

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR**

IN THE MATTER OF)	
)	
Service Oil, Inc.,)	Docket No. CWA-08-2005-0010
)	
RESPONDENT)	
_____)	

ORDER DENYING RESPONDENT’S MOTION TO DISMISS

This proceeding was initiated by a Complaint filed on February 22, 2005 by the U.S. Environmental Protection Agency, Region VIII (“EPA” or “Complainant”), alleging that Service Oil, Inc. (“Respondent”) violated Section 301(a) of the Clean Water Act (“CWA”), 33 U.S.C. § 1311(a), and the North Dakota Pollutant Discharge Elimination System (“NDPDES”) General Storm Water Permit No. NDR03-0571. The Complaint seeks \$80,000 in civil penalties for two Counts of violation. Respondent filed an Answer to the Complaint on April 18, 2005.¹

This Tribunal issued a Prehearing Order (“PHO”) in this matter on July 19, 2005. That Order required, *inter alia*, that Complainant file an Initial Prehearing Exchange (“PHE”) including:

- (H) a copy of any “penalty policy” relied upon by Complainant in consideration of the proposed penalty assessment; [and]
- (I) a copy of all other documents used in consideration of the proposed penalty in

¹Although the Answer is dated April 15, 2005 and was sent to the Regional Hearing Clerk “by first-class mail” on that date, it is stamped as “received” by the Regional Hearing Clerk on April 18, 2005. Rule 22.5(a), 40 C.F.R. § 22.5(a), states in part that “[a] document is filed when it is received by the appropriate [Regional Hearing] Clerk.”

this case and a separate Penalty Calculation Worksheet detailing exactly how the proposed penalty was calculated.

PHO at 3, ¶¶ 2(H) and 2(I). The PHO further stated that “Complainant is notified that its failure to file its prehearing exchange in a timely manner can result in a dismissal of the case with prejudice.” *Id.* at 5.²

Complainant filed its Initial PHE on September 20, 2005. In regard to paragraph 2(H) of the PHO, Complainant states in its Initial PHE that “a copy of the Clean Water Act 1995 Settlement Penalty Policy dated March 1, 1995 is designated as Complainant’s [Exhibit] [(“CX”)] 20.” Complainant’s Initial PHE at 10. Indeed, CX-20 is the March 1, 1995 “Interim Clean Water Act Settlement Penalty Policy.” Complainant further states: “The [EPA] has never issued a penalty policy for use by Presiding Officers in determining penalties under the CWA. Consequently, Presiding Officers rely on the working of the statutory penalty factors set out in section 309(g) [of the CWA].” Complainant’s Initial PHE at 12, n.1 (citations omitted).

In regard to paragraph 2(I) of the PHO, Complainant states in its Initial PHE that:

A detailed statement explaining how the proposed penalty amount was determined is attached as [CX] 23. [CX] 23 is a narrative of how the proposed penalty was arrived at using the [CWA] 1995 Settlement Penalty Policy. ... Under paragraph 2(I) of the [PHO], Complainant has been ordered to provide Penalty Calculation Worksheets developed in preparation of the Complaint. A Penalty Calculation Worksheet was not prepared in this matter.

Complainant’s Initial PHE at 12 (footnote omitted). CX-23 is a 5-page narrative “Penalty Justification” addressing the statutory penalty factors set forth in Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3), along with two attached “Tables,” entitled “Summary of Required Stormwater inspections” (Table A) and “Rule of Thumb Economic Benefit Spreadsheet” (Table B).

The July 19, 2005 PHO also required Respondent to submit, as part of its PHE:

²The July 19, 2005 PHO required Complainant to file its Initial PHE on or before August 12, 2005. On July 25, 2005, upon joint motion of the parties, this Tribunal returned this matter to the Alternative Dispute Resolution (“ADR”) process and stayed the PHE filing deadlines set in the July 19, 2005 PHO. However, due to the parties’ inability to reach settlement during the extended ADR process, this matter was returned to the litigation docket, and this Tribunal, by Order dated September 1, 2005, re-established PHE filing deadlines such that Complainant’s Initial PHE was due on or before September 20, 2005.

a detailed narrative statement that fully elaborates the precise factual and legal basis, and copies of all documents in support thereof, for Respondent's assertion on page 3 of the Answer that "EPA's proposed penalty of \$80,000.00 is inappropriate in light of the statutory factors and specific facts of this case."

PHO at 3-4, ¶ 3(F).³ The CWA statutory penalty factors are set forth in Section 309(g)(3), which states in pertinent part:

In determining the amount of any penalty assessed under this subsection, the Administrator or the Secretary, as the case may be, shall take into account the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require.

33 U.S.C. § 1319(g)(3).

Respondent's PHE, filed on October 12, 2005, responds to paragraph 3(F) of the PHO, with a "Motion for Dismissal with Prejudice," stating, in pertinent part, as follows:

In this [T]ribunal's [PHO], the Complainant was ordered in paragraph 2(I) to provide the following as part of its [PHE]:

(I) a copy of all other documents [other than EPA's "penalty policy"] used in consideration of the proposed penalty in this case and a separate Penalty Calculation Worksheet detailing **exactly** how the proposed penalty was calculated[.]

(Bracketed language and emphasis added).

Complainant has failed to comply with this [T]ribunal's [PHO]. Complainant did not prepare a Penalty Calculation Worksheet prior to issuing its Penalty Complaint, and Complainant has not prepared a Penalty Calculation Worksheet "detailing ... **exactly how the proposed penalty was calculated**" in response to the [PHO] which required it. (Bracketed language and emphasis added).

Complainant's failure to submit a Penalty Calculation Worksheet as ordered in the [PHO] requires *dismissal of this case with prejudice*, as provided for at p. 5 of this Tribunal's [PHO]. If this [T]ribunal decides not to immediately dismiss this case with prejudice, then Complainant's (1) failure to prepare a Penalty Calculation Worksheet prior to issuing its Penalty Complaint, and (2)

³Pursuant to the September 1, 2005 Order re-established PHE filing deadlines, Respondent's PHE was due on or before October 12, 2005.

failure to prepare a Penalty Calculation Worksheet “detailing ... exactly how the proposed penalty was calculated” should be *considered as an “other matter” that justice requires be considered* in this proceeding.

Respondent’s PHE at 21-22, ¶ (F)(6)(B) (underlining and bold type in original) (italics added). Thus, Respondent moves that this case be “dismissed with prejudice” or, in the alternative, for an Order that Complainant’s lack of inclusion of a “Penalty Calculation Worksheet” in its PHE be considered under the “other matters as justice may require” penalty factor pursuant to Section 309(g)(3) of the CWA.

On October 26, 2005, Complainant filed “Complainant’s Response in Opposition to Respondent’s Motion to Dismiss.”

This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits at 40 C.F.R. Part 22 (“Rules”). Regarding a “decision to dismiss,” Rule 22.20 provides that the Presiding Officer may, upon motion of a respondent, “dismiss a proceeding without further hearing ... on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of complainant.” 40 C.F.R. § 22.20(a). The Environmental Appeals Board (“EAB”) has elaborated:

In determining whether dismissal is warranted, all factual allegations in the complaint should be presumed true, and all reasonable inferences therefrom should be made in favor of the complainant. This is the standard used under the Federal Rules of Civil Procedure. *See Bank v. Pitt*, 928 F.2d 1108, 1109 (11th Cir. 1991) (“In the context of a motion to dismiss, we accept as true facts alleged in the complaint, and construe them in a light favorable to the plaintiffs.”). Although those rules are not applicable here, we have found them to be instructive in analyzing motions to dismiss. . . .

In re Commercial Cartage Company, Inc., 5 E.A.D. 112, 117, including n.9 (EAB, Feb. 22, 1994).

In the present case, Respondent has failed to demonstrate – or even to allege – that Complainant’s “failure to submit a Penalty Calculation Worksheet as ordered in the [PHO]” constitutes a “failure to establish a prima facie case or other grounds which show no right to relief” pursuant to Rule 22.20.

However, this Tribunal’s PHO stated that “Complainant is notified that its failure to file its prehearing exchange in a timely manner can result in a dismissal of the case with prejudice.” In this regard, Rule 22.17(a) (“Default”) states in pertinent part:

A party may be found to be in default ... upon failure to comply with the [prehearing] information exchange requirements of § 22.19(a) or an order of the Presiding Officer... Default by complainant constitutes a waiver of complainant's right to proceed on the merits of the action, and shall result in the *dismissal of the complaint with prejudice*.

40 C.F.R. § 22.17(a) (emphasis added).

This Tribunal observed in *Mr. C.W. Smith, Mr. Grady Smith & Smith's Lake Corporation*, 2004 EPA ALJ LEXIS 128 (ALJ 2004), that:

There are no civil penalty guidelines issued under the CWA to provide a methodology for calculating a penalty, so the penalty must be determined by some method on the basis of the evidence of record and the list of penalty criteria set forth in Section 309(g) the CWA. 40 C.F.R. § 22.27(b). The Supreme Court has indicated that highly discretionary calculations are necessary in assessing penalties under the CWA. *Tull v. United States*, 481 U.S. 412, 427 (1987)... Some Administrative Law Judges have calculated penalties under Section 309(g) of the CWA following the framework of EPA's general civil penalty policies, known as "GM-21" (Policy on Civil Penalties) and "GM-22" (A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties), 41 Env't Rep. (BNA) 2991, dated February 16, 1984. *See e.g., Urban Drainage and Flood Control District*, 1998 EPA ALJ LEXIS 42 (ALJ, June 24, 1998); *Industrial Chemicals Corp.*, 2000 EPA ALJ LEXIS 58 (ALJ, June 16, 2000).

Mr. C.W. Smith at *139. Although "[a]gency-issued penalty policies provide a framework that allows a presiding officer to apply his or her discretion to statutory penalty factors" (*Allegheny Power Service Corp. and Choice Insulation, Inc.*, 9 E.A.D. 636, 655 (EAB 2001) (citations omitted)), "the [EAB] has repeatedly explained that this regulatory requirement does not compel an ALJ to use a penalty policy in making his or her penalty determination. Rather, 'a Presiding Officer, having considered any applicable civil penalty guidelines issued by the Agency, is nonetheless free not to apply them to the case at hand.'" *John A. Capozzi, d/b/a/ Capozzi Custom Cabinets*, RCRA (3008) Appeal No. 02-01, slip op. at 30, 11 E.A.D. __ (EAB, Mar. 25, 2003) (citations omitted).

In the present case, Complainant states that "the proposed penalty was calculated based upon ... the application of the CWA statutory factors using, as appropriate, the 1995 Settlement Penalty Policy as guidance," and that "a Penalty Calculation Worksheet was not prepared in this matter." Complainant's Response in Opposition to Respondent's Motion to Dismiss at 6. Complainant provided, as part of its Initial PHE, the March 1, 1995 "Interim Clean Water Act Settlement Penalty Policy" (CX-20) and a 5-page narrative "Penalty Justification" addressing the

CWA statutory penalty factors with attached Table A (“Summary of Required Stormwater inspections”) and Table B (“Rule of Thumb Economic Benefit Spreadsheet”) (CX-23). Although CX-23 is not styled as a “worksheet,” under the circumstances of the case at hand, this Tribunal finds that CX-20 and CX-23 satisfy the requirements of the July 19, 2005 PHO that Complainant’s Initial PHE include “a copy of any ‘penalty policy’ relied upon by Complainant in consideration of the proposed penalty assessment” and “a copy of all other documents used in consideration of the proposed penalty in this case and a separate Penalty Calculation Worksheet detailing exactly how the proposed penalty was calculated.” PHO at 3, ¶¶ 2(H) and 2(I).

Therefore, because Complainant’s Initial PHE neither “fails to comply with the [prehearing] information exchange requirements of § 22.19(a) or an order of [this Tribunal]” under Rule 22.17(a), nor “fails to establish a prima facie case or other grounds which show no right to relief” under Rule 22.20, Respondent’s “Motion for Dismissal with Prejudice” set forth on pages 21-22 of Respondent’s PHE is **Denied**.

Further, it is premature to consider the appropriate penalty, if any, to be imposed in this case, should Respondent be found liable under any Count alleged in the Complaint. Therefore, Respondent’s alternative Motion for an Order finding that Complainant’s lack of inclusion of a “Penalty Calculation Worksheet” in its PHE should be considered in determining the penalty under the “such other matters as justice may require” factor of CWA § 309(g)(3) is **Denied as premature**.

ORDER

Respondent’s “Motion for Dismissal with Prejudice,” and Respondent’s alternative Motion for an Order finding that Complainant’s lack of inclusion of a “Penalty Calculation Worksheet” in its Prehearing Exchange should be considered under the “such other matters as justice may require” factor of Section 309(g)(3) of the Clean Water Act, 33 U.S.C. § 1319(g)(3), set forth on pages 21-22 of Respondent’s Prehearing Exchange, are **DENIED**.

Susan L. Biro
Chief Administrative Law Judge

Dated: November 9, 2005
Washington, D.C.