a).

Calculation of the Preliminary Deterrence Amount

Constantinos Loukeris, the assigned environmental engineer in this matter, sets forth the calculation of the preliminary deterrence amount he has performed in this matter in the attached declaration. The calculation follows the amounts set forth in the CAA Penalty Policy based on the facts of this case. More specifically:

- 1) No economic benefit component was calculated due to the minimal cost of compliance here (i.e., monitoring and recording the Freeboard Refrigeration Device (“FRD”) temperature during the weeks of February 26, 2007, March 5, 2007, April 2, 2007, May 14, 2007, June 11, 2007, and June 25, 2007).
- 2) No level of violation component was calculated since there was no monitoring data.
- 3) The toxicity of pollutant component is based on the fact that Wisconsin Plating’s violations involve the use of trichloroethylene, a hazardous air pollutant under Section 112 of the CAA, 42 U.S.C. § 7412.
- 4) No sensitivity of environmental component was applied since it does not apply to NESHAP cases.

5) A length of violation component is based on the fact that the time from when the violations began (February 26, 2007) to when the violations ceased (June 25, 2007) is five months.

6) The importance to regulatory scheme component is based on the fact that Wisconsin Plating failed to both monitor the FRD temperature and record the FRD temperature during the weeks of February 26, 2007, March 5, 2007, April 2, 2007, May 14, 2007, June 11, 2007, and June 25, 2007.

7) The size of violator component is based upon the reported net worth of Wisconsin Plating on a February 29, 2008 Dun and Bradstreet report (Exhibit 12 in Complainant's Initial Prehearing Exchange). The size of this component has been verified through the review of the net worth of Wisconsin Plating in documents that have been provided to U.S. EPA as claimed confidential business information ("CBI").

8) The inflation adjustment is based upon the September 21, 2004 memorandum which supplements the CAA Penalty Policy (specifically, Exhibit 10 at 3 in Complainant's Initial Prehearing Exchange).

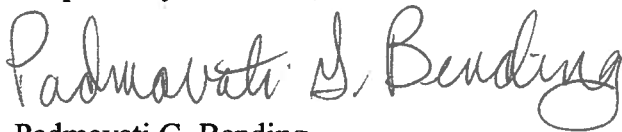
Based on these facts (summarized above and explained in the attached Declaration), a preliminary deterrence amount of \$73,502 was calculated in accordance with the CAA Penalty Policy in this matter. Due to a calculation error, U.S. EPA requested a proposed penalty of \$72,683, which is all it is requesting in this matter.

V. Conclusion

As a result of the pleadings, prehearing exchanges, this Court's previous rulings, and the above arguments, Complainant has demonstrated that no genuine issue of material fact exists concerning its calculation of the preliminary deterrence amount of the proposed penalty for this matter and it has demonstrated that it is entitled to judgment as a matter of law under 40 C.F.R. § 22.20(a).

Complainant respectfully requests this court issue an accelerated decision pursuant to 40 C.F.R. § 22.20(a) finding that Complainant followed the Clean Air Act Stationary Source Civil Penalty Policy when calculating the preliminary deterrence amount of the proposed penalty in this matter and that the preliminary deterrence amount of the proposed penalty is reasonable.

Respectfully submitted,



Padmavati G. Bending
Associate Regional Counsel

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Docket No. CAA-05-2008-0037
Proceeding to Assess a Civil Penalty
Under Section 113(d) of the Clean Air
Act, 42 U.S.C. § 7413(d)

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DECLARATION

I, Constantinos Loukeris, state as follows:

1. I am employed by the United States Environmental Protection Agency (U.S. EPA), Region 5. I have been employed by U.S. EPA as an Environmental Engineer for 6 years and 2 months.
2. Among my responsibilities as an Environmental Engineer, I perform inspections at various facilities to verify a company's compliance with the state, local and federally issued permits, verify compliance with any on-going enforcement actions, witness stack tests and perform penalty calculations for enforcement actions in accordance with U.S. EPA's Clean Air Act Stationary Source Civil Penalty Policy.
3. I am familiar with the National Emission Standards for Hazardous Air Pollutants for Halogenated Solvent Cleaning, codified at 40 C.F.R. Part 63, Subpart T.
4. As part of my job duties, I reviewed the certifications and records of the Wisconsin Plating Works of Racine, Inc. facility (WI Plating).
5. I assisted in drafting the Finding of Violation (FOV) issued by U.S. EPA to WI Plating on March 7, 2008.
6. I attended the conference between U.S. EPA and WI Plating held on March 26, 2008 to discuss U.S. EPA's FOV.
7. During the March 26, 2008 FOV conference, WI Plating provided to U.S. EPA tables indicating WI Plating's usage of their vapor degreaser for the months of February 2007, March 2007, April 2007, May 2007 and June 2007.
8. I reviewed the materials that WI Plating provided during the March 26, 2008 FOV conference.
9. On May 19, 2009, WI Plating provided various financial documents which they were required to provide under an Order made by the court in this matter on April 30, 2009.

10. I have reviewed the Dun & Bradstreet report for WI Plating (Complainant's Exhibit 12).
11. I have reviewed the net worth figures in WI Plating's annual 2007 and 2008 financial statements and first quarter of 2009 financial statements.
12. With the assistance of my assigned attorney, Ms. Padmavati G. Bending, I calculated the proposed penalty in this matter using the Clean Air Act Stationary Source Civil Penalty policy, dated October 25, 1991, updated by the January 17, 1992, May 9, 1997 and September 21, 2004 memoranda.
13. I calculated the preliminary deterrence portion of the proposed penalty in this matter as follows:

A. Economic Benefit Component \$0
 Not applicable due to the low cost of compliance (i.e., monitoring and recording FRD temperature weekly on 6 occasions).

B. Gravity Component

1. Actual or Possible Harm

- a. LEVEL OF VIOLATION \$0
 Due to a lack of monitoring data, this factor cannot be determined.
- b. TOXICITY OF POLLUTANT \$15,000
 Violations of NESHAP emissions standards are not handled by a separate appendix. WI Plating is subject to the Halogenated Solvent Cleaning NESHAP due to their use of trichloroethylene. Trichloroethylene is a hazardous air pollutant (HAP) listed under Section 112 of the Clean Air Act. The Policy provides for \$15,000 per HAP used by a facility.
- c. SENSITIVITY OF THE ENVIRONMENT \$0
 Not applicable; this factor applies for SIP and NSPS cases.
- d. LENGTH OF VIOLATION \$12,000
 This factor focuses on the length of the violation; the longer the violation goes uncorrected, the greater the risk of harm to the environment. The violation occurred from February 2007 through June 25, 2007, which is 5 months of violation. The Policy provides for \$12,000 for 4-6 months of violation.

2. Importance to the Regulatory Scheme

Recordkeeping – a penalty for failure to keep required Records \$15,000

Monitoring – a penalty for failure to perform required \$15,000

monitoring.

3. Size of the Violator \$5,000
The February 29, 2008 Dun and Bradstreet report indicates a net worth of \$333,402. The size of violator penalty for a company with a net worth between \$100,001 and \$1,000,000 is \$5,000 under the Policy. WI Plating's net worth for 2007, 2008, and the first quarter of 2009 are within this range (actual numbers not provided since the information has been claimed CBI under 40 C.F.R. Part 2)
- Sub-total: \$62,000

C. Inflation Adjustment

Based on inflation adjustments made under the Act for violations after March 2004, the gravity component must be multiplied by 1.2895. This results in a preliminary deterrence amount of \$73,502.

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct.

SIGNED: _____

Constantinos Loukeris
Environmental Engineer
U.S. EPA, Region 5

DATE: _____

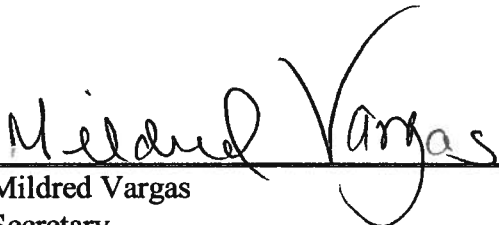
6/8/2009

CERTIFICATE OF SERVICE


I hereby certify that today I filed personally with the Regional Hearing Clerk, Region 5, United States Environmental Protection Agency, 77 West Jackson Boulevard (E-19J), Chicago, Illinois, 60604-3590, the original document and a copy entitled Complainant's Motion for Partial Accelerated Decision on Penalty for this civil administrative action, and that I issued to the Court (via pouch mail) and Respondent's Counsel (via first class mail) a copy of the original document:

The Honorable Susan L. Biro
Chief Administrative Law Judge
U.S. Environmental Protection Agency
Mail Code 1900L
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

Christopher T. Nowotarski
Stuart M. Sheldon
Stone, Pogrund and Korey, LLC
1 East Wacker Drive, Suite 2610
Chicago, IL 60601



Mildred Vargas
Secretary



Date