UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN THE MATTER OF:	)	
	)	Docket No. CAA-5-2001-004
Minnesota Brewing Company,	)	
	)	
Respondent.	)	
	)	

INITIAL DECISION AND DEFAULT ORDER

By Motion for Default, the Complainant, the Director of the Superfund Division, United States Environmental Protection Agency ("EPA"), Region 5, Chicago, Illinois, has moved for a Default Order finding the Respondent, Minnesota Brewing Company, liable for violation of the Risk Management Plan regulations found at 40 C.F.R. § 68 et seq. The Complainant requests assessment of a civil penalty in the full amount of Six Thousand Seven Hundred and Fifty Dollars ($6,750), as proposed in the Administrative Complaint.

Pursuant to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties ("the Consolidated Rules"), 40 C.F.R. Part 22, 2000 ed., and based upon the record in this matter and the following Findings of Violation, Conclusions of Law and Penalty Calculation, the Complainant's Motion for Default is hereby GRANTED. The Respondent, Minnesota Brewing Company, is hereby found in default and a civil penalty in the amount of $6,750 is assessed against it.

BACKGROUND

This civil administrative action arises under Section 113(d) of the Clean Air Act ("CAA" or the "Act"), 42 U.S.C. § 7413(d). This proceeding is governed by the Consolidated Rules. Section 112(r)

of the Act, 42 U.S.C. § 7412(r), directed the Administrator of EPA to promulgate regulations to prevent accidental releases of regulated substances and minimize the consequences of those releases that do occur. The regulations, known as the Risk Management Program regulations are codified at 40 C.F.R. § 68 et seq. The Risk Management Program regulations apply to all stationary sources with processes that contain more than a threshold quantity of regulated substance. Each facility subject to the Risk Management Program regulations must submit a Risk Management Plan ("RMP") and update it no later than the date upon which a regulated substance is first present above a threshold quantity in a new process. 40 C.F.R. § 68 et seq. On March 15, 2001, the Complaint in this matter was issued against the Respondent alleging violation of 40 C.F.R. § 68.190. The Complaint alleges that the regulated substance Pentane, was present at the Respondent's facility as of April 21, 2000, and that the Respondent did not update its Risk Management Plan until August 10, 2000. A civil penalty of Six Thousand Seven Hundred Fifty Dollars ($6,750) was proposed for this alleged violation.

The Complaint issued to the Respondent states in paragraph 34, in the section entitled "Answer," that:

> If Respondent does not file a written Answer within thirty (30) calendar days of receiving this Complaint, the Presiding Officer may issue a default order, after motion, under Section 22.17 of the Consolidated Rules, 40 C.F.R. § 22.17(c). Default by Respondent constitutes an admission of all factual allegations in the Complaint and a waiver of the right to contest the factual allegations. As provided by 40 C.F.R. § 22.17(d), Respondent must pay any penalty assessed in a default order without further proceedings thirty (30) days after the default order becomes the final order of the Administrator of U.S. EPA pursuant to 40 C.F.R. §22.27(c).

Service of the Complaint was complete on March 21, 2001. A copy of the return receipt establishing the date of service has been attached to the Motion for Default.

To date, no Answer has been filed in this matter.

FINDINGS OF VIOLATION

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 is, by delegation, the Director of the Superfund Division, U.S. EPA, Region 5, Chicago, Illinois.

2. The Respondent, Minnesota Brewing Company, a corporation doing business in the State of Minnesota, is a "person," as that term is defined at Section 302(e) of the Act, 42 U.S.C. § 7602(e).

3. On April 14, 2001, pursuant to Section 113(d) of the Clean Air Act, 42 U.S.C. § 7413(d), the Complainant filed an administrative complaint against the Respondent, alleging violation of Section 112(r) of the Act, 42 U.S.C. § 7412(r) and seeking an administrative penalty of Six Thousand Seven Hundred Fifty Dollars ($6,750).

4. The Complaint was properly served on March 21, 2001, as evidenced by a fully executed U.S. Postal Service Return Receipt.

5. Based upon Section 112(r) of the Act, 42 U.S.C. § 7412(r), and 40 C.F.R. § 68 et seq., all stationary sources subject to the Risk Management Plan regulations must submit a Risk Management Plan (RMP). 40 C.F.R. § 68.155(b) et seq.

6. The Risk Management Program regulations require that the owner or operator of a facility subject to the regulations review and update the RMP at specified times. 40 C.F.R. § § 68.190(a) and 68.190(b)(1)-(7).

7. The Respondent timely submitted its RMP to EPA on June 21, 1999.

8. On or before April 21, 2000, the Respondent constructed, at its facility, a new process for the production of fuel-grade ethanol, using Pentane as an ingredient of production.

9. Pentane is a "regulated substance" as the term is defined in 40 C.F.R. § 68.3.

10. On April 21, 2000, the Respondent had present at its facility an amount of Pentane greater than the "threshold quantity" listed in 40 C.F.R. § 68.130, as determined in accordance with the threshold determination requirements of 40 C.F.R. § 68.115.

11. Despite the presence of an amount greater than the threshold quantity of Pentane in a new process at the facility, the Respondent failed to update its RMP until August 10, 2000, the date upon which the Respondent disclosed to EPA its failure to comply with 40 C.F.R. § 68.190(b)(4).

12. On or about August 10, 2000, the Respondent updated its existing RMP and submitted the RMP to EPA.

13. The Complaint was served by certified mail; the return receipt card has been signed.

14. The Respondent has failed to file an Answer to the Complaint.

15. The Respondent was served with a Motion for Default.

16. The Respondent has failed to respond to the Motion for Default.

CONCLUSIONS OF LAW

1. Jurisdiction for this action was conferred upon EPA by Section113(d) of the Clean Air Act, 42 U.S.C. § 7413(d).

2. The Respondent was properly served with the Complaint.

3. The Respondent has not filed an Answer to the Complaint.

4. The Respondent's failure to file an Answer to the Complaint constitutes a default. "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. §§ 22.15(d) and 17(a).

5. By failing to timely update its RMP, the Respondent is in violation of the reporting requirements of 40 C.F.R. Part 68.

6. Section 113(d) of the CAA, 42 U.S.C. § 7413(d), as amended by the Debt Collection and Improvement Act of 1996, 31 U.S.C. § 3701, authorizes a civil penalty of up to $27,500 per day of violation.

7. The 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. 40 C.F.R. 22.17(a).

8. As described in the "Penalty Calculation" section below, I find the Complainant's proposed civil penalty of Six Thousand Seven Hundred and Fifty Dollars ($6,750) is based upon the statutory requirements of the Clean Air Act, 42 U.S.C. § 7413(d), EPA's Clean Air Act Stationary Source Civil Penalty Policy and EPA's Audit Policy.

PENALTY CALCULATION

Under Section 113(e) of the CAA, 42 U.S.C. § 7413(e), the statutory penalty factors include: (1) the size of the violator's 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) payments by the violator of penalties previously assessed for the same violation; (6) the economic benefit of noncompliance; and (7) the seriousness of the violation.

In calculating the $6,750 penalty, EPA relied upon the statutory factors; the "Clean Air Act Stationary Source Civil Penalty Policy," dated October 25, 1991 ("CAA Penalty Policy") and EPA's "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations," as revised on May 11, 2000 (commonly known as the "Audit Policy"). The penalty policy specific to the Risk Management Program had not been finalized on the date the Complaint was filed and, therefore, was not used.

The record submitted in this matter shows that EPA's penalty calculations evaluated the following facts. As the Respondent was out of compliance for a period of 111 days, it was potentially subject to a maximum penalty in excess of $3,000,000. (111 days x $27,500 = $3,052,500). The CAA Penalty Policy contains an economic component and a gravity component. EPA used the "BEN" computer program to determine the economic benefit, and determined there was no economic benefit due to noncompliance. The gravity component resulted in a penalty calculation of $27,000. The burden is on a Respondent to raise and prove any inability to pay the penalty; the Respondent did not raise the issue. Because the facility notified EPA of the violation, the Complainant was able to adjust

the proposed penalty by applying the Audit Policy. Using the Audit Policy, EPA adjusted the proposed penalty to $6,750.

Reviewing EPA's penalty calculation, I find the proposed civil penalty of $6,750 is appropriate and is based upon the statutory requirements found at Section 113(e) of the Clean Air Act, 42 U.S.C. § 7413(e), the CAA Penalty Policy and the Audit Policy.

DEFAULT ORDER

The Respondent is hereby ORDERED as follows:

A. The Respondent is assessed a civil penalty in the amount of Six Thousand Seven Hundred Fifty Dollars ($6,750).

B. Payment shall be made by certified or cashier's check payable to "Treasurer of the United States of America" within thirty (30) days after the effective date of the final order. 40 C.F.R. § 22.31(c). Such payment shall be remitted directly to :

U.S. Environmental Protection Agency
Region 5
P.O. Box 70753
Chicago, Illinois 60673

C. A copy of the payment shall be mailed to the Regional Hearing Clerk (Mail Code R-19J) and Counsel for the Complainant (Mail Code C-14J), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604-3590. 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 by any party to the proceedings *within thirty (30) days from the date of service provided in the Certificate of Service accompanying this order*, or (2) a party moves to set aside the Default Order, or (3) 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.

Dated: August 8, 2002

Thomas V. Skinner
Regional Administrator

Prepared by Regina Kossek, Regional Judicial Officer