

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8**

2011 JUN 17 AM 8:41

IN THE MATTER OF:)
)
Cheerful Cesspool Service)
)
18758 Surface Creek Road)
Cedaredge, CO 81413)
)
)
Respondent.)
_____)

FILED
EPA REGION VIII
HEARING CLERK

Docket No. CWA-08-2009-0017

ORDER TO SUPPLEMENT THE RECORD

On May 10, 2011, Complainant, U.S. Environmental Protection Agency (EPA) Region 8, filed a Motion for Default Order (Motion) against Respondent, Cheerful Cesspool Service, seeking a finding of default for failure to file an answer and failure to timely and fully respond to a section 308 Information Request pursuant to the Clean Water Act (CWA), 33 U.S.C. § 1318. The Motion and the attached Memorandum in Support of Complainant’s Motion for Default (Memo in Support) seeks a \$6,200 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.

Complainant filed a complaint in this administrative action on June 18, 2009, alleging that Respondent violated Section 308 of the Clean Water Act, 42 U.S.C. § 1318, by failing to respond to the information request. Respondent was served with a copy of the Complaint on June 19, 2009. (Memo in Support at 2, and Exhibit 10). Respondent has failed to file an answer as required by 40 C.F.R. § 22.15.¹ On May 10, 2011, Complainant moved for the entry of a Default Order against Cheerful Cesspool Service and the assessment of a penalty of \$6,200. In support of its Motion, Complainant attached 14 exhibits. 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 1, 2011, it was appropriate for this court to address Complainant’s Motion.

¹ An answer was required to be filed within 30 days of service of the Complaint, or July 20, 2009.

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 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 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 Memo in Support, which includes a narrative explanation of the penalty sought in this matter. Legal counsel's brief 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 (10th 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.² This court cannot move forward with evaluating the penalty without additional information.


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).

In addition, Complainant's Exhibit 1 to its Motion, the Complaint, has a recital of the statutory factors for determining the penalty. This narrative is inconsistent with the narrative in the Motion and needs to be reconciled. See, Memo in Support at 5, and Exhibit 1 at 5. For example, the History of Noncompliance paragraphs in each document are entirely different. Id. In the Complaint, Complainant states there is prior history of violations and also states EPA received a partial response from Respondent on August 15, 2002. Exhibit 1 at 5-6. In the Memo in Support, Complainant states Respondent has no prior history of similar violations. Memo in Support at 6.

For purposes of determining a penalty in this matter, it is unclear whether Complainant is asking this court to find that Respondent 1) failed to respond entirely to the information request as stated in the Complaint, or 2) failed to fully and timely respond to the information request as stated in the Motion's Memo in Support.

Complainant is hereby ORDERED to supplement the record with respect to its proposed penalty **on or before July 15, 2011**. A declaration or affidavit shall address the factual basis and any supporting documents for the penalty, including any economic benefit, days of violation, etc. Complainant is also ORDERED to clarify the Section 308 violation with respect to what relief it is asking this court to provide.

SO ORDERED this 17th day of June, 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 **CHEERFUL CESSPOOL SERVICE; DOCKET NO.: CWA-08-2009-0017** was filed with the Regional Hearing Clerk on June 17, 2011.

Further, the undersigned certifies that a true and correct copy of the documents were delivered Wendy Silver, 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 June 17, 2011, to:

Merl Reynolds
Cheerful Cesspool Service
18758 surface Creek Road
Cedaredge, CO 81413

June 17, 2011



Tina Artemis
Paralegal/Regional Hearing Clerk