UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

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FILED
EPA REGION VIII
HEARING CLERK

IN THE MATTER OF:	)	
	)	**Docket No. CWA-08-2011-0002**
Dockmaster Inc.	)	**Proceeding under Section 301(a) and**
	)	**404 of the Clean Water Act,**
Respondent.	)	**33 U.S.C. § 1311(a) and 1344**
	)	

DEFAULT INITIAL DECISION AND ORDER

This proceeding arises under the authority of sections 301(a) and 404 of the Clean Water Act ("CWA"), 33 U.S.C. §§ 1311(a) and 1344. This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, and the Revocation or Suspension of Permits ("Consolidated Rules" or "Part 22"), 40 C.F.R. §§ 22.1-22.32.

I. BACKGROUND

On October 28, 2010, the United States Environmental Protection Agency, Region 8 ("EPA" or "Complainant") filed a Penalty Complaint and Notice of Opportunity for Hearing ("Complaint"). The Complaint names Dockmaster, Inc. ("Dockmaster" or "Respondent") and alleges on November 7-9, 2007, it discharged dredge and fill material into Flathead Lake, near Lakeside, Montana without a permit in violation of the Clean Water Act.[1] Specifically, the Complaint alleged that Dockmaster discharged approximately 400 cubic feet of soil, dirt, clay, gravel and rocks from a barge into Flathead Lake, a navigable water of the United States, without authorization. The Complaint proposed that Respondent pay a $10,000 penalty. The Respondent failed to file an Answer in this matter.

On January 19, 2011, EPA filed a Motion for Default on Liability ("Default Motion") and Memorandum in Support of Complainant's Motion for Default on Liability ("Memo in Support"). In its Default Motion, EPA requested this court find Dockmaster liable for violating § 301(a) of the Act, 33 U.S.C. §1311(a). The Respondent failed to reply to Complainant's Default Motion.[2] On March 8, 2011, this court issued a Default Initial Decision and Order ("First Initial Decision") on liability only.[3] See, Exhibit 1, First Initial Decision. On April 25, 2011, the Environmental Appeals Board ("EAB") elected not to review this matter sua sponte.

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[1] See, Complaint, pp. 1-5, ¶¶ 1-27. In a companion case for the same violations, Complainant reached an agreement with two other Respondent's, Docket No. CWA-08-2010-0038. See, Complaint, p. 5, ¶29.

[2] See, 40 C.F.R. § 22.16(b). A party has 15 days after service to respond to any written motion.

[3] The January 19, 2011, Motion for Default requested this court to rule on liability only. Therefore, no assessment on the appropriate penalty was made in the March 8, 2011 Initial Decision and Order.

Therefore, the First Initial Decision on liability became a Final Order pursuant to 40 C.F.R. § 22.27.

On August 10, 2011, EPA filed a Motion for Assessment of Penalty on Default ("Penalty Default Motion") and Memorandum in Support of Motion for Assessment of Penalty on Default ("Penalty Memo"). The Penalty Default Motion requests this court assess a $10,000 penalty against Respondent, Dockmaster, Inc. as set forth in the Complaint. See, Complaint, p. 5. On August 18, 2011, this court issued an Order to Supplement the Record. The Order requested EPA to provide a declaration or affidavit to address the factual basis of the Penalty Default Motion and any supporting documents for the penalty. The Order also asked EPA to state whether it was alleging economic benefit as part of its penalty.

On September 29, 2011, EPA filed Supplemental Memorandum in Support of Motion for Assessment of Penalty Default ("Supplemental Penalty Memo"). The Supplemental Penalty Memo included the Declaration of Kenneth Champagne ("Champagne Declaration") and also stated that this declaration explains EPA's economic benefit calculation in support of the proposed penalty. Respondent has not filed any document in response to the Penalty Default Motion, this court's Order or the Supplemental Penalty Memo.

II. DEFAULT ORDER

Section 22.17 of the Consolidated Rules provides in part:

> (a) *Default*. A party may be found to be in default: after motion, upon failure to file a timely answer to the complaint . . . . 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.
>
> (c) *Default order*. When the Presiding Officer finds that a default has occurred, he shall issue a default order against the defaulting party as to any or all parts of the proceeding unless the record shows good cause why a default order should not be issued. If the order resolves all outstanding issues and claims in the proceeding, it shall constitute the initial decision under these Consolidated Rules of Practice. The relief proposed in the complaint or in the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act.
>
> 40 C.F.R. § 22.17.

It is appropriate at this juncture for this court to rule on the Penalty Default Motion.

III. ASSESSMENT OF ADMINISTRATIVE PENALTY

Section 309(g)(2)(B) of the Act, 33 U.S.C. § 1319(g)(2)(B), authorizes the Administrator to bring a civil suit for any violation of section 301 of the Act, 33 U.S.C. § 1311. The Administrator may seek a class II civil penalty of up to $10,000 per violation with a maximum for all violations not to exceed $125,000. 33 U.S.C. § 1319(g)(2)(B). For violations that occur on or after March 15, 2004 through January 12, 2009, the dollar amounts the Administrator may assess are $11,000 per violation with a maximum for all violations not to exceed $137,500. See, 40 C.F.R. Part 19. The unpermitted discharges occurred in 2007; and therefore, the relevant maximum penalty is $137,000. See, Exhibit 1, First Initial Decision.[4]

The Consolidated Rules provide in pertinent part that:

> 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 upon the evidence in the record and in accordance with any civil penalty criteria in the Act. The Presiding Officer shall consider any civil penalty guidelines issued under the Act. The Presiding Officer shall explain in detail in the initial decision how the penalty to be assessed corresponds to any penalty criteria set forth in the Act . . . . If the respondent has defaulted, the Presiding Officer shall not assess a penalty greater than that proposed by complainant in the complaint, the prehearing information exchange or the motion for default, whichever is less.

40 C.F.R. § 22.27(b).

Pursuant to section 309(g)(3) of the CWA, in determining the amount of any penalty assessed this court "shall take into account the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, and 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). In both its Complaint and Penalty Default Motion, EPA requests a civil penalty in the amount of $10,000.00.

As noted above, Consolidated Rule § 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. A conclusory allegation that the penalty was calculated in accordance with the statutory factors or penalty policy is insufficient. *See, Katzson Bros. Inc. v. U.S. EPA,* 839 F.2d 1396, 1400 (10th Cir. 1988). Submission of an affidavit by a person responsible for calculating the penalty, explaining how the category of harm/extent of deviation was arrived at and the underlying factual basis for the gravity-based and multi-day penalty components, is one way of establishing the factual basis for the proposed penalty.

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[4] The Findings of Fact and Conclusions of Law made by this court in the March 8, 2011 First Initial Decision are incorporated by reference into this Order.

On September 29, 2011, EPA filed the Declaration of Kenneth Champagne, which sets forth the criteria considered by the Agency in calculating the proposed penalty. The declaration states that EPA took into consideration the factors required by 33 U.S.C. § 1319(g)(3). See, Champagne Declaration, ¶ 6. Therefore, this court also evaluates these statutory factors and reaches the following decision regarding the penalty:

Nature, Circumstances, Extent and Gravity of the Violation:

According to the Complaint, Dockmaster discharged approximately 400 cubic feet of soil, dirt, clay, gravel and rocks from its barge into Flathead Lake, Lakeside, Montana without a permit. See, Complaint, ¶2; First Initial Decision, pp. 3-5. Mr. Champagne, in his declaration, states he considered Respondent's discharge to be serious for several reasons. Flathead Lake is a valuable aquatic resource and the State of Montana classifies it as an A-1 waterbody.[5] Waterbodies classified A-1 "are to be maintained suitable for drinking, culinary and food processing purposes after conventional treatment for removal of naturally present impurities." ARM §17.30.622(1) and (2).[6] An A-1 waterbody must also be maintained at a water quality level suitable for swimming, bathing and recreation; growth and propagation of salmonid fishes and associated aquatic life, waterfowl, and furbearers; and agricultural and industrial water supply. *Id.* In addition, Flathead Lake has been listed as an impaired waterbody pursuant to CWA § 303(d) due to sedimentation and siltation since 1996. The likelihood that Respondent's unauthorized discharge increased sedimentation and siltation in this high quality lake is high. See, Champagne Declaration, p. 2.

The increase in sedimentation and siltation in Flathead Lake has adverse impacts on the aquatic habitat. See, Champagne Declaration, p. 4. "Dredging and re-depositing the crib dock material would have immediate, adverse impacts on the aquatic habitat in the area of the discharge due to increased turbidity and degraded water quality...High levels of suspended sediment and turbidity can result in direct mortality of fish by damaging and clogging gills." *Id.* Flathead Lake is home to ten native species of fish including the bull trout and westslope cutthroat trout. *Id.* Bull trout were listed as threatened and endangered under the Endangered Species Act in July 1998. *Id.* Both bull trout and westslope cutthroat trout are on the State of Montana's list of Animal Species of Special Concern. *Id.* These species do not tolerate high sediment levels in spawning areas because sediment can suffocate the developing embryos before they hatch.[7]

In a case where, as here, the discharge of pollutants occurred in designated critical habitat for endangered or threatened species, plainly the sensitivity of the environment is extremely high and the gravity of the violation correspondingly high. The EAB observed in *In re Don Cutler*, 11 E.A.D. 622, 653 (EAB 2004), that "in assessing the gravity or seriousness of any violation, [EPA] customarily considers 'the sensitivity of the environment' at the location where the

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[5] Administrative Rule of Montana (ARM) §17.30.608(1)(b).

[6] See also, Exhibits 5-7 of EPA's Penalty Default Motion, August 11, 2011.

[7] See, U.S. Fish and Wildlife Service's guidance "Biological Effects of Sediment on Bull Trout and Their Habitat-Guidance for Evaluating Effects," by Jim Muck, July 13, 2010, available at http://www.fws.gov/wafwo/pdf/2010%20Final%20Sediment%20Document.pdf, as cited in the Champagne Declaration, p. 5.

violation occurred." citing, *In re Phoenix Constr. Servs., Inc.*, 11 E.A.D. 379, 405 (EAB 2004) (citing EPA General Enforcement Policy #GM-22, *A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties* 15 (Feb. 16, 1984)). Therefore, this court has determined that the unauthorized discharge has caused serious harm to the aquatic life in Flathead Lake and likely created substantial cumulative loss to the resource. For this reason, I find that an assessment of $5,000 is appropriate for this statutory factor.

Ability to Pay:

The record contains no information regarding Respondent's financial ability to pay the penalty. On May 16, 2011, EPA contacted Respondent by letter and indicated that this court had issued a Default Initial Decision and Order on liability. See, Penalty Default Memo, p. 8. EPA offered Respondent the opportunity to provide financial information to determine if Respondent could pay the $10,000 penalty. Respondent did not provide any information to EPA. Therefore, no adjustment is made to the penalty based upon this statutory factor.

Prior History of Violations:

The record contains no information and EPA is not aware of any prior violations. No adjustment shall be made to the penalty based upon this statutory factor.

Degree of Culpability:

Respondent's complete disregard towards its obligation to comply with environmental regulations is concerning.[8] EPA states, "as the owner of a barge operating Flathead Lake, Dockmaster is likely to engage in activities that are regulated by the Clean Water Act." See, Penalty Memo, p. 9. Dockmaster is in the business of dock construction and therefore should be aware of the potential need for a CWA Section 404 Permit. See, Champagne Declaration, p. 6. Respondent has shown no willingness to work with EPA and therefore should be penalized, to some degree, for its lack of cooperation. See, *In re Urban Drainage and Flood Control District, et al.*, 1998 EPA, ALJ Lexis 42, at 74 (Initial Decision, June 24, 1998)(noting that the Respondent's degree of cooperation with EPA in rectifying the violations is a factor to consider in determining an appropriate penalty); *In re Veldhuis*, 2002 EPA ALJ Lexis 39, at 309(Initial Decision, June 24, 2002).

Based upon these facts and a demonstrated disregard for the statutory scheme of the Clean Water Act, I find an assessment of $2,000 to be an appropriate penalty for this statutory factor.

[8] It is possible Dockmaster believed it was relying on the direction of another Respondent, Mr. Brett McCrumb, who worked with and settled with EPA, to get all necessary authorizations. See, Penalty Default Memo, Exhibit 8. The court did consider this possibility in evaluating Respondent's degree of culpability.

Economic Benefit:

The economic benefit factor is set out in EPA's Supplemental Penalty Memo. See, Champagne Declaration, p. 7. EPA calculated the economic benefit or savings resulting from the violation to be $2,000. *Id.* EPA estimated that Respondent would have incurred costs to transport and dispose of the soil, dirt, clay gravel and rocks from the crib dock to a proper upland location. *Id.* Many courts start with economic benefit as the base for determining an appropriate penalty. "The base figure used to calculate a CWA penalty is "economic benefit," the assessment of which "deters violations by removing an incentive to violate the law [and] helps create a level playing field by ensuring that violators do not obtain an economic advantage over their competitors." *Service Oil*, 2007 EPA ALJ LEXIS 21, at 146. "[C]ase law has established that [Complainant] need not demonstrate the exact amount of economic benefit, since a tribunal is only required to make a "reasonable approximation" thereof when calculating a CWA penalty." *Id.*

I find that EPA's estimation reasonably reflects the amount avoided by Dockmaster for the violation. Therefore, I assess $2,000 towards the penalty for this statutory factor.

Other Matters as Justice May Require:

EPA indicates that deterrence was considered in its penalty for other matters as justice may require. Complainant states, "EPA's goal with this penalty action is to send the deterrence message to Dockmaster and the regulated community that these types of activities require authorization under a CWA Section 404 permit." See, Champagne Declaration, p. 8. I find an increase in the penalty based on deterrence is reasonable. Therefore, an increase in the penalty of $1,000 was made for this statutory factor.

Total Penalty:

EPA did not specifically place a dollar value on each statutory factor; however, under Section 309(g)(2)(B) of the Act, 39 U.S.C. § 1319(g)(2)(B), the Respondent is subject to a civil penalty of $ 11,000/day, for each day that a violation continues, up to $137,000. Therefore, the $10,000 penalty proposed by EPA is found to be reasonable considering the risk of harm to the environment from Respondent's discharges remaining in place for an extended period of time. This court accepts the $10,000 penalty in this matter.

ORDER

In accordance with 40 C.F.R. § 22.17(c), "the relief proposed in the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act." Based on the record, the statutory factors, and the information in Complainant's declaration regarding economic benefit and economic impact on the violator, this court is awarding the full amount of the penalty proposed in the Complaint. I hereby find that Respondent is in default and liable for a total penalty of **$10,000.00**

IT IS THEREFORE ORDERED that Respondent, Dockmaster, Inc., shall, within thirty (30) days after this Order becomes final under 40 C.F.R. § 22.27(c), submit by cashier's or

certified check, payable to the United States Treasurer, payment in the amount of **$10,000.00** to the following address:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Financial Center
P.O. Box, 979077
St. Louis, MO 63197-9000

Contacts: Craig Steffan 513-487-2091
Eric Volck 513-487-2103

Or Respondent can make payment of the penalty as follows:

WIRE TRANSFERS:

Wire transfers should be directed to the Federal Reserve Bank of New York:
Federal Reserve Bank of New York
ABA = 021030004
Account = 68010727
SWIFT address = FRNYUS33
33 Liberty Street
New York NY 10045
Field Tag 4200 of the Fedwire message should read " D 68010727 Environmental Protection Agency "

OVERNIGHT MAIL:
U.S. Bank
1005 Convention Plaza
Mail Station SL-MO-C2GL
St. Louis, MO 63101
Contact: Natalie Pearson
314-418-4087

ACH (also known as REX or remittance express)
Automated Clearinghouse (ACH) for receiving US currency
PNC Bank
808 17th Street, NW
Washington, DC 20074
Contact – Jesse White 301-887-6548
ABA = 051036706
Transaction Code 22 - checking
Environmental Protection Agency
Account 310006
CTX Format

ON LINE PAYMENT:

There is now an On Line Payment Option, available through the Dept. of Treasury. This payment option can be accessed from the information below:

WWW.PAY.GOV
Enter sfo 1.1 in the search field
Open form and complete required fields.

Respondent shall note on the check the title and docket number of this Administrative action.

Respondent shall serve a photocopy of the check on the Regional Hearing Clerk at the following address:

Regional Hearing Clerk
EPA Region 8
1595 Wynkoop Street
Denver, Colorado 80202

Each party shall bear its own costs in bringing or defending this action.

Should Respondent fail to pay the penalty specified above in full by its due date, the entire unpaid balance of the penalty and accrued interest shall become immediately due and owing. Pursuant to the Debt Collection Act, 31 U.S.C. § 3717, EPA is entitled to assess interest and penalties on debts owed to the United States and a charge to cover the cost of processing and handling a delinquent claim. Interest will therefore begin to accrue on the civil penalty, if it is not paid as directed. Interest will be assessed at the rate of the United States Treasury tax and loan rate, in accordance with 40 C.F.R. § 102.13(e).

This Default Order constitutes an Initial Decision ("Second Initial Decision"), in accordance with 40 C.F.R. § 22.27(a) of the Consolidated Rules. This Second Initial Decision shall become a Final Order forty five (45) days after its service upon a Party, and without further proceedings unless: (1) a party moves to reopen the hearing; (2) a party appeals the Second Initial Decision to the Environmental Appeals Board; (3) a party moves to set aside a default order that constitutes an initial decision; or (4) the Environmental Appeals Board elects to review the Second Initial Decision on its own initiative.

Within thirty (30) days after the Second Initial Decision is served, any party may appeal any adverse order or ruling of the Presiding Officer by filing an original and one copy of a notice of appeal and an accompanying appellate brief with the Environmental Appeals Board. 40 C.F.R. § 22.27(a). If a party intends to file a notice of appeal to the Environmental Appeals Board it should be sent to the following address:

U.S. Environmental Protection Agency
Clerk of the Board
Environmental Appeals Board (MC 1103B)
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-0001

Where a respondent fails to appeal an Initial Decision to the Environmental Appeals Board pursuant to § 22.30 of the Consolidated Rules, and that Initial Decision becomes a Final Order pursuant to § 22.27(c) of the Consolidated Rules, **RESPONDENT WAIVES ITS RIGHT TO JUDICIAL REVIEW.**

SO ORDERED This 25th Day of January, 2012.

Elyana R. Sutin
Presiding Officer

CERTIFICATE OF SERVICE

The undersigned certifies that the original of the attached **DEFAULT INITIAL DECISION AND ORDER ON PENALTY** in the matter of **DOCKMASTER, INC.; DOCKET NO.: CWA-08-2011-0002.** The documents were filed with the Regional Hearing Clerk on January 24, 2012.

Further, the undersigned certifies that a true and correct copy of the documents were delivered to, Margaret "Peggy" Livingston, Enforcement Attorney, U. S. EPA – Region 8, 1595 Wynkoop Street, Denver, CO 80202-1129. True and correct copies of the aforementioned document was resent and placed in the United States mail certified/return receipt requested on January 24, 2012, to:

Glenda Walton
Dockmaster, Inc.
517 Cleveland St., SW
Ronan, MT 59864

And e-mailed to:

Honorable Elyana R. Sutin
Regional Judicial Officer
U. S. Environmental Protection Agency – Region 8
1595 Wynkoop Street (8RC)
Denver, CO 80202-1129

Elizabeth Whitsel
U. S. Environmental Protection Agency
26 W. Martin Luther King Drive (MS-0002)
Cincinnati, OH 45268

January 24, 2012

Tina Artemis
Paralegal/Regional Hearing Clerk

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

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IN THE MATTER OF:	)	
	)	**Docket No. CWA-08-2011-0002**
Dockmaster, Inc.	)	**Proceeding under Section 301(a) and**
	)	**404 of the Clean Water Act,**
Respondent.	)	**33 U.S.C. § 1311(a) and 1344**
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DEFAULT INITIAL DECISION AND ORDER

This proceeding arises under the authority of sections 301(a) and 404 of the Clean Water Act ("CWA"), 33 U.S.C. §§ 1311(a) and 1344. This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, and the Revocation or Suspension of Permits ("Consolidated Rules" or "Part 22"), 40 C.F.R. §§ 22.1-22.32.

I. BACKGROUND

On October 28, 2010, the United States Environmental Protection Agency, Region 8 ("EPA" or "Complainant") filed a Penalty Complaint and Notice of Opportunity for Hearing ("Complaint"). The Complaint names Dockmaster, Inc. ("Dockmaster" or "Respondent") and alleges on November 7-9, 2007, it discharged dredge and fill material into Flathead Lake, near Lakeside, Montana without a permit in violation of the Clean Water Act ("CWA" or "Act").[1] The Complaint proposed that Respondent pay a $10,000 penalty. EPA mailed a copy of the Complaint to Respondent at the correct address but wrong town on October 29, 2010.[2] On November 15, 2010, the Complaint was re-sent to the correct address and town.[3] According to the domestic return receipt card indicating service for certified mail received by Dockmaster an answer to the Complaint was due no later than December 18, 2010.

Pursuant to 40 C.F.R. § 22.15(a), a respondent must file an answer to a complaint within 30 days of service of the complaint. On December 22, 2010, Complainant sent a letter reminding Respondent that an answer must be filed within 30 days and notified Dockmaster that EPA "is entitled to file a motion for default asking the Regional Judicial Officer to assess the entire $10,000 penalty against Dockmaster."[4] The letter also provided additional time, until

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[1] See, Complaint, pp. 1-5, ¶¶ 1-27. In a companion case for the same violations, Complainant reached an agreement with two other Respondents, Docket No. CWA-08-2010-0038. See, Complaint, p. 5, ¶29.
[2] See, Exhibits 1and 2 of Complainant's Motion for Default on Liability and Memorandum in Support.
[3] See, Exhibit 3 of Complainant's Motion for Default on Liability and Memorandum in Support which shows that the Registered Agent, Glenda Walton, signed for the Complaint on December 18, 2010.
[4] The Motion for Default requests this court to rule on liability only. Therefore, no assessment on the appropriate penalty will be made in this Initial Decision and Order.

January 10, 2011, for Respondent to file an answer. The letter was sent certified mail and was refused by Respondent. [5]

The Complaint iterates Respondent's obligations with respect to responding to the Complaint, including filing an answer. (See, Complaint, p. 8). Specifically, the Complaint states:

> **By failing to request a hearing or to file a written answer within the thirty (30) day time limit, Respondent may waive the right to contest any of the allegations set forth in this complaint and/or be subject to a default judgment pursuant to 40 C.F.R. §22.17 imposing the full penalty proposed in this complaint.** (emphasis in original document).

An answer from Dockmaster has not been filed with the Regional Hearing Clerk to date.

On January 19, 2011, Complainant filed a Motion for Default on Liability ("Default Motion") and Memorandum in Support of Complainant's Motion for Default on Liability ("Memo in Support"). In its Default Motion, Complainant requests this Court to find Dockmaster liable for violating section 301(a) of the Act, 33 U.S.C. §1311(a). Specifically, the Complaint alleges that Dockmaster discharged approximately 400 cubic feet of soil, dirt, clay, gravel and rocks from a barge into Flathead Lake, a navigable water of the United States, without authorization. The discharges occurred without a permit November 7-9, 2007. The Respondent has not filed a reply to Complainant's Motion.[6] A decision on the Default Motion is, therefore, ripe and appropriate.

II. DEFAULT ORDER

This proceeding is governed by the Consolidated Rules of Practice, 40 C.F.R. Part 22 (Consolidated Rules). Section 22.17 of the Consolidated Rules provides in part:

> (a) *Default.* A party may be found to be in default: after motion, upon failure to file a timely answer to the complaint . . . . 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. . .
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> (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.
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> (c) *Default order.* When the Presiding Officer finds that a default has occurred, he shall issue a default order against the defaulting party as to any or all parts of

[5] See, Exhibit 5 of Complainant's Motion for Default on Liability and Memorandum in Support.
[6] See, 40 C.F.R. § 22.16(b). A party has 15 days after service to respond to any written motion.

the proceeding unless the record shows good cause why a default order should not be issued. If the order resolves all outstanding issues and claims in the proceeding, it shall constitute the initial decision under these Consolidated Rules of Practice. The relief proposed in the complaint or in the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act.

40 C.F.R. § 22.17.

It is appropriate at this juncture for this court to rule on the Default Motion.

III. FINDINGS OF FACT

Pursuant to 40 C.F.R. §§ 22.17(c) and 22.27(a) of the Consolidated Rules, and based upon the record before me, I make the following findings of fact:

1) Dockmaster is a Montana Corporation doing business in Montana.

2) From Approximately November 7, 2007 to November 9, 2007, Dockmaster discharged approximately 400 cubic feet of soil, dirt, clay, gravel, and rocks from a barge into Flathead Lake, South of Caroline Point, near Lakeside, Montana.

3) The discharge occurred using an excavator that was placed on the deck of a barge.

4) The barge is owned by Respondent, Dockmaster.

5) The excavator on the barge was operated by Dockmaster employees.

6) The soil, dirt, clay, gravel and rocks were wastes comprised from residual building material from the demolition of a crib dock and/or construction of a replacement dock near the shore of Flathead Lake.

7) The dock is owned by Montana Eagle Development, a respondent in a separate action.

8) Flathead Lake has supported and is capable of supporting commercial navigation.

9) The soil, dirt, clay, gravel and rocks remain in Flathead Lake.

10) The work performed in paragraph 2 above was not authorized by any permit.

11) The U.S. Corps of Engineers ("Corps") determined in a letter dated January 7, 2005, that repair to the existing dock and structures on Flathead Lake was authorized by Department of Army Nationwide Permit 39: Residential, Commercial and Institutional Developments.

12) The Corps authorized Montana Eagle Development to place approximately 0.2018 of an acre of total fill below the ordinary high water mark for the project.

13) The discharges described in paragraph 2 above exceeded the January 7, 2005 authorization through Nationwide Permit 39 by the Corps.

14) On October 28, 2010, EPA filed a Penalty Complaint and Notice of Opportunity for Hearing.

15) On November 15, 2010, Complainant re-sent the Complaint to Glenda Walton, Registered Agent for Dockmaster, to the correct address and town in Montana.

16) On November 18, 2010, Ms. Walton received the Complaint according to the return receipt card.

17) On December 22, 2010, EPA notified Dockmaster, in writing, that the date to file an answer had passed and EPA was entitled to file a motion for default. Dockmaster was put on notice that if an answer was not filed by January 10, 2011, EPA intended to file such motion.

18) On January 19, 2011, Complainant filed a Motion for Default on Liability.

19) No response to the Motion for Default on Liability was filed.

IV. Conclusions of Law

Pursuant to 40 C.F.R. §§ 22.17(c) and 22.27(a) of the Consolidated Rules, and based upon the record before me, I make the following conclusions of law:

1. Respondent, Dockmaster is a corporation and therefore a "person" with the meaning of section 502(5) of the Act, 33 U.S.C. § 1362(5) and 40 C.F.R. §122.2.

2. Soil, dirt, clay, gravel and rocks consisting of wastes from building materials are "dredged material" and/or "fill material" as defined in 33 C.F.R. § 323.2(c) and 33 C.F.R. § 323.2(e), and "pollutants" as defined by section 502(6) of the Act, 33 U.S.C. § 1362(6) and 40 C.F.R. §122.2.

3. The placement of dredged and fill material into Flathead Lake, is a "discharge of pollutants" as defined by section 502(12) of the Act, 33 U.S.C. § 1362(12) and 40 C.F.R. §122.2.

4. The excavator and barge are "point sources" as defined by section 502(14) of the Act, 33 U.S.C. § 1362(14) and 40 C.F.R. §122.2.

5. Flathead Lake is a "navigable water" as defined by section 502(7) of the Act, 33 U.S.C. § 1362(7) and a "water of the United States" as defined by 33 C.F.R. §328.3(a).

6. Pursuant to section 404, 33 U.S.C. § 1344, the Secretary of the Army, acting through the Corps, is authorized to issue permits for the discharge of dredged or fill material into navigable waters of the United States.

7. Pursuant to 33 C.F.R. § 323.3(a), unless exempted by 33 C.F.R. § 323.4, a permit is required for the discharge of dredged or fill material.

8. Dockmaster discharged pollutants from a point source into navigable waters of the United States without authorization by a permit issued pursuant to section 404, constituting a violation of section 301(a), 33 U.S.C. § 1311(a) of the Act.

9. Pursuant to 40 C.F.R. § 22.5(b)(1), Complainant has demonstrated that it has complied with the service requirements.

10. 40 C.F.R. § 22.14 provides that an answer to a complaint must be filed within thirty (30) days after service of the complaint.

11. 40. C.F.R. § 22.17 provides that a party may be found to be in default, after motion, upon failure to file a timely answer to the complaint.

12. This default constitutes an admission, by Dockmaster, of all facts alleged in the Complaint and a waiver, by Dockmaster, of its rights to contest those factual allegations pursuant to 40 C.F.R. § 22.17(a).

DEFAULT ORDER

In accordance with 40 C.F.R. § 22.17(c), "the relief proposed in the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act." Based on the record and the Findings of Fact set forth above, I hereby find that Dockmaster is in default and liable as a matter of law for the discharge of dredge and fill material into Flathead Lake on November 7-9, 2007.

This Default Order constitutes an Initial Decision, in accordance with 40 C.F.R. § 22.27(a) of the Consolidated Rules. This Initial Decision shall become a Final Order forty five (45) days after its service upon a party, and without further proceedings unless: (1) a party moves to reopen the hearing; (2) a party appeals the Initial Decision to the Environmental Appeals Board; (3) a party moves to set aside a default order that constitutes an initial decision; or (4) the Environmental Appeals Board elects to review the Initial Decision on its own initiative.

Within thirty (30) days after the Initial Decision is served, any party may appeal any adverse order or ruling of the Presiding Officer by filing an original and one copy of a notice of appeal and an accompanying appellate brief with the Environmental Appeals Board. 40 C.F.R. §

22.27(a). If a party intends to file a notice of appeal to the Environmental Appeals Board it should be sent to the following address:

U.S. Environmental Protection Agency
Clerk of the Board
Environmental Appeals Board (MC 1103B)
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-0001

Where a respondent fails to appeal an Initial Decision to the Environmental Appeals Board pursuant to § 22.30 of the Consolidated Rules, and that Initial Decision becomes a Final Order pursuant to § 22.27(c) of the Consolidated Rules, **RESPONDENT WAIVES ITS RIGHT TO JUDICIAL REVIEW.**

Each party shall bear its own costs in bringing or defending this action.

SO ORDERED This 8th Day of March, 2011.

Elyana R. Sutin
Presiding Officer

CERTIFICATE OF SERVICE

The undersigned certifies that the original of the attached **DEFAULT INITIAL DECISION AND ORDER** in the matter of **DOCKMASTER, INC.; DOCKET NO.: CWA-08-2011-0002** was filed with the Regional Hearing Clerk on March 8, 2011.

Further the undersigned certifies that a true and correct copy of the document was delivered to Peggy Livingston, Enforcement Attorney, U. S. EPA Region 8; 1595 Wynkoop Street, Denver, CO 80202-1129. True and correct copies of the aforementioned document were placed in the United States mail return receipt requested on March 8, 2011 to:

Glenda Walton, Registered Agent
Dockmaster, Inc.
517 Cleveland Street, SW
Ronan, MT 59864-2906

And

Glenda Walton, Registered Agent
Dockmaster, Inc.
517 Cleveland Street, SW
Polson, MT 59860

3-8-2011
DATE

Kathi Glavin for
Tina Artemis
Paralegal/Regional Hearing Clerk