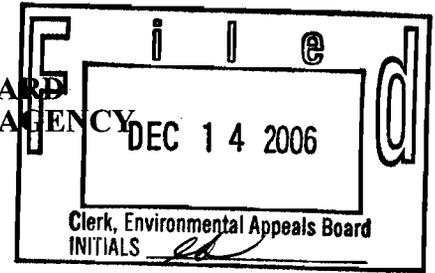


BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.



In re:)
)
Gaskey Construction Corp.)
)
Docket No. CWA-06-2004-2335)

CWA Appeal No. 06-07

FINAL ORDER

On February 6, 2006, the Regional Judicial Officer for U.S. EPA Region 6, Michael C. Barra (“First RJO”), issued an “Initial Decision and Default Order” in this matter against Gaskey Construction Corporation (“Gaskey”). See Initial Decision and Default Order (Feb. 6, 2006) (“Default Order”). The Default Order found Gaskey in default for failing to file an answer to an administrative complaint filed by U.S. EPA, Region 6 (the “Region”). The Region’s administrative complaint alleged that Gaskey discharged pollutants from its construction site into waters of the United States without a permit in violation of section 301 of the Clean Water Act, 33 U.S.C. § 1311. For this violation, the Default Order assessed an administrative penalty of \$10,155, the amount proposed by the Region. Gaskey did not file a timely appeal from the Default Order.

Because Gaskey failed to file a timely answer to the complaint, the Board agreed that a default order was appropriate in this matter. However, the Board elected to review the matter *sua sponte* and remanded to the First RJO for clarification on the penalty assessment. See Order Electing to Review Sua Sponte and Remanding to the Regional Judicial Officer (Mar. 21, 2006) (“Remand Order”). In an amended initial decision, Regional Judicial Officer Ben J. Harrison (“Second RJO”)¹ reviewed the

¹ The Amended Initial Decision states that Mr. Harrison was assigned to this matter following Mr. Barra’s withdrawal. Amended Initial Decision at 1.

penalty portion of the February 6 Default Order *de novo*, and concluded that the Region's proposed penalty of \$10,155 was appropriate. *See* Amended Initial Decision After Remand ("Amended Initial Decision") (Sept. 18, 2006). By appeal filed with the Board on October 23, 2006, Gaskey requests that the Board set aside both the Default Order and Amended Initial Decision and order that a hearing be conducted on the merits of the original complaint.² Gaskey's appeal objects to the entry of any default order. In addition, Gaskey asserts that the penalty assessment was unreasonable. In particular, Gaskey asserts that the Second RJO did not properly apply the statutory factors governing the assessment of a civil penalty.³

For the following two reasons, the Amended Initial Decision is affirmed.⁴ First, as we already held in our March 21, 2006 Remand Order, because Gaskey failed to file a timely answer to the complaint, entry of a default order was appropriate in this matter. *See* Remand Order at 1. Nothing in Gaskey's current appeal convinces us that this determination was erroneous. Moreover, because

² Gaskey divides its appeal into two parts. The first is titled "PART ONE OF RESPONDENT'S ANSWER, REPLY, RESPONSE, REQUEST FOR HEARING AND PRAYERS TO DE NOVO AMENDED INITIAL DECISION AFTER REMAND ("AIDAR") OF THE PRESIDING JUDICIAL OFFICER, BEN J. HARRISON, REGIONAL JUDICIAL OFFICER, WHO REPLACED REGIONAL JUDICIAL OFFICER, AS PRESIDING OFFICER, ALL IN THE ABOVE CAPTIONED MATTER, WHO WROTE THE INITIAL DECISION AND DEFAULT ORDER ("IDADO") WHICH IDADO WAS REMANDED SUA SPONTE BY THE ENVIRONMENTAL APPEALS BOARD AS TO JUSTIFICATION OF THE CIVIL PENALTY ASSESSED." The second part of Gaskey's Appeal is titled "RESPONSE OF RESPONDENT TO AMENDED INITIAL DECISION AFTER REMAND ("RORTAIDAP" [sic]) AND ("AIDAR") AMD [sic] ANSWER OF RESPONDENT TO COMPLAINT."

³ Clean Water Act section 309(g), 33 U.S.C. § 1319(g), provides that the EPA may assess civil penalties for violations of CWA section 301. The statute provides that the amount of the penalty must be based on "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).

⁴ The Amended Initial Decision supercedes the Default Order.

the Board's Remand Order concerned only the proposed penalty, the finding of default, as opposed to the magnitude of the penalty, was beyond the scope of the remand.

Second, it appears from the record before us that the Second RJO followed the applicable statutory requirements and provided an adequate explanation for his assessment of the \$10,000 gravity-based penalty. As previously noted, section 309(g) of the Clean Water Act provides that the amount of the penalty must be based on "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). With regard to the nature of the violation, the Amended Initial Decision states:

The nature of this violation is failure to obtain a permit for the discharge of pollutants to waters of the United States. The objective of the Clean Water Act, in part through the use of permitting, is to "restore and maintain the chemical, physical and biological integrity of the Nation's water." CWA section 101(a), 33 U.S.C. § 1251(a), * * *. Failure of facilities to obtain permits that limit discharges and ensure best management practices would thwart the stated purposes of the statute.

Amended Initial Decision at 5-6. On appeal, Gaskey asserts that the nature of the violation does not justify the penalty in this case because Gaskey was not aware that a permit was required, and was told by the owner of the land and by the County in which the land was located that no permit was necessary. However, the record before us does not contain any documentation supporting this assertion. Moreover, the record before us indicates that, prior to the filing of the complaint, Gaskey was informed of the need to obtain a permit and was provided with information on how to obtain one. Nevertheless, Gaskey failed to come into compliance. Under these circumstances, we find Gaskey's arguments on this issue unconvincing.

With regard to the extent of the violation, the Amended Initial Decision states:

The extent of the violation in this matter is a complete failure to comply with the statutory and regulatory permitting requirements. [Gaskey] was informed of the need for a permit, the mechanism for obtaining such a permit and the requirements that would be included in a permit before the complaint was filed. There were several months of discussion after the Complaint was filed in which [Gaskey] could have come into compliance, yet failed to do so.

Amended Initial Decision at 6. On appeal, Gaskey does not appear to contest its failure to comply with the applicable permitting requirements. Rather, as far as we can ascertain, Gaskey appears to challenge the significance of these requirements. However, Gaskey provides no discussion or analysis that convinces us that the Second RJO abused his discretion or committed clear error.⁵ Moreover, to the extent that Gaskey is challenging the regulations themselves, we decline to entertain such a challenge in this matter. *See In re B.J. Carney Indus., Inc.*, 7 E.A.D. 171, 194 (EAB 1997) (affirming that “there is a strong presumption against entertaining challenges to the validity of a regulation in an administrative enforcement proceeding.”).

With regard to the gravity of the violation, the Amended Initial Decision states:

The gravity of the violation here is significant. That no actual environmental harm is in evidence does not mean the violations are not significant. Harm to the regulatory scheme is also a consideration. The permitting program is essential to effective control of discharges into surface water. The allegation of five counts is appropriate given that [Gaskey] failed to comply for five months.

Amended Initial Decision at 6. On appeal, Gaskey appears to challenge the Second RJO’s consideration of harm to the regulatory scheme in assessing an appropriate penalty. However, harm to the regulatory scheme is an appropriate consideration in quantifying the gravity of a violation. *See*

⁵ The Board will generally not substitute its judgment for the presiding officer’s absent a showing of that the presiding officer has committed an abuse of discretion or a clear error in assessing the penalty. *See In re Ronald H. Hunt*, TSCA Appeal No. 05-01, slip op. at 44 (EAB Aug. 17, 2006), 12 E.A.D. ____.

In re Phoenix Constr. Servs., Inc., 11 E.A.D. 379, 396-97 (EAB 2004). Under the circumstances, Gaskey has failed to convince us that the Second RJO abused his discretion or committed clear error.

With regard to the remaining penalty factors, the Amended Decision states:

[Gaskey] does not have a history of violations and there is nothing in the record to indicate [Gaskey] is unable to pay the penalty sought by Complainant. [Gaskey's] culpability, as demonstrated by [Gaskey's] failure to achieve compliance, warrants the imposition of the penalty sought by Complaint.

Amended Initial Decision at 6. On appeal, Gaskey asserts that it lacks the ability to pay the proposed penalty. However, Gaskey has failed to provide any documentation to support this assertion, nor does it appear that any such documentation was before either the First or Second RJO.

The Amended Initial Decision also upholds the assessment of a \$155 penalty for the economic benefit of noncompliance. In this regard, the Amended Initial Decision states:

Complainant seeks \$155.00 for the economic benefit of noncompliance. According to the declaration of Everett H. Spencer,⁶ this figure represents what it would have cost [Gaskey] to prepare and implement a Storm Water Pollution Prevention Plan, the requirement in the type of permit [Gaskey] would have received had it ever sought to comply. There is nothing in the record to suggest that this is not an accurate assessment of Respondent's economic benefit.

Id. Gaskey does not appear to contest the economic benefit calculation of \$155. Rather, Gaskey asserts that the penalty in this case was the result of a vendetta by EPA. We find no support for such an assertion. Moreover, nothing in Gaskey's petition convinces us that the Second RJO's economic benefit calculation constituted an abuse of discretion or clear error.

⁶ Mr. Spencer is the Region 6 Enforcement Officer who calculated the proposed penalty. His Affidavit is part of the administrative record in this matter.

With regard to “other matters as justice may require,” the Amended Initial Decision states:

I find no other “matters as justice may require” for consideration. The fact that Respondent did not come into compliance is considered in the gravity and degree of culpability factors. Complainant was correct in not including any penalty amount under this factor as there is no evidence in the record that would support either an increase or decrease in the appropriate penalty for this particular factor.

Id. at 6-7. Although Gaskey disagrees with the Second RJO conclusion in this regard, nothing in the appeal or in the record before us indicates that the Second RJO’s determination constituted an abuse of discretion or clear error.

Finally, the Amended Initial Decision states:

Based on the entire record before me, the statutory factors listed above, the regulatory requirement that the relief proposed or requested in a complaint or default motion shall be ordered unless clearly inconsistent with the record or the underlying statute and the Board’s [Remand Order], I find that the civil penalty of \$10,155.00 is appropriate.

Id. at 7. Nothing in Gaskey’s appeal convinces us that the amount of the penalty is unreasonable, that the Second RJO improperly applied the statutory factors, or that the Second RJO abused his discretion or committed clear error in assessing the penalty.

Under these circumstances, the Board upholds the penalty assessment of \$10,155. Appellant shall pay the full amount of the penalty within 30 days of receipt of this Final Order. Payment shall

be made by forwarding a cashier's check or certified check payable to the Treasurer, United States of America, to the following address:

Regional Hearing Clerk
U.S. EPA Region 6
P.O. Box 371099M
Pittsburgh, PA 15251

So ordered.⁷

Dated: *December 14, 2006*

ENVIRONMENTAL APPEALS BOARD

By: *Kathie A. Stein*

Kathie A. Stein
Environmental Appeals Judge

⁷ The panel deciding this matter is comprised of Environmental Appeals Judges Edward E. Reich, Kathie A. Stein, and Anna L. Wolgast.

CERTIFICATE OF SERVICE

I hereby certify that copies of the forgoing Final Order in the matter of Gaskey Construction Corp., CWA Appeal No. 06-07, were sent to the following persons in the manner indicated:

Certified Mail:

Carl G. Mueller, Jr.
#3 River Hollow
Houston, Texas 77027

Mr. Bill Gaskey, President
Gaskey Construction Corp.
11422 Craighead Dr.
Houston, Texas 77025

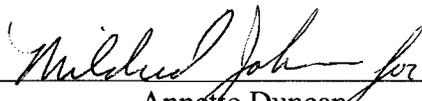
Pouch Mail:

Lorena S. Vaughn
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Ben J. Harrison
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Dallas, Texas 75202-2733

Dated: DEC 14 2006


Annette Duncan
Secretary