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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6
DALLAS, TEXAS

SEP 18 10 3 57
REGIONAL HEARING CLERK
EPA REGION VI

In the Matter of:)
)
Gaskey Construction Corporation,) Docket No. CWA-06-2004-2335
)
Respondent.)

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ENVIR. APPEALS BOARD

AMENDED INITIAL DECISION AFTER REMAND

On February 6, 2006, Regional Judicial Officer Michael Barra, as Presiding Officer in the above caption matter, issued an Initial Decision and Default Order ("Default Order") against Respondent Gaskey Construction Corporation ("Gasky"). On March 21, 2006, The Environmental Appeals Board ("Board") issued an Order Electing to Review Sua Sponte and Remanding to Regional Judicial Officer ("Order"). In its Order, the Board remanded the penalty portion of the Default Order and required that the Presiding Officer either provide further explanation and analysis regarding the rationale for the \$10,155 penalty assessment or adjust the penalty in light of the Board's Order and fully explain the rationale for the such adjustment. In particular, the Board's Order requires Presiding Officer to address three matters: (1) adoption of the Region's proposed \$10,000 gravity-based penalty; (2) adoption of the Region's \$155 economic benefit calculation; and (3) consideration of "other factors as justice may require" in adjusting the penalty amount, specifically regarding Judge Barra's statement regarding consideration of Respondent's "general recalcitrance in its dealings with EPA." On August 23, 2006, Judge Barra withdrew as Presiding Officer in this matter. As an appointed Regional Judicial Officer, I have been assigned as the new Presiding Officer in this case. Because I am not privy to Judge Barra's thought processes in analyzing Complainant's proposed penalty and it

would be inappropriate to discuss this matter with him, I am reviewing the penalty *de novo*.

BACKGROUND AND DEFAULT STATUS

The Board remanded only the penalty portion of Judge Barra's Initial Decision. However, it is noted that Respondent submitted a letter dated April 12, 2006, signed by Mignonne Gaskey, to the Board regarding this matter. After a careful review of the record in this matter and weighing the Board's Order upholding Judge Barra's determination, I do not find any basis for reconsideration of the Default Order. In the April 12, 2006 letter, Mignonne Gaskey asserts, as President of Gaskey Construction Corporation, that he was unaware of the Complainant's claim against Respondent and that Respondent relied on "representations of Chase Bank and it's Architect and Engineer." The record in this matter shows receipt of all important filings and significant involvement by officials with Gaskey Construction Corporation. The Complaint in this matter was originally filed on September 21, 2004, and sent certified mail to Mr. Bill Gaskey, President. The return receipt was signed by Mrs. Gaskey (no first name was included in the signature block). The cover letter to the Complaint specifically references the provisions to request a hearing and is very clear in the consequences of failure to do so within 30 days of receipt of the Complaint. Section IV of the Complaint, paragraphs 25, 26, 27 and 28 include statements in bold regarding the proper manner in which to Respond and the address of the Regional Hearing Clerk is provided.

On October 28, 2004, Complainant filed a status report indicating the belief that there was a settlement in principle. The Status Report was addressed to Bill Gaskey, President, and the return receipt was signed by Mr. Gaskey (no first name is on the return receipt). This status

report also included a copy of a letter from Respondent dated October 20, 2004 and signed by Guy W. Gaskey, President, in which Respondent claims reliance on the owner of the property and its architects. This letter was not filed with the Regional Hearing Clerk, does not contain a request for a hearing and does not clearly admit, deny or explain all of the factual allegations in the complaint. In a Notice of Assignment and Initial Scheduling Order issued on November 19, 2004, Judge Barra clearly indicated that Respondent's letter did not meet the requirements for an answer and stated "(i)t is not clear if the Respondent is under the mistaken impression that its letter satisfies the requirement that Respondent file an answer to the Complaint." Judge Barra then extended the date by which Respondent was to file an answer to December 20, 2004. The Order was sent to Bill Gaskey, President, Gaskey Construction Company and the return receipt shows that it was signed for by Mrs. Gaskey (again, no first name was on the signature).

On December 3, 2004, parties filed a Joint Status Report. This report stated that the parties had engaged in discussions and that no settlement had been reached. This status report specifically stated that "Respondent will file its answer to the complaint and request for a hearing consistent with 40 C.F.R. § 22.15 on or before December 20, 2004." The signature block for Respondent indicates the Status Report was signed by Bill Gaskey. The return receipt for the copy that was sent to Respondent was signed by Frank Gaskey. The record indicates that this was the last communication from Respondent until Mignonne Gaskey's April 2006 letter to the Board. A January 4, 2005 Status Report from Complainant indicates several attempts to contact Respondent were unsuccessful and calls were not returned.

On March 1, 2005, Complainant filed an Amended Complaint in this matter, thus giving Respondent another 30 days in which to file an Answer. The return receipt for the Complaint

in a complaint or default motion shall be ordered unless clearly inconsistent with the record or the underlying statute.

45. The civil penalty of \$10,155.00 requested in the Motion for Default is not inconsistent with the record or with section 309(g) of the Clean Water Act, 33 U.S.C. § 1319.

ANALYSIS OF CIVIL PENALTY CRITERIA

The Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination and Suspension of Permits at 40 C.F.R. § 22.27(b) state the following:

If the Presiding Officer determines that a violation has occurred and the complaint seeks a civil penalty, the Presiding Officer shall determine the amount of the recommended civil penalty based on the evidence and in accordance with any penalty criteria set forth in the Act. The Presiding Officer shall consider any civil penalty guidelines issued under the Act.

Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3), establishes the factors governing the assessment of a civil penalty. Those factors are:

...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.

The nature of this violation is failure to obtain a permit for 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), *see* Attachment G to Complainant’s Motion for Default Order, Declaration of Everett H. Spencer. Failure of facilities to obtain

was signed by Frank Gaskey. On July 1, 2005, Complainant filed a Motion for Default Order. A return receipt with a illegible signature indicates this was delivered to the same office as all prior correspondence. The Initial Decision and Default Order was not issued until February 6, 2006, affording Respondent ample opportunity to address the issues and request a hearing.

The record as discussed above shows that Gaskey Construction Corporation, not Chase Bank or its architects, knew of the Complaint and allegations, officers of Respondent corporation were involved in initial discussions with EPA and were informed as to the necessary steps to avoid a Default Order. Respondent was given far more time to file an Answer than is afforded in the regulations, yet failed to do so. Because of these facts, there is no basis for revising Judge Barra's Default Order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

As discussed above, the Board did not remand Judge Barra's Default Order regarding liability. The remand related solely to the penalty awarded. On April 21, 2006, the Clerk of the Board transferred Respondent's April 12, 2006 letter for consideration. That letter and its attachments were considered as was the entire record available as discussed above. As a result, it is determined that there is no basis to revoke the Findings of Fact or the Conclusions of Law reached by Judge Barra in the February 6, 2006 Initial Decision and Default Order as they pertain to the default and liability.

1. Paragraphs 1 through 43 of the February 6, 2006 Initial Decision and Default Order under the sections titled Findings of Fact and Conclusions of Law are hereby adopted and incorporated by reference.

44. 40 C.F.R. § 22.17(c) states, in relevant part, that the relief proposed or requested

permits that limit discharges and ensure best management practices would thwart the stated purposes of the statute.

The extent of the violation in this matter is a complete failure to comply with the statutory and regulatory permitting requirements. Respondent 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 Respondent could have come into compliance, yet failed to do so.

The gravity of the violations 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 Respondent failed to comply for five months.

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

Complainant seeks \$155.00 for the economic benefit of noncompliance. According to the Declaration of Everett H. Spencer, this figure represents what it would have cost Respondent to prepare and implement a Storm Water Pollution Prevention Plan, the requirement in the type of permit Respondent 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.

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.

Conclusion

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 Order Electing to Review Sua Sponte and Remanding to Regional Judicial Officer, I find that the civil penalty of \$10,155.00 is appropriate.

Order

Respondent is hereby **ORDERED** as follows:

- a. Respondent is assessed a civil penalty in the amount of \$10,155.00.
 - i. Payment of the full amount of the civil penalty assessed shall be made within thirty (30) days after this default order becomes final under 40 C.F.R. § 22.27(c) by submitting a certified check or cashier's check payable to "Treasurer, United States of America," and mailed to:

Regional Hearing Clerk
EPA Region 6
P.O. Box 360582M
Pittsburgh, PA 15251

A transmittal letter identifying the subject case and the EPA docket number, plus Respondent's name and address, shall accompany the check.

- ii. Respondent shall mail a copy of the check to:

Lorena S. Vaughn
Regional Hearing Clerk (6RC)
U.S. Environmental Protection Agency
Region 6
1445 Ross Avenue
Dallas, TX 75202-2733


and to:

Chief, Water Enforcement Branch
Compliance Assurance and Enforcement Division
U.S. EPA Region 6
1445 Ross Avenue
Dallas, Texas 75202-2733

Yerusha Beaver
Assistant Regional Counsel (6RC-EW)
U.S. EPA Region 6
1445 Ross Avenue
Dallas, Texas 75202-2733

- b. This Default Order constitutes an Initial Decision, as provided in 40 C.F.R. § 22.17(c). This Initial Decision shall become a final order unless (1) an appeal to the Environmental Appeals Board is taken from it by any party to the proceeding within thirty (30) days from the date of service provided in the certificate of service accompanying this order; (2) a party moves to set aside the Default Order, or (3) the Environmental Appeals Board elects, *sua sponte*, to review the Initial Decision within forty-five (45) days after its service upon the parties.

SO ORDERED, this 18th day of September, 2006



BEN J. HARRISON
REGIONAL JUDICIAL OFFICER

CERTIFICATE OF SERVICE

I, Lorena S. Vaughn, the Regional Hearing Clerk for Region 6 of the Environmental Protection Agency, hereby certify that a true and correct copy of the **Amended Initial Decision After Remand** in Docket No. CWA-06-2004-2335, was served upon the parties or their counsel of record on the date and in the manner set forth below:

Bill Gaskey
President
Gaskey Construction Corporation
11422 Craighead Drive
Houston, Texas 77025

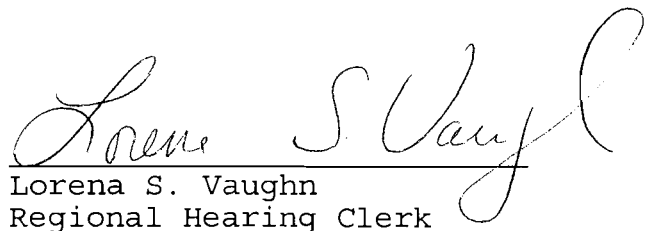
U.S. FIRST CLASS MAIL
RETURN RECEIPT REQUESTED

Eurika Durr
U.S. Environmental Protection Agency
Clerk of the Board
Environmental Appeals Board (MC1103B)
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-0001

Yerusha Beaver
U.S. Environmental Protection Agency
1445 Ross Avenue
Dallas, Texas 75202

HAND DELIVERED

DATE: 9-18-06


Lorena S. Vaughn
Regional Hearing Clerk