UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
Charles Lindy Daniels &	)	**Docket No. CWA-08-2005-0016**
Athalene Daniels	)	
	)	
	)	
Respondents	)	

ORDER DENYING COMPLAINANT'S MOTION FOR DEFAULT

I. Introduction

This proceeding under Section 309(g)(2)(B) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(g)(2)(B), was commenced on April 25, 2005, by the issuance, by the Assistant Regional Administrator, Office of Enforcement, Compliance and Environmental Justice, U. S. EPA, Region 8 ("Complainant" or "EPA"), of a complaint alleging that Charles Lindy Daniels and Athalene Daniels ("Respondents") violated § 301 of the Act by discharging dredged or fill material into waters of the United States without a permit. Specifically, the complaint alleges that Respondents placed dredge or fill material into the South Fork of the Rio Grande River and its adjacent wetlands located in Section 24, Township 39 North, Range 2 East, Mineral County, Colorado, the "Moses-Bolton Tract", without a permit from the Corps of Engineers ("COE") pursuant to § 404 of the Act. Additionally, the complaint alleges that Respondents violated § 308 of the Act by failing to respond to an EPA information request, dated May 9, 2000.[1] For these alleged violations, it was proposed to assess Respondents a penalty of $137,500.

Respondents answered by two letters, dated May 15, 2005, denying, except for a small acreage, the existence of wetlands on the property in question; alleging, inter alia, that portions of this property had been in use for farming, i.e., the growing of peas and lettuce, for almost a century, and that other alleged wetlands were simply irrigated meadowland; [2] claiming CWA § 404(f) exemptions from the permitting requirements for certain dredging and filling activities on the property[3], denying liability for, or ability to pay, a penalty of the magnitude proposed by Complainant and by implication requested a hearing.

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[1] . It appears that Respondents replied to the information request, by a letter, dated May 17, 2000,with attachments. Complainant, however, alleges that the reply was incomplete.

[2]. The property at issue is referred to as the "Moses-Bolton Tract." It appears that this property, consisting of 78.44 acres,. was purchased by the Respondents in 1995 and sold in 2002. Respondents allege that they were forced to accept a lower price because of the alleged wetlands on the property and government claims that it must be restored to its original condition. Paragraph 36 of the complaint alleges that Respondents did not inform the purchasers of wetlands on the property, of the cease and desist orders issued by the COE and of EPA's request for information.

[3] . CWA § 404(f) contains exemptions from the permitting and regulatory requirements as to discharges of dredged or fill material for, e.g., normal farming, silviculture, and ranching activities, for the maintenance including emergency reconstruction of currently serviceable structures such as dikes, dams, levees, groins, breakwaters, causeways, and

In the second of the mentioned letters, Respondent, Lindy Daniels, stated, among other things, that he was 76 years old, alluded to the tremendous burden financially, mentally and physically imposed upon his wife and himself [by the complaint in this matter], and stated that, of course, he desired a hearing. Respondent enclosed a copy of the CWA § 404(f) exemptions and alleged that he had scrupulously adhered to the exemptions, while getting four or five Cease and Desist Orders " along the way". He referred to activities in connection with the straightening of Highway 160, i.e., a sound barrier wall, 40 feet at the base, 16- to- 20 feet high and a half mile long; to 40 thousand cubic yards more or less of rock, berm, etc. placed on the "upper meadow", which he knew was dry farm land, but deemed by the COE to be wetland; and to the fact that he was cited for parking his little "maintainer" (road grader?) on wetland, while the [construction contractor, apparently Peter Kiewit, Inc.] was permitted to store [heavy] construction equipment, which was used daily for almost a year, on his (Daniels') old farm. Respondent referred to EPA's order that the so-called wetland be restored to its original condition as the "coup de grace", asserting that this property, which they knew to be irrigated meadow land, would, if they were so inclined which they were not, cost several million dollars to remove [restore], which they did not have and never would have.

II. Background

By an Order, dated August 10, 2005, the ALJ directed the parties to exchange prehearing information on or before September 9, 2005 ("Order"). The Order included a requirement that both parties supply a "list of prospective witnesses, a brief summary of their anticipated testimony, and a copy of each document or exhibit to be proffered into evidence." Complainant filed its prehearing exchange in a timely manner.

By a letter addressed to Complainant's counsel, dated August 23, 2005, Respondent, Lindy Daniels, stated that both he and his wife were in poor health and that he was scheduled to go onto Baylor [Geriatrics Hospital] in Dallas at a later date for "further evaluations on more potential strokes and failing organs". The Daniels' health problems were further described in a letter to Complainant's counsel, dated August 1, 2005, in which Mr. Daniels stated that he was 76 years old and in very bad health suffering from arthritis almost to the point of being immobile upon rising and that he had suffered a stroke, ending up in the Del Norte Hospital. His wife was described as being 73 years old and in precarious health, suffering from fibromyalga, a crushed and worn out knee joint, which was scheduled for replacement [if her health permitted] and from illness and fever associated with a septic kidney.

The letter, dated August 23, 2005, referred to above, enclosed a copy of a letter to Complainant's counsel, dated August 1, 2005, on the first page, but July 24, 2005, on the second page, which, inter alia, disputed the allegation that Robert Cross, the purchaser of the Moses-Bolton Tract, was not informed of alleged wetlands on the property and of the Cease and Desist Orders issued by the COE. The letter also referred to a wetland delineation performed by wetlands specialists ERO, not otherwise identified and no date stated, which was allegedly "O.K.'d" by the

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bridge abutments, and for the construction and maintenance of farm or forest roads, or temporary roads for moving mining equipment.

COE.[4] The August 23 letter requested that the hearing be held in either South Fork or Del Norte, Colorado, but did not provide any documents or exhibits to be offered in evidence or a list a of prospective witnesses . Explaining that providing a detailed witness list would be tedious and time consuming, the letter asserted that they were working diligently [to provide the requested information]. This letter along with the description of their health problems could readily be construed as a request for a continuance or an extension of time of no indefinite extent.

By a letter, dated September 26, 2005, addressed to Ms. Nelida Torres, the ALJ's legal staff assistant, in Denver rather than Washington, D.C. ("Torres Letter"), which appears to have been copied to the Regional Hearing Clerk and Complainant's counsel, Respondents provided a list of some 18 prospective witnesses who are allegedly familiar with the history of the Moses-Bolton Tract. Testimony of witnesses as to their personal observations which make the existence of wetlands more or less probable as well as testimony supporting the applicability of the Section 404(f) exemptions, e.g., the existence of old roads, would be admissible. Although several of the listed individuals may have the expertise and experience to testify as to the existence of wetlands on the property and to give opinion testimony as to the upland/wetland demarcation, it is not clear that this is so. These matters would need to be addressed before opinion testimony would be admissible.

The Torres Letter also addressed the health problems of Charles Lindy Daniels including the severity of his arthritis and his stroke during 2004 (id. at 1). The letter stresses that his health during the writing of the letter "compelled [him] to fly out to Dallas for medical evaluation, and treatment at the Baylor Hospital." Mr. Daniels closes the letter by stating that "..health problems permitting when I return from my trip to Dallas and the hospital, I shall, with vigor, return to the task of fulfilling your wishes."

On September 29, 2005, Complainant filed a Motion for Default, asserting that Respondents have failed to comply with the Consolidated Rules of Practice and the ALJ's Order. The Motion acknowledges that Respondents' letter [dated August 23, 2005] requested a location for a hearing, but alleges that in all other respects it failed to respond to the Order. Complainant points out that the letter was not filed with the Regional Hearing Clerk, as required by both 40 C.F.R. § 22.5(b) and the Order, nor was a copy sent to the ALJ, as required by the Order. Moreover, Complainant asserts that the August letter did not meet the requirements of an adequate prehearing exchange.[5] The Motion did not mention or otherwise acknowledge the Torres Letter. Arguing that Respondents "have not filed a prehearing exchange marginally responsive," EPA moves that the ALJ find that Respondents have defaulted and assess a full penalty amount of $137,500 (*id.* at ¶ 11). Complainant argues that Respondents' *pro se* status and assertions of illness should not preclude issuance of a default order (*id.* at ¶ 12).

Respondents' response to the Motion for Default consisted of a letter with attachments, dated September [October] 12, 2005, addressed to the ALJ. Respondents assert that " we are being told that being incapacitated does not construe [constitute cause for] a continuance in our case " and argue that a default order would act as a deprivation of due process of law (id.). The principal

[4] A copy of this delineation does not appear to be included in the voluminous correspondence and documentation constituting Complainant's Prehearing Exchange.

[5] Rule 22.19(a)(2) provides that each party's prehearing information exchange shall contain "(i) The names of any expert or other witnesses it intends to call at the hearing, together with a brief narrative summary of their expected testimony, or a statement that no witness will be called; and (ii) Copies of all documents and exhibits which it intends to introduce into evidence at the hearing."

portion of the Response was contained in an attached letter, addressed to Complainant's counsel, also dated October 12, 2005, which alleges, inter alia, that the $130,000 "extortion money" demanded by EPA is money we do not have and cannot raise. The Response also includes two letters from the Lewis H. Entz, a Colorado State Senator. Senator Entz describes his personal observations of the site and concludes that the land at issue is not a wetland.

III. Discussion

Consolidated Rule 22.17 is entitled **Default** and provides in pertinent part

"(a) *Default.* A party may be found in default, after motion, upon failing 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 the purpose 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……."

Use of the word "may" in the foregoing quote from Rule 22.17(a) indicates that issuance of a default order is discretionary with the ALJ. This is true even though Rule 22.17(c) *Default order* provides in pertinent part "When the Presiding Officer finds that a default has occurred, he shall issue a default order against the defaulting party as to all or any parts of the proceeding unless the record shows good cause why a default order should not be issued…." The ALJ, of course, has discretion to find that a default has occurred and, even if such a finding is made, a default order is not appropriate, if the record shows good cause why a default order should not be issued.

This is not a case where Respondents have ignored the requirements of the Rules of Practice and of the ALJ's Order for an exchange of prehearing information. Rather by a letter, dated September 26, 2005 ("Torres Letter"), they have presented an extensive witness list and a statement of the general subject matter of their expected testimony. While this letter is not a complete response to the ALJ's Order and was submitted tardily, there is no evidence or allegation that Complainant was prejudiced in any manner by this late filing. Moreover, as noted above, Respondents' letter, dated August 23, 2005, describing their health problems, which appear to be serious, and asserting that they are diligently working to [provide the requested information] is readily subject to the interpretation that it is a request for a continuance or an extension of time, albeit indefinite in scope. It is also worthy of emphasis that Respondents responded to the Motion for Default, opposing the Motion, inter alia, as a deprivation of due process of law, thus indicating their continued willingness and desire to participate in this litigation.

While it may well be as Complainant argues that Respondents' *pro se* status and their health problems do not preclude issuance of a default order, these facts plus their responses to the ALJ's Order strongly suggest that issuance of a default order under the circumstances present here would not be appropriate. It is, of course, well settled that ".. default is a harsh and disfavored sanction reserved only for the most egregious behavior." *Agronics Inc,* Docket No. CWA 6-1631-99, Order Denying Complainant's Motion For Default, etc, slip op. at 7, 2003 EPA RJO LEXIS 11, at *5 (RJO, May 7, 2003), citing, among others, *Lacy v Sitel Corp,* 227 F. 3d 290 (5th Cir. 2001) and *Ackra Direct Marketing Corp. v. Fingerhut Corp,* 86 F. 3d 852 (8th Cir.1996). See also *James Bond,* Docket No. CWA-08-2004-0047, 2005 EPA ALJ LEXIS 1 (January 11, 2005) ("default orders are

not favored by law and as a general rule cases should be decided on their merits whenever possible"[6]).

It should also be noted that even if a default order is issued, assessment of the penalty sought in the complaint is not automatic as Complainant appears to assume. Rather, in accordance with Rule 22.17(c) "(t)he relief requested in the complaint or the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act." See, e.g. *Lerro Products, Inc.*, Docket No. FIFRA 03-2002-0241, Order Granting Motion for Default Judgment, 2003 ALJ LEXIS 189 (ALJ, October 8, 2003) (even though Respondent was found to be in default, penalty of $1,000 for late submission of a pesticide production report was held to be consistent with the record and assessed rather than maximum penalty of $5.500 sought by Complainant).

From the foregoing, it follows that the Motion for Default is lacking in merit and will be denied.

IV. Order.

Complainant's Motion for Default is denied.[7]

Dated this 18th day of November, 2005.

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Spencer T. Nissen
Administrative Law Judge

[6] . In the present case, Respondents' arguments should be determined on the merits and not decided by default order. Respondents challenge the need for a permit for certain activities on the property. Specifically, they assert that their activities fall within CWA § 404(f) exemptions (supra note 3) from permitting requirements. While exemptions to the CWA are often construed narrowly, Section 404(f) has been applied to situations where fill material was discharged in order to maintain and expand the embankments which support a road. *June v. Town of Westerfield*, 370 F.3d 255 (2d Cir. 2004). Respondents have raised factual issues that ought to be determined in context of the law.

[7] . The ALJ will be in telephonic contact with the parties in the near future for the purpose of scheduling this matter for hearing. The hearing will be held in one of the two locations requested by Respondents or in the vicinity thereof depending on available courtroom space.