UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6
DALLAS, TEXAS

IN THE MATTER OF:	)	
	)	
MERLE BLOOD	)	SDWA DOCKET NO. C98-0005
	)	
Respondent	)	
	)	

DECISION AND ORDER DENYING MOTION FOR DEFAULT

By default motion dated January 7, 1999, the Complainant, Chief of the Water Enforcement Branch, Compliance Assurance and Enforcement Division, United States Environmental Protection Agency (EPA), Region 6, sought issuance of a default order assessing a six thousand dollar ($6,000) civil penalty against Merle Blood, the Respondent.[1] Record evidence shows that Respondent supplies public water through its operations at Blood's Trailer Park located in Marshall County,

[1] Record evidence shows that the filed copy of the administrative complaint commencing this Safe Drinking Water Act (SDWA), 42 U.S.C. § 1414(g), penalty action governed by the Administrative Procedure Act (APA), 5 U.S.C. § 554, was signed by the Director of the Compliance Assurance and Enforcement Division. This tribunal takes official notice that, Region 6 Delegation Nos. R6-9-33-A (August 7, 1995) and R6-9-33-B (August 7, 1995), authorize the Director to maintain this default action. Except for negotiation of consent agreements, these delegations also prohibit SDWA penalty action authority below the Division Director level. Yet, Complainant did not explain why the Chief of the Water Enforcement Branch moved for issuance of a default order in this SDWA penalty action. This Decision and Order provides Complainant the opportunity to explain its actions consistent with 40 C.F.R. 22.22(f).

Oklahoma. As a result, Complainant alleged that Respondent violated Section 1414(g)(3)(B) of the Safe Drinking Water Act, 42 U.S.C. § 300g-3(g)(3)(B), and 40 C.F.R. § 141.86, by failing to comply with an Administrative Order dated October 31, 1997, requiring submission of a sampling plan and collection of tap samples for lead and copper.[2] Pursuant to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits (Consolidated Rules), 40 C.F.R. Part 22, and based on the entire record, this tribunal denies Complainant's motion for default.[3]

I. **STATUTORY AND REGULATORY BACKGROUND**

This Decision and Order specifically addresses whether the administrative record sufficiently shows that Complainant satisfied crucial pre-complaint and procedural requirements. In addition, it also provides a discussion regarding penalty determination factors under SDWA Section 1414(b), and regulatory proof requirements. In pertinent part, SDWA

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[2] Notwithstanding the limitation of authority officially noticed in footnote 1, this tribunal officially notices the authority of the Water Enforcement Branch to issue administrative compliance orders. See Region 6 Delegation No. R6-9-32 (June 20, 1997).

[3] This tribunal's authority to render a decision herein is found at 40 C.F.R.§§ 22.04(b) and 22.16(c).

Section 1414(b) provides that upon finding a violation under the SDWA and implementing regulations, the appropriateness of a civil penalty must reflect "the seriousness of the violation, the population at risk, and other appropriate factors."

In this default action, controlling regulations found at 40 C.F.R. § 22.17(a), authorize a finding of default "upon failure to timely answer a complaint," while 40 C.F.R. § 22.24 requires Complainant to submit evidence showing that "the violation occurred" and the "proposed civil penalty . . . is appropriate." However, 40 C.F.R. § 22.42(c) discloses that issuance of an administrative compliance order is a jurisdictional prerequisite to the filing of a complaint under SDWA Section 1414(g). Thus, after issuance of an administrative compliance order and the filing of a complaint, 40 C.F.R. § 22.15(a) requires an answer to the complaint within twenty (20) days after service. The requirement to file an answer is effectuated by the filing of an original complaint with the Regional Hearing Clerk, and service of a copy to Respondent. Complainant must prove service by affidavit or properly executed return receipt. See 40 C.F.R. §§ 22.05(a) and (b)(v).

II. **FINDINGS OF FACT**

Due to controlling statutory and regulatory provisions, and based on the entire record, this tribunal makes the following findings of fact:

1. Complainant purportedly served Respondent with the April 17, 1998, complaint, which included a copy of an October 31, 1997, Administrative Order (Docket No. 980007). The record does not include any document purporting to be the above Administrative Order. Likewise, the record is barren of any proof that Respondent received a copy of the purported Administrative Order. However, nothing in the administrative record controverts the existence of the above Administrative Order.

2. The record does not include the original April 17, 1998, complaint. While the record includes an original certificate of service for the complaint, there is no proof that Respondent received a copy of the original complaint.

3. According to record evidence, Respondent did not answer the complaint.

4. Complainant filed the original motion for default dated January 7, 1999, with the Regional Hearing Clerk. Complainant also served the same to Respondent by certified mail, return receipt requested, on January 7, 1999.

5. Respondent signed the return receipt on January 11, 1999. Complainant filed the signed return receipt on February 17, 1999. Respondent failed to respond to the motion for default.

6. Complainant's motion for default did not proffer evidence or analysis explaining why the proposed penalty was appropriate.

III. **CONCLUSIONS OF LAW**

Pursuant to controlling statutory and regulatory standards, and based on the administrative record, this tribunal makes the following conclusions of law:

1. Pursuant to 40 C.F.R. § 22.42(c), Complainant must issue an administrative compliance order to Respondent before filing an administrative complaint under SDWA Section 1414(g). Thus, because the record does not include an administrative compliance order, and proof that Respondent was served with such an order, Complainant has not demonstrated conformity with the applicable pre-complaint regulation for SDWA Section 1414(g), administrative penalty actions. See 40 C.F.R. § 22.42(c).

2. Apart from the relevant pre-complaint requirement, 40 C.F.R. §§ 22.05(a) and (b)(v) require Complainant to file the original complaint with the Regional Hearing Clerk, and prove

service by affidavit or properly executed return receipt. This tribunal failed to find any record proof that the complaint was properly served to Respondent. Nor, despite this tribunal's review, does the record include the original complaint. As such, a default order against Respondent lacks justification.

3. Indeed, 40 C.F.R. § 22.15(a) requires Respondent to file an answer to a complaint within twenty (20) days after service of the complaint. However, Respondent's duty to answer is not triggered until it receives the complaint. Because Complainant has not provided proof of service, it is unclear whether Respondent actually received the complaint. As a result, issuance of a default order is premature and unwarranted.[4]

4. Besides the above shortcomings, Complainant's original January 7, 1999, motion for default failed to address statutory penalty determination factors as required by SDWA Section 1414(b). Further, Complainant also failed to address regulatory proof requirements for administrative penalty actions. Complainant's motion for default did not present a

[4] However, because nothing in the record controverts Complainant's certification that Respondent was served, this Decision and Order provides Complainant the opportunity to prove service.

scintilla of probative evidence and analysis concerning the appropriateness of the recommended penalty. See 40 C.F.R. § 22.24.

5. As such, even if the apparent pre-complaint and procedural defects were absent, no penalty assessment against Respondent is appropriate based upon the current record. This tribunal will not blindly assess a penalty recommended by Complainant. Complainant must present prima facie evidence and analysis supporting the appropriateness of the proposed penalty before any assessment by this tribunal.

IV. **DISCUSSION**

Without question, the law favors resolution of cases on their merits. Consequently, default judgements are ill-favored, harsh sanctions, and courts resort to them only in extreme situations. See In Re Rains, 946 F.2d 731, 732-733 (10th Cir. 1991). This case does not represent an extreme situation where entry of a default order is favorable. To the contrary, this case may be one which warrants dismissal.[5]

The Supreme Court recently held that "[w]ithout jurisdiction the court cannot proceed at all in any cause.

[5] Aside from the issues discussed below, Complainant has not provided any evidence or information concerning the Water Enforcement Branch Chief's delegated authority, or lack thereof, to commence a default motion in a SDWA penalty proceeding governed by the APA.

Jurisdiction is power to declare law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." Steel Co. v. Citizens for a Better Environment, 118 S. Ct. 1003, 1012 (1998). Jurisdiction is certainly at issue in this action. As mentioned previously, the administrative record before this tribunal fails to include a filed administrative compliance order consistent with 40 C.F.R. § 22.42(c). This tribunal has no evidence that Respondent received an administrative compliance order as well. The issuance of such an administrative compliance order is a jurisdictional prerequisite to commencing a penalty action under the SDWA. See In the Matter of Paul Durham, Docket No. SDWA -C930025, at footnote #15, (Initial Decision, April 14, 1997). As such, before proceeding any further in this action, Complainant must satisfy its burden that jurisdiction exists. See FW/PBS, Inc. v. Dallas, 110 S.Ct. 596, 607-608 (1990).[6]

[6] This Decision and Order provides instructions below designed to resolve the jurisdictional issue. In short, Complainant has the opportunity to show that jurisdiction exists in this action. This opportunity is appropriate, as a copy of the administrative complaint included in the administrative record, contains an uncontroverted reference to the issuance of Administrative Order F980007, dated October 31, 1997.

Entry of a default order here is also unfavorable due to additional concerns. Specifically, 40 C.F.R. §§ 22.05(a) and (b)(v) require Complainant to file the original complaint with the Regional Hearing Clerk, and prove service by affidavit or properly executed return receipt. For reasons unexplained by Complainant, the administrative record contains neither an original complaint, nor proof of service of the complaint to Respondent. The record fails to include either an affidavit by a competent person, or a properly executed return receipt. Therefore, record evidence fails to contain basic information demonstrating that the requirement to file an answer within twenty (20) days after service was triggered. See 40 C.F.R. § 22.15(a). Indeed, Respondent's duty to answer is not triggered until the complaint is properly served.

This tribunal now turns to a discussion relevant for informational purposes. When, as here, Complainant presents no prima facie evidence and analysis sufficient to show that all statutory factors were considered in assessing an appropriate civil penalty, this tribunal will not rubber-stamp or blindly assess Complainant's recommended penalty. See Katzson Bros., Inc. v. U.S. E.P.A., 839 F.2d 1396, 1401 (10th Cir. 1988).

As provided previously, SDWA Section 1414(b) requires consideration of the seriousness of the violation, the population at risk, and other appropriate factors, when assessing a penalty. Nothing in the existing administrative record remotely shows that Complainant adequately considered the above factors. In fact, Complainant's motion for default proffered neither prima facie evidence (for example, a declaration or affidavit by the person who calculated the penalty describing how statutory penalty factors were considered), nor analysis demonstrating consideration of statutory penalty determination factors. Based upon the current record, even if Complainant adequately responds to jurisdictional and procedural issues, no penalty can be assessed against Respondent. This tribunal cannot lawfully assess a penalty until Complainant sufficiently presents prima facie evidence and analysis supporting imposition of the proposed penalty in accordance with SDWA Section 1414(b) and 40 C.F.R. § 22.24. See In Re New Waterbury, Ltd., 5 E.A.D. 529, 537-539 (EAB 1994).

V. **DECISION AND ORDER**

Having considered controlling regulations, record evidence, and relevant case law, this tribunal has no basis to

grant Complainant’s default motion. In fact, if jurisdictional and procedural issues are not adequately addressed or cured, this action may be subject to dismissal. Accordingly, Complainant's motion for default pursuant to 40 C.F.R. § 22.17(a), is hereby denied.

With jurisdictional and procedural issues in mind, Complainant shall, within thirty (30) days from the date of this Decision and Order, file the following with the Regional Hearing Clerk: 1) The original administrative compliance order, and proof of service of the same to Respondent; 2) A written statement or explanation concerning the Water Enforcement Branch Chief’s authority to commence this SDWA default proceeding; and 3) The original complaint, and proof of service of the same.

If Complainant is capable of addressing or curing the above items and desires to move for a default order again, the default motion and supporting documentation shall also be filed with the Regional Hearing Clerk within thirty (30) days from the date of this Decision and Order. Respondent should note that under 40 C.F.R. § 22.17(a), any reply to a new default motion filed by Complainant is due twenty (20) days

from service. Such a reply must be filed with the Regional Hearing Clerk.

Failure of either party to comply with the terms of this Decision and Order may result issuance of a default order against the defaulting party under 40 C.F.R. § 22.17(a).

SO ORDERED this 22ND day of April 1999.

/s/
GEORGE MALONE, III
REGIONAL JUDICIAL OFFICER

In the Matter of Merle Blood, SDWA Docket No. C98-0005

CERTIFICATE OF SERVICE

I, Lorena S. Vaughn, Regional Hearing Clerk for the Region 6, U.S. Environmental Protection Agency located in Dallas, Texas, hereby certify that I served true and correct copies of the foregoing Order dated April 22, 1999, on the persons listed below, in the manner and date indicated:

Mr. Merle Blood Blood's Trailer Park HC 69, Box 360 Kingston, Oklahoma 73439	U.S. CERTIFIED MAIL RETURN RECEIPT REQUESTED
Mr. Carlos Zequeira, Esq. Ms. Ellen Chang, Esq. U.S. EPA Region 6 (6RC-EW) 1445 Ross Avenue Dallas, Texas 75202-2733	HAND DELIVERY

Dated:

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Lorena S. Vaughn
Regional Hearing Clerk