

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

2011 JAN 19 AM 9:35

FILED
EPA REGION VIII
READING CLERK

IN THE MATTER OF)
)
Dockmaster Inc.) Docket No. CWA-08-2011-0002
)
) **COMPLAINANT'S**
) **MOTION FOR DEFAULT**
) **ON LIABILITY**
Respondent.)
_____)

For the reasons set forth in the accompanying Memorandum In Support of Complainant's Motion for Default on Liability, Region 8 of the United States Environmental Protection Agency (EPA) requests that Respondent Dockmaster Inc. be found liable for violating § 301(a) of the Clean Water Act (the Act), 33 U.S.C. § 1311(a).

Respectfully submitted,

Margaret J. (Peggy) Livingston
Margaret J. (Peggy) Livingston
Enforcement Attorney
Office of Enforcement, Compliance
and Environmental Justice
U.S. EPA Region 8
1595 Wynkoop Street
Denver, CO 80202
Telephone Number: (303) 312-6858
Facsimile Number: (303) 312-7202

Certificate of Service

This is to certify that the preceding Complainant's Motion for Default and the accompanying Memorandum in Support of Complainant's Motion for Default on Liability were sent as indicated below on the date indicated below to the following:

Glenda Walton, Registered Agent
Dockmaster Inc.
517 Cleveland St. SW
Ronan, MT 59864-2906
By Certified Mail, Return Receipt Requested
No. 7009-3410-0000-2592-8109

and

Glenda Walton, Registered Agent
Dockmaster Inc.
517 Cleveland St. SW
Polson, MT 59860
By Certified Mail, Return Receipt Requested
No. 7009-3410-0000-2592-8116

Date: January 19, 2011.

Judith McTernan
Judith McTernan

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

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Dockmaster Inc.)
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Docket No. CWA-08-2011-0002

**MEMORANDUM IN
SUPPORT OF COMPLAINANT'S
MOTION FOR DEFAULT
ON LIABILITY**

I. INTRODUCTION

This memorandum is filed in support of a motion for default filed by the United States Environmental Protection Agency (EPA). As set forth below, Respondent Dockmaster Inc. (Dockmaster or Respondent) has failed to answer the Penalty Complaint and Notice of Opportunity for a Hearing (the Complaint) that EPA filed on October 28, 2010.

EPA requests a ruling that Dockmaster is liable for violating § 301(a) of the Clean Water Act (the Act), 33 U.S.C. § 1311(a), because it has discharged dredged or fill material into Flathead Lake without a permit.

II. BACKGROUND

Upon filing the Complaint, EPA mailed a copy to Dockmaster at 517 Cleveland St. SW, Polson, Montana, 59860. This is the address listed with Montana Secretary of State for Dockmaster's Registered Agent. (Exhibit 1.) The Complaint was returned to EPA with the notation that there was no such street and that the Post Office was unable to forward the package. (Exhibit 2.)

On November 15, 2010, EPA re-sent the Complaint, this time to the same street address but to the town of Ronan, Montana, instead of Polson, Montana. According to the return receipt card accompanying the November 15th letter, Glenda Walton, Registered Agent for Dockmaster, received the Complaint on November 18, 2010. (Exhibit 3.) The original return receipt card has been filed with the Regional Hearing Clerk.

On December 22, 2010, having received no answer to the Complaint, EPA notified Dockmaster in writing that EPA would be entitled to file a motion for default, but that EPA would not do so if Dockmaster filed an answer with the Regional Hearing Clerk by January 10, 2011. (Exhibit 4.) The letter was returned to EPA as refused. (Exhibit 5.)

The Complaint proposed that Dockmaster pay an administrative civil penalty of \$10,000 for its violations of the Act.

III. STANDARD FOR FINDING DEFAULT

A respondent may be found in default upon failure to file a timely answer to an administrative complaint. A respondent's default constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of the respondent's right to contest such factual allegations. 40 C.F.R. § 22.17(a).

A motion for default may seek resolution of all or part of the proceeding. Where the EPA requests a penalty in a motion for default, EPA must specify the amount of, and explain the legal and factual basis for, the penalty it seeks. 40 C.F.R. § 22.17(b).

When a Presiding Officer finds that a default has occurred, s/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. The relief proposed in a complaint or motion for

default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the particular statute authorizing the proceeding at issue. 40 C.F.R. § 22.17(c).

IV. ARGUMENT

A. Respondent Has Failed to File an Answer

According to 40 C.F.R. § 22.15(a), a respondent must file an answer to a complaint with the Regional Hearing Clerk within 30 days after service of the complaint.

As mentioned above, EPA mailed a copy of the Complaint to Dockmaster on October 28, 2010. On November 15, 2010, EPA mailed an additional copy of the Complaint to Dockmaster. Dockmaster received the Complaint, as evidence by the return receipt card that Glenda Walton signed on November 18, 2010. (Exhibit 3.) Although EPA's letter dated December 22, 2010, specifically pointed out that Dockmaster had not filed an answer and could therefore be subject to a default order, Dockmaster refused to accept that letter and has yet to file an answer.

B. Prima Facie Case of Liability

Section 301(a) of the Act, 33 U.S.C. § 1311(a), provides that except as in compliance with certain other provisions of the Act, including § 404, 33 U.S.C. § 1344, "the discharge of any pollutant by any person shall be unlawful."

To prove a *prima facie* case that Dockmaster is liable for violating § 301(a) of the Act, EPA must prove that Dockmaster is a person that has discharged pollutants from a point source without authorization under the Clean Water Act. Avoyelles Sportsman's League, Inc. v. Marsh, 715 F.2d 897 (5th Cir. 1983); U.S. v. Lambert, 915 F.Supp. 797 (S.D. W.Va. 1996); U.S. v. Zanger, 767 F.Supp. 1030 (N.D. Calif. 1991).

The Complaint alleges each of these elements, as demonstrated below. By failing to answer the Complaint, Dockmaster has admitted all factual allegations in the Complaint, including but not limited to the following, as of all times relevant to the Complaint:

- Dockmaster is a Montana corporation. (Par. 1, Complaint.)
- On or about November 7, 8, and 9, 2007, Dockmaster, along with McCrumb Construction & Marine, Inc. (McCrumb Construction) and Montana Eagle Development, LLC (MED),¹ discharged at least 400 cubic feet of soil, dirt, clay, gravel, and rocks from a barge into Flathead Lake, south of Caroline Point, near Lakeside, Montana. (Par. 2, Complaint.)
- The discharge described above was accomplished with an excavator, which was on the deck of the barge. (Par. 3, Complaint.)
- The barge mentioned above was owned by Dockmaster. (Par. 4, Complaint.)
- The excavator on the barge mentioned above was operated by employees of Dockmaster. (Par. 5, Complaint.)
- The soil, dirt, clay, gravel, and rocks mentioned above were wastes consisting of residual building materials from the demolition of a crib dock and/or construction of a replacement dock near the shore of Flathead Lake near Lakeside, Montana. (Par. 8, Complaint.)
- Flathead Lake has supported and/or is capable of supporting commercial navigation. (Par. 9, Complaint.)
- The soil, dirt, clay, gravel, and rocks mentioned above have not been removed from Flathead Lake. (Par. 11, Complaint.)
- No discharge mentioned above was authorized by any permit issued pursuant to the Act by the U.S. Army Corps of Engineers. (Par. 21-24, Complaint.)

1. Person

The admission that Dockmaster is a corporation² establishes that Dockmaster is a “person” as defined in § 502(5) of the Act, 33 U.S.C. § 1362(5).

¹ As indicated in Par. 29 of the Complaint, McCrumb Construction and MED have entered into a consent agreement with EPA resolving their civil penalty liability for their violations. See also the Final Order dated November 3, 2010, in Docket No. CWA-08-2010-0038.

² Dockmaster admitted this by admitting Par. 1 of the Complaint.

2. Discharged

The admissions that Dockmaster, along with two other entities, discharged the wastes at issue into Flathead Lake on or about November 7, 8, and 9, 2007, that Dockmaster owned the barge from which the discharge occurred, and that Dockmaster's employees operated the excavator performing the discharge³ establish that Dockmaster added the wastes in question to Flathead Lake on those dates.

The term "discharge of a pollutant" is defined in § 502(12) of the Act, 33 U.S.C. § 1362(12), to include "any addition of any pollutant to navigable waters from any point source." As noted above, Dockmaster has admitted it added pollutants to Flathead Lake.

The term "point source," which is included in the statutory definition of "discharge of a pollutant," is defined by § 502(14) of the Act, 33 U.S.C. § 1362(14), to include any discernible, confined and discrete conveyance, including but not limited to any . . . conduit . . . or vessel or other floating craft, from which pollutants are or may be discharged." This definition was designed to "embrac[e] the broadest possible definition of any identifiable conveyance from which pollutants might enter the waters of the United States." U.S. v. Earth Sciences, Inc., 599 F.2d 368, 373 (10th Cir. 1979). Barges are expressly included in the statutory definition of "point source." United States v. West Indies Transport, Inc., 127 F.3d 299 (3d Cir. 1997), cert. den. 522 U.S. 1052, 139 L. Ed. 2d 644, 118 S. Ct. 700, 1998 U.S. LEXIS 125 (1998). Equipment that collects material that finds its way into navigable waters also has been held to be a "point source." Avoyelles, supra, 715 F.2d 897 at 922. Thus, the excavator that Dockmaster admitted operating is also a "point source."

³ Dockmaster admitted these facts by admitting Par. 2-5 of the Complaint.

3. Pollutants

Dockmaster's admission that the materials it added to Flathead Lake were soil, dirt, clay, gravel, and rocks that were wastes consisting of residual building materials from the demolition of a crib dock and/or construction of a replacement dock⁴ establishes that the discharged material included "pollutants" as that term is defined by § 502(6) of the Act, 33 U.S.C. § 1362(6). That provision defines "pollutant" to include, among other things, "dredged spoil, solid waste, rock, sand, cellar dirt[,] and industrial, municipal, and agricultural waste discharged into water." Thus, Dockmaster has admitted that it discharged pollutants into Flathead Lake.

4. Into Navigable Water

The admission that Flathead Lake has supported and/or is capable of supporting commercial navigation⁵ establishes that Flathead Lake is part of our nation's "navigable waters" as defined in § 502(7) of the Act, 33 U.S.C. §1362(7), and part of the "waters of the United States" as defined in 33 C.F.R. § 328.3(a). See also Confederated Salish and Kootenai Tribes of the Flathead Reservation v. Namem, 665 F.2d 951, 953 (9th Cir. 1982), cert. den. 459 U.S. 977, 103 S.Ct. 314, 74 L.Ed.2d 291, 1982 U.S. LEXIS 4195 (1982), stating that Flathead lake is "a navigable body of water roughly 26 miles long and up to 5 miles wide."

Among other things, "waters of the United States" include "[a]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide." 33 C.F.R. § 328.3(a)(1).⁶

⁴ Dockmaster admitted this by admitting Par. 2 and 8 of the Complaint.

⁵ Dockmaster admitted this by admitting Par. 9 of the Complaint.

⁶ Flathead Lake's status as a traditional navigable water is sufficient in and of itself for it to be a "navigable water" as defined in § 502(6) of the Act, 33 U.S.C. § 1262(6), and a "water of the United States" as defined in 33 C.F.R. § 328.3(a). However, EPA does not take the position that this is the only ground for considering Flathead Lake a "navigable water" and a "water of the United States."

5. Without a Permit

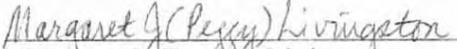
Dockmaster's admission that it did not hold a Clean Water Act permit authorizing the discharges at issue⁷ establishes that it had no such permit authorization.

Dockmaster therefore has admitted all elements of a violation of § 301(a) of the Act, 33 U.S.C. § 1311(a).

V. CONCLUSION

Dockmaster has failed to answer EPA's Complaint. For the reasons set forth above, EPA requests that the Presiding Officer find Dockmaster liable as a matter of law for violating § 301(a) of the CWA, 33 U.S.C. § 1311(a).

Respectfully submitted,


Margaret J. (Peggy) Livingston
Enforcement Attorney
Office of Enforcement, Compliance
and Environmental Justice
U.S. EPA Region 8
1595 Wynkoop Street
Denver, CO 80202
Telephone Number: (303) 312-6858
Facsimile Number: (303) 312-7202

⁷ Dockmaster admitted this by admitting Par. 21-24 of the Complaint.

Certificate of Service

This is to certify that the preceding Memorandum in Support of Complainant's Motion for Default on Liability and the accompanying Complainant's Motion for Default on Liability were sent as indicated below on the date indicated below to the following:

Glenda Walton, Registered Agent
Dockmaster Inc.
517 Cleveland St. SW
Ronan, MT 59864-2906
By Certified Mail, Return Receipt Requested
No. 7009-3410-0000-2592-8109

and

Glenda Walton, Registered Agent
Dockmaster Inc.
517 Cleveland St. SW
Polson, MT 59860
By Certified Mail, Return Receipt Requested
No. 7009-3410-0000-2592-8116

Date: January 19, 2011.

Judith McTernan
Judith McTernan



MONTANA SECRETARY OF STATE LINDA MC Business Entity

Instructions Search Tips

COMPLAINANT'S
EXHIBIT NO. 1

Data Current as of...

If you are ordering a Certificate of Fact or Certificate of Existence, please make sure the Foreign/Do Corporation or Limited Liability Company is in "Good Standing".
Enter the name of the business, and check to see whether their annual report was filed in the current year.

We are not able to provide a Certificate of Fact or Certificate of Existence unless the current annual report has been filed.

Name: DOCKMASTER INC
ID #: D158083
Type: CLOSE CORPORATION
Jurisdiction State: MT
Status: ACTIVE
Status Reason: GOOD STANDING

Status Dates

Expiration Date:
Date of Incorporation: 06/26/2006
Last AR Filed: 02/14/2009
Suspension:
Inactive Date:
Diss/Widthdr/Revoke:

Additional Info

Term: PERP
Shares: 50000.00
Purpose Code: NONE STATED

Agent

Registered Agent: GLENDA WALTON
Address 1: 517 CLEVELAND ST SW
Address 2: P O BOX 362
City: POLSON
State: MT
Zip: 59860-0000

If you would like to purchase a Certificate of Existence for this business entity, select the button below. You will be assessed a \$5.00 fee for this service.

If you would like to purchase a Certificate of Fact for this business entity, select the button below. You will be assessed a \$15.00 fee for this service.

- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

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

X Agent
 Addressee

B. Received by (*Printed Name*) C. Date of Delivery

D. Is delivery address different from item 1? Yes
 If YES, enter delivery address below: No

3. Service Type
 Certified Mail Express Mail
 Registered Return Receipt for Merchandise
 Insured Mail C.O.D.

4. Restricted Delivery? (*Extra Fee*) Yes

COMPLAINANT'S
 EXHIBIT NO. 2

2. Article Number (Transfer from service label) 7008 3230 0003 0731 3880

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540
 CWA-03-2011-0002

1595 Wynkoop Street
 Denver, CO 80202-1129
 8 EUFF. L-PL.

MAIL BUSINESS - PENALTY FOR PRIVATE USE - \$300

- Undeliverable as Addressed
- Mailed Left No Address
- Unclaimed
- Refused
- Attention, Not Known
- No Such Street
- No Such Number
- No Postoffice
- Vacant

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



7008 3230 0003 0731 3880

NIXIE

3007 1 07 11/06/10

RETURN TO SENDER
 NO SUCH STREET
 UNABLE TO FORWARD
 RETURN TO SENDER

CERTIFIED
 MAIL

RETURN RECEIPT
 REQUESTED

10/29/2010
 Denver, CO 80202
 US POSTAGE

COMPLAINANT'S
EXHIBIT NO. 3

SENDER: COMPLETE THIS SECTION	COMPLETE THIS SECTION ON DELIVERY
<ul style="list-style-type: none">■ Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.■ Print your name and address on the reverse so that we can return the card to you.■ Attach this card to the back of the mailpiece, or on the front if space permits.	<p>A. Signature <input checked="" type="checkbox"/> <i>Glenda L. Walton</i> <input type="checkbox"/> Agent <input type="checkbox"/> Addressee</p> <p>B. Received by (Printed Name) <input type="checkbox"/> C. Date of Delivery <i>Glenda L. Walton</i> <i>11-18-10</i></p>
1. Article Addressed to: Glenda Walton, Registered Agent Downmaster Inc. 517 Cleveland St. SW Ronan, MT 59864-2906	<p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input checked="" type="checkbox"/> No</p> <p><i>NOV 16 2010</i></p> <p>3. Service Type <input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail <input type="checkbox"/> Registered <input type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.</p> <p>4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes</p>
2. Article Number (Transfer from service label)	7009 3410 0000 2593 8450
PS Form 3811, February 2004	Domestic Return Receipt <i>Returned 11/15/10</i> 102595-02-M-1540



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 8

1595 WYNKOOP STREET
DENVER, COLORADO 80202-1129
Phone 800-227-8917
<http://www.epa.gov/region08>

2010 DEC 22 AM 9:30

DEC 22 2010

COMPLAINANT'S
EXHIBIT NO. 4

Re: 81/NF-E

CERTIFIED MAIL No. 7009 3410 0000 2592 8079
RETURN RECEIPT REQUESTED

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

Re: Administrative Penalty Complaint
Docket No. CWA-08-2011-0002

Dear Ms. Walton:

On October 28, 2010, the U.S. Environmental Protection Agency (EPA) issued an Administrative Complaint (penalty complaint) to Dockmaster Inc. (Dockmaster) under § 309 of the Clean Water Act (CWA), 33 U.S.C. § 1319. The penalty complaint alleged that Dockmaster violated the CWA by discharging pollutants into Flathead Lake without a CWA permit.

The penalty complaint proposed that EPA assess a penalty of \$10,000 against Dockmaster. The penalty complaint stated that if Dockmaster wished to contest the allegations in the penalty complaint, Dockmaster would be required to file an answer with the Regional Hearing Clerk for EPA Region 8 within thirty days of Dockmaster's receipt of the penalty complaint. The complaint also stated that if Dockmaster failed to request a hearing or file a written answer within thirty days of its receipt of the penalty complaint, Dockmaster could be subject to a default judgment imposing the full penalty proposed in the penalty complaint.

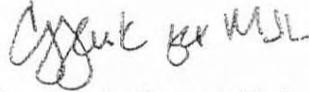
According to EPA's records, Dockmaster received the penalty complaint on November 18, 2010. However, no answer or request for hearing from Dockmaster is on file with the Regional Hearing Clerk for EPA Region 8. Therefore, EPA would be entitled to file a motion for default asking the Regional Judicial Officer to assess the entire \$10,000 penalty against Dockmaster. **However, our office will not file such a motion if Dockmaster files an answer with the Regional Hearing Clerk by January 10, 2011.** In addition, as required by 40 C.F.R. part 22, a copy of which was provided to Dockmaster with the penalty complaint, a copy of the answer would need to be sent to me, as counsel of record for EPA.



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If you have any questions or comments, please contact Ken Champagne, Technical Enforcement, who can be reached at 800/227-8917, extension 6608. If Doekmaster is represented by an attorney, please ask your attorney to call me at 800/227-8917, extension 6858 or, in my absence, David Janik, Senior Supervisory Attorney, at 800/227-8917, extension 6719.

Sincerely,



Margaret J. (Peggy) Livingston
Enforcement Attorney

cc:

✓ Kenneth Champagne, 8E:NF-W
David Janik, 8E:NF-I.



Printed on Recycled Paper



COMPLAINANT'S
EXHIBIT NO. 5

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[FAQs](#)

Track & Confirm

Search Results

Label/Receipt Number: **7009 3410 0000 2592 8079**
Service(s): **Certified Mail™**
Status: **Refused**

Your item was refused by the addressee at 3:03 pm on December 27, 2010 in RONAN, MT 59864 and is being returned to the sender. Information, if available, is updated periodically throughout the day. Please check again later.

Detailed Results:

- **Refused, December 27, 2010, 3:03 pm, RONAN, MT 59864**
- **Notice Left, December 24, 2010, 8:30 am, RONAN, MT 59864**

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FOIA



EPA REGION 8
U.S. ENVIRONMENTAL PROTECTION AGENCY
1595 WYNKOOP STREET
DENVER CO 80202-1129

8ENF-11

OFFICIAL BUSINESS - PENALTY FOR PRIVATE USE - \$300

Glenda Walton, Registered Agent
Dockmaster, Inc.
517 Cleveland St., S.W.
Ronan, MT 59864-2906

12-24
29

PLACE STICKER AT TOP OF ENVELOPE TO THE RIGHT
OF THE RETURN ADDRESS. FOLD AT DOTTED LINE
CERTIFIED MAIL™



7009 3410 0000 2592 8079

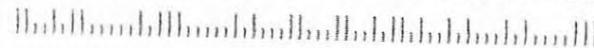
8020201129
598642906 0001

HUP MAIL

NIXIE 591 DC 1 00 12/28/10

RETURN TO SENDER
REFUSED
UNABLE TO FORWARD

BC: 80202112995 *0820-03751-22-41



2 of 2