



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
 REGION VII
 901 NORTH 5TH STREET
 KANSAS CITY, KANSAS 66101



IN THE MATTER OF)
)
) Docket No. CAA-7-2000-0003
 NANCY ALLEN)
 and)
 RUSSELL ZOOK d/b/a)
 HASKINS RECYCLING)
)
 Respondent.)

INITIAL DECISION AND DEFAULT ORDER

By Motion for Default Order filed June 16, 2000, Complainant, the Director of the Air, RCRA (Resource Conservation and Recovery Act), and Toxics Division, United States Environmental Protection Agency, Region VII (“EPA”), moved for a default judgment against Respondent, Nancy Allen and Russell Zook d/b/a Haskins Recycling for liability under the Clean Air Act, 42 U.S.C. § 7401 *et seq.*, in the full amount of the penalty in the Complaint filed December 14, 1999, Eighteen Thousand Five Hundred (\$18,500) Dollars.

Pursuant to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties at 40 C.F.R. Part 22, 64 Federal Register 40138 (July 23, 1999) and based upon the record in this matter and the following Findings of Fact, Conclusions of Law, and Determination of Penalty, Complainant’s Motion for Default Judgment is hereby GRANTED in part and DENIED in part. The Respondent, Russell Zook, is hereby found in default and a civil penalty is assessed against him in the

amount of \$18,500. Complainant's Motion for Default Order against Respondent Nancy Allen is hereby denied.

BACKGROUND

This civil administrative action arises under Section 113(d) of the Clean Air Act ("CAA"), 42 U.S.C. § 7413(d). This proceeding is governed by 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") at 40 C.F.R. Part 22, Subpart I, 64 Federal Register 40138 (July 23, 1999).

Section 114(a) of the CAA, 42 U.S.C. § 7414(a) provides the EPA Administrator or authorized representative with authority to, among other things, require any person subject to any requirements of the CAA (with an exception not applicable in this case) to provide such information as the Administrator or authorized representative may reasonably require. On December 14, 1999, a Complaint was issued against the Respondent alleging violation of Section 114(a) of the CAA, 42 U.S.C. § 7414(a), due to Respondent's failure to submit information to EPA in accordance with said provision. A civil penalty of Eighteen Thousand Five Hundred (\$18,500) Dollars was proposed in the Complaint.

The Complaint issued to Respondent states in paragraph 20, pages four and five, in a section entitled "Answer and Request for Hearing" that, "If Respondents fail to file a written answer and request for a hearing within thirty (30) days of service of this Complaint and Notice of Opportunity for Hearing, such failure will constitute a binding admission of all of the allegations in this Complaint, and a waiver of Respondent's right to a hearing under the Act. A Default Order may thereafter be issued by the Regional

Administrator, and the civil penalties proposed therein shall become due and payable without further proceedings.”

The Complaint in this matter names Nancy Allen and Russell Zook d/b/a Haskins Recycling as Respondent. On September 13, 1999, two letters from EPA requiring Respondent to provide information to EPA pursuant to Section 114 of the CAA were hand-delivered to Nancy Allen and to Russell Zook. The return of service stated that, “Ms. Allen was not there. I left both letters with a Mr. Russell Zook.” No response to the letter was received by either Nancy Allen or Russell Zook. On February 4, 2000, Russell Zook was personally served by the Washington County, Iowa Sheriff’s Department with the Complaint after attempts to serve Nancy Allen and Russell Zook by certified mail were unsuccessful. On May 8, 2000, a notice to file an answer to the Complaint was hand-delivered to Russell Zook after attempts to deliver the same by certified mail were unsuccessful. To date, Nancy Allen and Russell Zook have failed to file an Answer to the Complaint.

On June 16, 2000, Complainant filed a Motion for Default Judgment. On June 30, 2000, Russell Zook was personally served with said Motion for Default Order and a Proposed Default Order by the Washington County, Iowa Sheriff’s Department. To date, Nancy Allen and Russell Zook have failed to file a Response to Complainant’s Motion for Default Judgment.

FINDINGS OF FACT

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

1. The Complainant, by delegation from the Administrator of the EPA, and the Regional Administrator, EPA, Region VII, is the Director of the Air, RCRA and Toxics Division, EPA, Region VII.

2. On December 14, 1999, pursuant to Section 113(d) of the Clean Air Act, 42 U.S.C. § 7413(d), Complainant filed an administrative Complaint against the Respondents, Nancy Allen and Russell Zook d/b/a Haskins Recycling, alleging violation of Section 114(a) of the Act, 42 U.S.C. § 7414(a) and seeking an administrative penalty of Eighteen Thousand Five Hundred (\$18,500) Dollars.

3. On February 4, 2000, Respondent Russell Zook was personally served with the above-referenced Complaint by the Washington County, Iowa Sheriff's Office, after attempts to serve Respondent by certified mail were unsuccessful.

4. Based on the allegations of the Complaint and the record before me:

(1) Respondent(s) are Nancy Allen and Russell Zook d/b/a Haskins Recycling and are each a "person" as defined in Section 302(e) of the CAA, 42 U.S.C. § 7602(e).

(2) Respondent Russell Zook receives and has received for disposal at his facility in Ainsworth, Iowa, among other things, appliances, including refrigerators, freezers, and air conditioners containing class I and class II refrigerants.

(3) Section 114(a) of the CAA, 42 U.S.C. § 7414(a) provides the Administrator with authority to, among, other things, require any person subject to any requirements of CAA (with an exception not applicable here) to provide such information as the Administrator may reasonably require.

(4) On May 27, 1999 and July 20, 1999, Complainant issued a letter pursuant to Section 114 of the Clean Air Act requiring submittal of documents and information to determine compliance with the requirements of Sections 608 and 609 of the Clean Air Act. The Letter was hand delivered to Russell Zook on September 13, 1999, after attempts to deliver the document by certified U.S. mail were unsuccessful.

(5) Respondent Russell Zook was to provide the required information within (10) days of receipt or by September 23, 1999.

(6) To date, Respondent Russell Zook has failed to provide the requested information.

(7) Section 113(d) of the CAA, 42 U.S.C. § 7413(d) authorizes a civil penalty of up to \$27,500 per day for each violation of the CAA.

5. The term “person” is defined in § 302(e) of the CAA to include “an individual, corporation, partnership, association, State, municipality, political subdivision of a State, and an agency, department, or instrumentality of the United States and any officer, agent, or employee thereof.”

6. There is no proof of service upon Respondent Nancy Allen of the Section 114 letter requiring submittal of documents and information to determine compliance with the requirements of Sections 608 and 609 of the Clean Air Act, Complaint, notice to file Answer to Complaint, or Motion for Default Order, nor has there been any identification or allegation of the individual served, Russell Zook, as “officer, partner, managing or general agent, or . . . other person authorized by appointment or by Federal or State law to receive service of process” for a corporation, partnership, or other unincorporated association which is subject to suit under a common name, or as a representative of an individual respondent. 40 C.F.R. § 22.5(b)(1)(i) and 22.5(b)(1)(ii)(A).

7. It is impossible to determine from the record whether Respondent is a corporation, partnership, or other type of legal entity. 40 C.F.R. § 22.5 sets forth specific requirements for proper service, compliance with which is not apparent from the record.

8. The Consolidated Rules provide that an order of default may be issued “after motion, upon failure to file a timely answer to the complaint; upon failure to comply with the information exchange

requirements of § 22.19(a) or an order of the Presiding Officer; or upon failure to appear at a conference or hearing. Default by respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations." 40 C.F.R. § 22.17(a).

9. On May 8, 2000, Respondent Russell Zook received by hand-delivery a notice to file an Answer to the Complaint, Docket No. CAA-7-2000-0003 from EPA, after attempts to serve Respondent by certified mail were unsuccessful.

10. To date, Respondent Russell Zook has failed to file an Answer to the Complaint.

11. On June 16, 2000, Complainant filed a Motion for Default seeking assessment of the civil penalty sought in the Complaint.

12. On June 30, 2000, Respondent Russell Zook was personally served with a Motion for Default Order by the Washington County, Iowa Sheriff's Office.

13. To date, Respondent Russell Zook has failed to respond to the Motion for Default Order.

CONCLUSIONS OF LAW

Pursuant to 40 C.F.R. § 22.17(c) and based on the entire record in this matter, I make the following conclusions of law:

1. Jurisdiction for this action is conferred upon Complainant by Section 113(d) of the Clean Air Act, 42 U.S.C. § 7413(d).

2. Pursuant to 40 C.F.R. § 22.5(b)(1)(iii), proof of service of the complaint shall be made by affidavit of the person making personal service, or by properly executed receipt.

3. Respondent Russell Zook is a person under Section 302(e) of the Clean Air Act.
4. The Complaint was properly served on Respondent Russell Zook.
5. The Complaint was not served upon Respondent Nancy Allen and, as such, personal jurisdiction over Nancy Allen is not shown.
6. Respondent Russell Zook's failure to file a timely answer to the Complaint constitutes grounds for issuing the present order finding Respondent Russell Zook in default.
7. Respondent Russell Zook's default constitutes an admission of all facts alleged in the Complaint, as described in the Findings of Fact above, and a waiver of the Respondent's right to a hearing on such factual allegations. 40 C.F.R. § 22.17(a) and 22.15 (d).
8. Section 113(d) of the CAA, 42 U.S.C. § 7413(d), authorizes a civil penalty of up to \$27,500 per day for each violation of the CAA.
9. Respondent Russell Zook was required to comply with Section 114 of the CAA and by failing to comply, Respondent Russell Zook has violated the requirements of Section 114(a) of CAA, 42 U.S.C. § 7414(a) and he is rendered liable for civil penalties pursuant to Sections 113(a)(3) and 113(d) of CAA, 42 U.S.C. §§ 7413(a)(3) and 7413(d).

PENALTY CALCULATION

Under Section 113(e)(1) of the CAA, 42 U.S.C. § 7413(e)(1), the statutory penalty factors to be considered when assessing a penalty include the size of the Respondent's business; the economic impact of the proposed penalty on the Respondent's business; the Respondent's full compliance history and good faith efforts to comply; the duration of the violation alleged in the Complaint as established by credible evidence; payment by the Respondent of penalties previously assessed for the same violation; economic

benefit of noncompliance; and the seriousness of the alleged violation. The EPA guidance document used to implement these statutory penalty factors in a consistent nationwide manner is the *Clean Air Act Stationary Source Civil Penalty Policy* (CAA Stationary Source Penalty Policy) (“penalty policy”).

The penalty policy provides that the starting point for assessing a penalty for violation of Section 608 of the CAA and the implementing regulations, 40 C.F.R. Part 82, Subpart F, is to determine the economic benefit and gravity of the violation.

In accordance with the CAA and the penalty policy, Complainant made the following determinations:

- The economic benefit component, calculated under the Penalty Policy for Count I is \$0, based on the cost of compliance being an insignificant amount.
- The gravity component for Count I is \$16,500 for failure to respond to the Section 114 requirements. (\$15,000 plus an additional upward adjustment of gravity component of 10% (\$1,500) pursuant to the Civil Monetary Inflation Adjustment Rule, 28 U.S.C. § 2461, as amended by 31 U.S.C. § 3701)
- The size of violator component calculated under the Penalty Policy for this proposed penalty assessment is \$2,000 where the net worth of Respondent is unknown.
- The total proposed penalty is derived by combining the total gravity component of \$16,500 with the economic benefit of \$0, plus the size of violator component of \$2,000 for a total penalty of \$18,500.

I find it reasonable that because Complainant did not know the net worth of Respondent, it utilized the lowest amount for the size of violator component. There were no further adjustments to the proposed

penalty insofar as Respondent failed to respond to the Complaint and failed to cooperate by refusing to take delivery of documents mailed to Respondent, thereby resulting in hand-delivery of all documents.

Evaluating all of the information, I have determined that the proposed civil administrative penalty of \$18,500 is appropriate. The proposed penalty was calculated in accordance with Section 113 of the CAA, 42 U.S.C. § 7413, and the CAA Stationary Source Penalty Policy. The record supports the proposed penalty. A civil penalty of Eighteen Thousand Five Hundred (\$18,500) Dollars is hereby assessed against the respondent Russell Zook.

DEFAULT ORDER

Pursuant to the Consolidated Rules at 40 C.F.R. Part 22, including 40 C.F.R. § 22.17, Complainant's Motion for Default Judgment is hereby GRANTED in part with respect to Russell Zook, DENIED in part with respect to Nancy Allen and Russell Zook is hereby ORDERED to comply with all terms of this Order:

A. Respondent Russell Zook is hereby assessed a civil penalty in the amount of Eighteen Thousand Five Hundred (\$18,500) Dollars and ordered to pay the civil penalty as directed in this order.

B. Respondent Russell Zook 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

C. 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, KS 66101. A transmittal letter identifying the name and docket number should accompany both the remittance and the copies of the check.

D. 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: November 22, 2000

/S/ _____
Karina Borromeo
Regional Judicial Officer