UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6
DALLAS, TEXAS

IN THE MATTER OF:	)	
DONALD HAYDEL d/b/a HAYDEL BROTHERS/ADAMS WRECKING CO.	)	CWA DOCKET NO. VI-99-1618
RESPONDENT	)	

ORDER DENYING COMPLAINANT'S MOTION FOR DEFAULT ORDER

I. BACKGROUND AND PROCEDURAL HISTORY

On May 28, 1999, the Complainant filed an Administrative Complaint (Complaint) against the Respondent, alleging violations of the Clean Water Act (CWA). The Complaint sought a $27,500 civil penalty. However, the Respondent did not file an answer. On February 14, 2000, the Presiding Officer issued an Order to Show Cause, requiring the Complainant to file proof of service of the Complaint by February 25, 2000, or show cause why the Complaint should not be dismissed without prejudice for failing to complete service. If the Complainant filed proof of service, it was also ordered to file a motion for a default order by March 13, 2000, or show cause why the Complaint should not be dismissed for lack of prosecution.

The Order to Show Cause was issued because over eight months had passed since the Complaint was filed, and the Respondent had not filed an answer. Furthermore, proof of service of the

Complaint had not been filed with the Regional Hearing Clerk, as required by 40 C.F.R. § 22.5(b)(1)(iii). Thus, there was no proof that service of the Complaint had been completed.[1] The Complainant also had not filed a motion for a default order. The Presiding Officer could not, *sua sponte,* find the Respondent in default for failing to file an answer. The Presiding Officer noted that unless some action was taken by the Complainant, this case could remain on his docket indefinitely.

_____On February 23, 2000, the Complainant filed a Motion for Default Order. The Motion included a copy of a return receipt green card showing that the Respondent received a copy of the Complaint on June 7, 1999. The basis for the motion is that the Respondent failed to timely file an answer, and as such, pursuant to 40 C.F.R. § 22.15(d), each allegation in the Complaint is deemed admitted. Attached to the motion is a Declaration of Thea Lomax. This Declaration states that she considered the penalty factors set forth in the CWA and EPA's CWA Settlement Policy, and that the statutory factors and the penalty policy were considered and served as the basis for the penalty proposed in the Complaint ($27,500). However, there was no explanation of how the statutory penalty factors were taken into account in proposing a

[1]The certificate of service for the Complaint states that it was sent to the Respondent by certified mail, return receipt requested on May 28, 1999. However, for purposes of proving service, this is insufficient by itself to show that the Respondent received the Complaint. 40 C.F.R. § 22.5(b)(1)(iii).

penalty for this case.

II. DISCUSSION

A. STANDARD FOR DEFAULT ORDER

40 C.F.R. § 22.17 provides the following:

> (a) *Default*. A party may be found to be in default: 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. . . .
>
> (b) *Motion for default*. A motion for default may seek resolution of all or part of the proceeding. Where the motion requests the assessment of a penalty or the imposition of other relief against a defaulting party, the movant must specify the penalty or other relief sought and state the legal and factual grounds for the relief requested.

As a preliminary matter, the Complainant must prove that the Respondent was properly served a copy of the Complaint. Proof of service is required to be filed with the Regional Hearing Clerk *immediately* upon completion of service, not eight months later. 40 C.F.R. § 22.5(b)(1)(iii) (emphasis added). Furthermore, the Complainant is required to file the original document showing proof of service. *See* 40 C.F.R. § 22.5(a). For a complaint served by certified mail, return receipt requested, proof of service would be the return receipt green card. Although the Complainant only filed a *copy* of the return receipt green card, this is not fatal *in this instance*.

The Respondent failed to file a response to the Complainant's default motion, and thus is deemed to have waived any objection to the granting of the motion. 40 C.F.R. § 22.16(b). In addition, the Respondent's failure "to admit, deny or explain [the] material allegations in the complaint constitutes an admission of the allegation[s]." 40 C.F.R. § 22.15(d). However, "default orders are not favored, and doubts are usually resolved in favor of the defaulting party." *In Re Rybond, Inc.*, 6 E.A.D. 614, 616 (1996). Therefore, the Complainant's motion must be analyzed on the merits. *See In the Matter of Billy Yee*, 1999 WL 1201417 (EPA November 8, 1999); *In the Matter of Mr. C.E. McClurkin*, Docket No. VI-UIC-98-001, slip op. at 9 (February 10, 2000).

On February 25, 1998, EPA proposed amendments to the Consolidated Rules of Practice, 40 C.F.R. Part 22. 63 *Fed. Reg.* 9464 (Proposed Rules). These amendments were finalized on July 23, 1999. 64 *Fed. Reg.* 40138. Prior to amendment of 40 C.F.R. Part 22 (Part 22), there was no requirement in Part 22 for a Presiding Officer to make a finding that the Complainant established a prima facie case on liability when a party is found in default for failing to file an answer, or comply with a prehearing order. Part 22 specifically limited the requirement for the Complainant to establish a prima facie case only when the Respondent fails to appear at the hearing. 40 C.F.R. § 22.17(a);

In Re Rybond, Inc., 6 E.A.D. 614, 622 - 623, fn 17.

However, a number of changes were made to the default provisions of 40 C.F.R. § 22.17 when Part 22 was amended. The sentence in 40 C.F.R. § 22.17(a) - "[n]o finding of default on the basis of a failure to appear at a hearing shall be made against the respondent unless the complainant presents sufficient evidence to the Presiding Officer to establish a prima facie case against the Respondent" was deleted. 63 *Fed. Reg.* at 9486; 64 *Fed. Reg.* at 40182. Furthermore, in the preamble to the Proposed Rules, EPA stated the following in explaining its proposed changes to the default procedures:

> The Agency would still be required to make a prima facie case in regard to the appropriateness of the proposed relief, *as well as in regard to liability*. The proposed change would not affect determinations of liability in default, which would remain subject to the "preponderance of the evidence" standard of § 22.24.

63 *Fed. Reg.* at 9470 (emphasis added). This portion of the proposed rule, 40 C.F.R. § 22.17(c), was not significantly changed when it was finalized. 64 *Fed. Reg.* at 40182. Therefore, due to the deletion of the sentence in 40 C.F.R. § 22.17(a) which required proof of a prima facie case only when the Respondent failed to appear at the hearing, and the clear language in the preamble to the Proposed Rules requiring the Complainant to make a prima facie case in regard to liability when seeking default orders, this Presiding Officer can only come to one conclusion. The Complainant must now establish a prima

facie case on liability by a preponderance of the evidence for all default actions under 40 C.F.R. § 22.17(a).[2]

This conclusion is supported by other provisions of Part 22. 40 C.F.R. § 22.17(c) provides that if a default order resolves all issues in the proceeding, it constitutes an initial decision. An initial decision is required to contain findings of fact and conclusions of law, as well as the reasoning for the findings and conclusions. 40 C.F.R. § 22.27(a). Furthermore, 40 C.F.R. § 22.27(b) provides that if the Presiding Officer determines that a violation has occurred, and the complaint seeks a penalty, he shall determine the amount of the proposed penalty. In order to determine if a violation has occurred, one must determine if the elements of the violation have been met. For a default order, this would entail the Presiding Officer determining that a prima facie case has been proven by a preponderance of the evidence.

However, the Presiding Officer believes that in order to find liability when a Respondent is in default, the Complainant would only have to show that it pled a prima facie case in its

[2]Alternatively, the Presiding Officer could review the complaint and/or record and make the determination on its own that the Complainant had established a prima facie case against the Respondent. It appears that this has been the practice of some Presiding Officers. It may be particularly appropriate where a party has not complied with a Presiding Officer's order. However, this Presiding Officer declines to do so in this situation.

complaint, not submit evidence proving a prima facie case.[3] Section 22.17(a) does not contemplate submitting evidence when a Respondent is in default, since it provides that the Respondent's default constitutes an admission of all facts alleged in the complaint. If the Complainant alleged a prima facie case in its complaint, admission of all facts in the complaint would result in the Respondent's liability. Therefore, there would be no need to submit evidence to prove a prima facie case on liability for a default order.

As to the issue of the penalty, 40 C.F.R. § 22.17(b) provides that when a motion for default requests the assessment of a penalty, the movant must state the legal and factual grounds for the penalty requested. Therefore, a conclusory allegation that the penalty was calculated in accordance with the statutory factors or penalty calculations is insufficient. These legal and factual grounds are necessary in order for the Presiding Officer to set forth its reasons for adopting the proposed penalty. *See Katzson Brothers, Inc. v. U.S. EPA*, 839 F.2d 1396, 1400 (10th Cir. 1988); *Harborlite Corporation v. ICC*, 613 F.2d 1088, 1092 - 1093 (D.C. Cir. 1979); 40 C.F.R. § 22.27(b) (Presiding Officer

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[3]*See Patray v. Northwest Publishing, Inc.*, 931 F.Supp. 865, 869 (S.D. Ga. 1996) (Before a court can enter a default judgment, the complaint must state cause of action); 46 Am Jur. 2d, Judgments §§ 295 (1994) ("when a valid cause of action is not stated, the moving party is not entitled to requested relief, even on default").

shall determine the amount of the penalty based on the evidence in the record and in accordance with any penalty criteria set forth in the Act).

In summary, in order to receive a default order for liability and penalty when the Respondent is in default, the Complainant must prove the following by a preponderance of the evidence:

1. The Respondent was properly served with a copy of the Complaint;

2. A prima facie case has been pled in the Complaint; and

3. The factual and legal grounds for the proposed penalty (e.g., how the penalty was calculated in accordance with the penalty criteria set forth in the Act). Submission of an affidavit by a person responsible for calculating the penalty is one way of establishing the factual basis for the proposed penalty.

The Complainant did show that the Complaint was properly served. A review of the Regional Hearing Clerk's file shows that the Respondent has failed to file an answer. Therefore, I find that the Respondent is in default, and thus admits all facts alleged in the Complaint and waives its right to contest such factual allegations. 40 C.F.R. § 22.17(a). However, the Complainant failed to show that it pled a prima facie case in its Complaint, and failed to state the legal and factual grounds for

the proposed penalty. Thus, I find that good cause exists for not entering a default order. *See* 40 C.F.R. § 22.17(c). Therefore, the Complainant's motion for default is denied. The Complainant is therefore **ORDERED** to file another motion for default in accordance with this Order by **April 21, 2000.**

Dated this 5th day of April, 2000.

/S/
Evan L. Pearson
Regional Judicial Officer

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of April, 2000, I served true and correct copies of the foregoing Order Denying Complainant's Motion for Default Order on the following in the manner indicated below:

CERTIFIED MAIL - RETURN RECEIPT REQUESTED _____

Donald Haydel
Haydel Brothers/Adams Wrecking Company
10101 Old Gentilly Road
New Orleans, Louisiana 70127-4413

INTEROFFICE MAIL

Gary Smith
Assistant Regional Counsel (6RC-EW)
U.S. EPA - Region 6
1445 Ross Avenue
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_____
Lorena S. Vaughn
Regional Hearing Clerk