UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION VII

IN THE MATTER OF	)	
	)	Docket No. CAA-7-2000-0010
JAMES W. VAUGHN, JR.,	)	
Respondent	)	

INITIAL DECISION AND DEFAULT ORDER

This initial decision is upon Motion for Reconsideration of Denial of Motion for Default in this proceeding filed by Complainant, Director of the Air, RCRA and Toxics Division, Environmental Protection Agency, Region VII on December 11, 2000. [1] The Motion seeks an order assessing a civil penalty in the amount of one thousand six hundred fifty dollars ($1,650) against Respondent, James W. Vaughn, Jr., an individual who salvages old appliances. Pursuant to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties ("Consolidated Rules"), 40 C.F.R. Part 22, and based upon the record in this matter and the following Findings of Fact, Conclusions of Law, and Determination of Civil Penalty Amount, Complainant's Motion for Default Order is hereby GRANTED.

[1] Complainant previously filed a Motion for Default Order on April 17, 2000. Although Respondent did not oppose the earlier motion, it was denied for failure to include an explanation of the factual basis to support the assessment of a penalty. Decision on Motion for Default Order, November 1, 2000. Although Complainant has filed a document styled "Motion for Reconsideration of Denial of Motion for Default," it appears to actually be an Amended Motion for Default Order and I shall treat it as such.

FINDINGS OF FACT

Pursuant to 40 C.F.R. § 22.17 and the entire record, I make the following findings of fact:

1. The Respondent is James W. Vaughn, a person who receives and has received for disposal at his facility at 3802 E. 78th Street, Kansas City, Missouri, among other things, appliances, including refrigerators, freezers, air conditioners, and automobiles containing air conditioner units.

2. 40 C.F.R. § 82.156(f) states that persons who take the final step in the disposal process of a small appliance, room air conditioning, MVACS, or MVAC-like appliances must either: (1) recover any remaining refrigerant from the appliance in accordance with paragraph (g) or (h) of this section, as applicable; or (2) verify that the refrigerant has been evacuated from the appliance or shipment of appliances previously. Such verification must include a signed statement from the person from whom the appliance or shipment of appliances is obtained that all refrigerant that had not leaked previously has been recovered from the appliance or shipment of appliances in accordance with paragraph (g) and (h) of this section as applicable. This statement must include the name and address of the person who recovered the refrigerant and the date the refrigerant was recovered or a contract that refrigerant will be removed prior to delivery. (3) Persons complying with paragraph (f)(2) of this section must notify suppliers of appliances that refrigerant must be properly removed before delivery of the items to the facility. The form of this notification may be warning signs, letters to suppliers, or other equivalent means.

3. Under Section 601 of the Clean Air Act (the "Act" or “CAA”), 42 U.S.C. § 7671, the term "appliance" means any device which contains and uses a class I or class II substance as a

refrigerant and which is used for household or commercial purposes, including any air conditioner, refrigerator, chiller or freezer.

4. Section 608 of the Act, 42 U.S.C. § 7671g and the regulations at 40 C.F.R. § 82.166(i) state that "(i) Persons disposing of small appliances, MVACS, and MVAC-like appliances must maintain copies of signed statements obtained pursuant to § 82.156(f)(2)."

5. On February 25, 2000, Complainant initiated a civil administrative proceeding for the assessment of a civil penalty pursuant to Section 113(d) of the CAA, 42 U.S.C. § 7413(d), by issuing a Complaint and Notice of Opportunity for Hearing.

6. On February 26, 2000, Respondent received the Complaint and a return receipt for the Complaint was subsequently filed with the Regional Hearing Clerk, EPA, Region VII.

7. The Complaint alleged that Respondent violated section 113(d) of the CAA, 42 U.S.C. § 7413(d) and EPA regulations implementing the Act in that Respondent failed to recover refrigerant remaining in appliances received at its facility, failed to verify from the persons from whom the appliances were received that refrigerant in said appliances had been properly evacuated, failed to obtain signed verification statements and failed to notify the suppliers of said appliances of the requirement to remove refrigerant from said appliances. The Complaint proposed to assess a penalty of one thousand six hundred fifty dollars ($1,650) for these alleged violations.

8. The Complaint stated that Respondent had a right to request a hearing and that, in order to avoid being in default, Respondent was required to file a response to the Complaint within thirty (30) days of service. The Complaint also stated that failure to file a timely answer would

constitute an admission of the allegations in the Complaint and that a default order might then be issued, resulting in the proposed penalty becoming due without further proceedings.

9. The Respondent did not file an answer or other response to the Complaint within thirty (30) days of service and has not, to date, filed an answer or other response to the Complaint.

10. On April 17, 2000, Complainant filed a Motion for Default Order and a proposed order, stating as grounds therefor that Respondent had failed to file an Answer to the Complaint.

11. On May 17, 2000, Respondent was personally served with said Motion for Default Order and proposed order.

12. The Respondent did not file a response to the Motion for default order as described above.

13. The Motion for Default Order was denied in a decision dated November 1, 2000.

14. On December 11, 2000, Complainant filed a Motion for Reconsideration of Denial of Motion for Default Order together with Memorandum of Points and Authorities. See footnote 1, supra. This motion included, as an attachment, information relating to the calculation of the proposed penalty in this matter.

15. On December 15, 2000, Respondent was personally served with said Motion for Reconsideration, Memorandum of Points and Authorities, and a copy of said Decision on Motion for Default Order as referenced in paragraph 13 above.

16. The Respondent has not, to date, filed any response to the December 11, 2000 Motion.

CONCLUSIONS OF LAW

Pursuant to 40 C.F.R. § 22.17 and the entire record, I make the following conclusions of law:

1. The Complaint in this action was lawfully and properly served upon Respondent in accordance with the Consolidated Rules.

2. Respondent was required to file an answer to the Complaint within thirty (30) days of service of the Complaint. 40 C.F.R. § 22.15(a).

3. Respondent's failure to file an answer to the Complaint or otherwise respond to the Complaint constitutes an admission of all facts alleged in the Complaint and a waiver of Respondent's right to a hearing on such factual allegations. 40 C.F.R. §§ 22.15(d) and 22.17(a).

4. The December 11, 2000 Motion for Reconsideration of Denial of Motion for Default was lawfully and properly served on Respondent on December 15, 2000.

5. Respondent was required to file any response to the motion within 15 days of service. 40 C.F.R. § 22.16(b).

6. Respondent's failure to respond to the motion is deemed to be a waiver of any objection to the granting of the motion. 40 C.F.R. § 22.17(a).

7. Respondent is a "person" as defined in Section 302(e) of the Act, 42 U.S.C. § 7602(e).

8. Respondent receives and has received for disposal at his facility at 3802 E. 78th Street, Kansas City, Missouri, among other things, "appliances," as defined in section 601 of the Act, 42 U.S.C. § 7671.

9. Section 608 of the Act, 42 U.S.C. § 7671g and the regulations at 40 C.F.R. § 82.156(f) require that persons who take the final step in the disposal process of a small appliance, room air conditioning, MVACS or MVAC-like appliance must either recover any remaining refrigerant from the appliance in accordance with the Act and EPA regulations implementing the Act or verify that the refrigerant has been evacuated from the appliance or shipment of appliances previously and obtain and maintain verified statements to this effect and must notify suppliers of appliances that refrigerant must be properly removed before delivery of the items to the facility.

10. Respondent's failure to recover refrigerant in said appliances is a violation of 40 C.F.R. § 82.156(f)(1); Respondent's failure to verify from the persons from whom the appliances were received that refrigerant in said appliances had been properly evacuated and failure to obtain verified statements of the same is a violation of 40 C.F.R. § 82.156(f)(2); Respondent's failure to notify the suppliers of said appliances of the requirement to remove refrigerant from said appliances is a violation of 40 C.F.R. § 82.156(f)(3).

11. Respondent's failure to comply with the requirements of 40 C.F.R. § 82.156(f)(1), (2) and (3) above is a violation of Section 608 of the Act, 42 U.S.C. § 7671g for which Respondent is liable for civil penalties under Section 113(d) of the Act, 42 U.S.C. § 7413(d).

12. Section 113(d) of the Act, 42 U.S.C. § 7413(d) authorizes the assessment of a civil penalty of up to twenty seven thousand five hundred dollars ($27,500) against Respondent for each violation as described in paragraph 11 above, for each day the violation continues.

13. Respondent's failure to file a timely answer to the Complaint or otherwise respond to the Complaint is grounds for the entry of a default order against the Respondent assessing a civil penalty for the violation described above.

14. Respondent's failure to file a response to Complainant's Motion for Reconsideration of Denial of Motion for Default dated December 11, 2000 is deemed a waiver of Respondent's right to object to the issuance of this Default Order.

DETERMINATION OF CIVIL PENALTY AMOUNT

Section 113(e) of the CAA, 42 U.S.C. § 7413(e) provides that in determining the amount of the civil penalty to be assessed under section 113(e), the following factors must be considered: (1) the size of the business; (2) the economic impact of the penalty on the business; (3) the violator's full compliance history and good faith efforts to comply; (4) the duration of the violation; (5) payment by the violator of penalties previously assessed for the same violation; (6) the economic benefit of noncompliance; and (7) the seriousness of the violation. The EPA has also issued a Final Penalty Policy for Violations of 40 C.F.R. Part 82, Subpart F: Maintenance, Service, Repair, and Disposal of Appliances Containing Refrigerant, which is used as guidance for the assessment of penalties for violations of Section 608 of the CAA, as amended, and 40 C.F.R. Part 82, Subpart F.

Complainant requests the assessment of a penalty of one thousand six hundred fifty dollars ($1,650) for the violations stated in the Complaint, based on its analysis of the statutory factors and the EPA policy cited above. In its December 11, 2000 motion, Complainant included additional information showing how the proposed penalty was derived. In determining the amount of the penalty, Complainant considered the economic benefit of avoided labor costs to either check the appliances for

the presence or absence of refrigerant, to verify that refrigerant had been removed prior to delivery to his site, obtain statements from his suppliers or have a written contract in place with his suppliers to be minimal and, therefore, no economic benefit was assessed. Further, Complainant found the seriousness of the violation to be a major deviation from the Act's requirements in that Respondent completely disregarded the Act's requirements to either recover refrigerant or verify that the refrigerant was removed prior to delivery to his site, Respondent did not have refrigerant recovery equipment, did not obtain the required information from suppliers, did not have the required information posted on his site, nor did Respondent have written contracts with his suppliers that refrigerant will be properly removed prior to his acceptance. Complainant also took into account the size of Respondent's business. Although Complainant did not have actual financial information regarding Respondent, it based its assumption of gross revenues on experience in dealing with over a hundred similar operations in the past five years. As previously noted, Respondent has not provided any information concerning the appropriateness of the penalty (or any other aspect of this matter) despite numerous opportunities to do so.

I have determined that the penalty amount proposed by Complainant is appropriate based on the record and on section 113 of the CAA. The penalty amount takes account of the significance of the violations since there is a substantial risk of or actual loss of refrigerant to the environment. The penalty amount is also substantially lower than the statutory maximum penalty of $27,500 per day per violation.

DEFAULT ORDER

Respondent is hereby ORDERED as follows:

1. Respondent James W. Vaughn, Jr. is hereby assessed a civil penalty in the amount of one thousand six hundred fifty dollars ($1,650) and ordered to pay the civil penalty as directed in this order.

2. Respondent James W. Vaughn, Jr. shall pay the civil penalty by certified or cashier's check payable to the Treasurer of the United States within thirty (30) days after this default order has become final. The check shall be sent by certified mail, return receipt requested, to:

Mellon Bank
EPA - Region VII
Regional Hearing Clerk
P.O. Box 360748M
Pittsburgh, Pennsylvania 15251

3. A copy of the payment shall be mailed to the Regional Hearing Clerk, U.S. Environmental Protection Agency, Region VII, 901 N. 5th Street, Kansas City, Kansas 66101. A transmittal letter identifying the name and docket number should accompany both the remittance and the copies of the check.

4. This Default Order constitutes an Initial Decision, as provided in 40 C.F.R. § 22.17(c). This Initial Decision shall become a final order unless (1) an appeal to the Environmental Appeals Board is taken from it by any party to the proceedings *within thirty (30) days from the date of service provided in the certificate of service accompanying this order*, (2) a party moves to set aside the Default Order, or the Environmental Appeals Board elects, *sua sponte,* to review the Initial Decision within forty-five (45) days after its service upon the parties.

IT IS SO ORDERED.

Date: Jan. 22, 2001

/S/
Karina Borromeo
Regional Judicial Officer