

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 2

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG. II
2008 OCT 29 PM 1:03
REGIONAL HEARING
CLERK

IN THE MATTER OF:

Rio Construction Corporation
P.O. Box 10462
Caparra Heights
San Juan, PR 00922

NPDES Permit Number PRR10B936

Respondent

Proceeding to Assess a Class II Administrative
Penalty Pursuant to Section 309(g) of the Clean
Water Act, 33 U.S.C. §1319(g)

DOCKET NO. CWA-02-2007-3414

ICIS No. 7730897

RESPONSE OF THE EPA
TO
MOTION IN OPPOSITION TO ORDER IN DEFAULT, ANSWER TO COMPLAINT
AND REQUEST FOR HEARING

On September 24, 2007, Complainant, EPA Region 2, issued a Complaint to Respondent, Rio Construction Corporation (Docket No. CWA-02-2007-3414). Respondent received the Complaint on October 24, 2007, but did not respond to it in any way. On September 22, 2008, Complainant filed a Motion for Default Order on Liability. On October 20, 2008, Rio Construction Corporation ("Rio") filed a Motion In Opposition To Order In Default, Answer To Complaint And Request For Hearing ("Rio's Motion").

Rio Construction Corporation has failed to demonstrate that it should not be found in default. Therefore, a Default Judgment should issue.

In addition, Respondent never filed a request for extension of time to file an Answer.

Therefore, the Answer incorporated into Rio's Motion should be stricken from the record. Respondent, likewise, never requested an extension of time to file a hearing request. In addition, no genuine question of fact or law was raised by Respondent. Therefore, the request for a hearing should be denied.

EPA's discussion follows, below.

OPPOSITION TO ORDER ON DEFAULT

Respondent admitted it received the Complaint in this case and simply set it aside, unopened. (Rio's Motion, Paragraph 3).

Respondent asserted that it is a "well known principle of law that the resolution of a case by default judgment is not favored", but failed to provide any support for that statement.

The Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (applicable to EPA actions), provides at 40 C.F.R. § 22.17(a), that a party may be found to be in default after motion, upon failure to file a timely answer to the complaint. Moreover, 40 C.F.R. § 22.17(c) states that when the Presiding Officer finds that default has occurred, she shall issue a default order unless the record shows good cause why a default order should not be issued. Although "good cause" is a matter of subjective interpretation, it is defined by Black's Law Dictionary as "Substantial reason, one that affords a legal excuse. Legally sufficient ground or reason." See Black's Law Dictionary, Fifth Edition, page 353. Respondent's actions of merely setting aside, and not opening, an envelope sent Certified Mail - Return Receipt Requested from an arm of the Federal Government should not be viewed as a substantial reason that affords a legal excuse and justifies Respondent's failure to appear in this enforcement action. Respondent's failure to show "good cause" must result in this Court granting Complainant's Motion for Default Order on Liability.

Respondent, boldly, included an Answer in Rio's Motion. By doing so, in the absence of first requesting and obtaining an extension of time to file an Answer, Respondent ignored Federal regulations clearly delineated at 40 C.F.R. Part 22, which require that Respondent request of the Court, via Motion served on Complainant, an extension of time to Answer outside the regulated time-frame of 30 days after receipt of the Complaint. By including the Answer in its Motion, Rio Construction Corporation abused the administrative process and usurped the authority of this Court. Therefore, the Answer should be stricken.

Respondent also included in Rio's Motion an untimely Request for a Hearing, therefore, in the absence of a motion for extension of time and an order granting an extension of time to file a request for a hearing, this Request for a Hearing should be denied. In addition, there is no basis to hold a hearing because Respondent failed to raise any genuine issue of fact or law.

Paragraph 7 of Rio's Motion asserted there is "a high likelihood of success on the merits of the case..." This assertion is repudiated. Although Complainant believes the Answer should be stricken because it was filed 11 months after it was due, and filed without leave by the Court to make such a delinquent filing, Complainant nevertheless addresses the Answer below. If the Court accepts the Answer which is incorporated into Rio's Motion, Complainant requests additional time to file a complete response to the Answer. Likewise, Complainant requests additional and time to provide a Certified Administrative Record, if the request for a hearing is granted.

Statutory Authority

Respondent admitted being a person within the meaning of the Clean Water Act, operating the construction site at issue in this matter, and admits the site was at all relevant times a point source as defined at Section 502 of the Clean Water Act. See Rio's Motion Paragraphs

10-12.

In Rio's Motion, it denied that the construction site disturbed approximately 5 acres of land and denied that storm water from the site entered storm sewers which discharge directly into Los Muertos Creek. Respondent asserted now, 2 years after the construction was completed, that the entire project was 1.8 acres and that a smaller portion of the site was disturbed by construction activities. See Rio's Motion Paragraph 13. These statements are not supported by the evidence in the case. On June 2, 2006, Rio Construction Corporation filed a Notice of Intent with EPA which indicated the start date of the project was December 16, 2002, with an estimated end date of August 16, 2006, and the estimated area to be disturbed was 5.00 acres (estimated to the nearest quarter acre). This Notice of Intent was submitted while the construction project was on-going and therefore is likely to be more accurate than a statement made today, 2 years after conclusion of the project. More importantly, the Notice of Intent was signed by Gregory Mazza, Vice-President of Rio Construction Corporation, and certified by him, under penalty of law, that the information was true and accurate.

Complainant EPA asserted that the Los Muertos Creek is a continuous flowing creek and is a navigable water body of the United States. See Complaint Paragraph 18. Respondent denied the truth of EPA's statement, but did so based on "lack of knowledge". See Rio's Motion Paragraph 14. It would have been more appropriate, and more accurate, to neither admit nor deny this statement of fact. EPA can provide factual materials to support its allegation that the Los Muertos Creek is a continuous flowing creek and a navigable water of the United States, if the Court so desires.

Respondent admitted that it commenced construction activities on or about December 16, 2002. See Rio's Motion Paragraph 17. Respondent also admitted that it filed for and received

National Pollutant Discharge Elimination System (“NPDES”) permit coverage in December 2005. See Rio’s Motion Paragraph 15. This is 3 full years after construction began at the site in issue, and overdue by those 3 years because the Clean Water Act at Section 301 and Section 402, *in pari materia*, requires that a discharge permit be obtained prior to discharging into waters of the United States.

In Paragraph 18 of Rio’s Motion, Respondent denied that it failed to obtain the necessary NPDES permit, arguing the regulations in effect at the time the project commenced only applied to projects of 5 acres or more. Respondent is relying on its earlier statement (Rio’s Motion Paragraph 13) that the project site was less than 5 acres. Respondent is attempting to put into dispute the size of the construction site, but the evidence is clear on its face and unambiguous. The administrative record includes the Notice of Intent, dated June 2, 2006, signed by the Vice-President of Rio Construction Corporation who certified, under penalty of law, that the project site was 5.00 acres.

In Rio’s Motion, it denied knowledge of relevant weather data, which indicates rain amounts that would result in a flow from the construction site. It also denied the conditions reported by the EPA inspector during his inspection of the construction on September 1, 2006. See Rio’s Motion Paragraphs 19-26. The weather data and inspection report are included in the administrative record and speak for themselves.

Notice of Proposed Order Assessing a Civil Penalty

In Rio’s Motion, Respondent addressed EPA’s Notice of Proposed Order Assessing a Civil Penalty. See Rio’s Motion Part C. Respondent asserted that the proposed penalty is “contrary to law and unwarranted” and also asserted, in the alternative, that “it is excessive and violation of the criteria established in Section 309(g) of the Clean Water Act” and in violation of

due process rights and of the Administrative Procedure Act. Respondent also asserted that Complainant failed to consider the factors mandated by the Clean Water Act. These allegations are not supported in any way. To the contrary, the facts contained in the Administrative Record indicate that the penalty is not contrary to law and is warranted. In addition, the Administrative Record contains supporting evidence that EPA considered the criteria established by Section 309(g) of the Clean Water Act. Due process has not been denied and the Administrative Procedures Act has been adhered to, as these concerns are addressed in the regulations found at 40 C.F.R. Part 22, which procedures have been followed by Complainant in this action.

Rio's Motion at Page 6 alleged that Respondent at all relevant times implemented and maintained measures that parallel, comply with or exceed any of the control measures required by regulations. The evidence in the Administrative Record does not support this statement, but, instead, evidences non-compliance with the applicable Clean Water Act regulations.

Rio's Motion at Page 6 stated that the violations alleged in the Complaint have not resulted in any harm to the environment. It is true that no harm to the environment has been documented. However, the scheme of Congress when it enacted the Clean Water Act, and the mandate of EPA, is to protect water bodies of the U.S. from unregulated discharges of pollutants. Respondent's failure to obtain the necessary NPDES permit prior to discharging, and then its failure to comply with the requirements of the applicable NPDES permit, undermines the intent of Congress and the mandate of EPA. Its failure to comply harms the network necessary to ensure that the U.S. water bodies are duly protected.

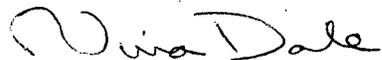
Respondent also claimed that the owner of the construction site must be joined as a party to this action in order to afford complete relief. EPA initiated enforcement against the construction company that was in complete control at the site and performing the regulated

construction activities which resulted in the discharge of pollutants into a water body of the U.S. Rio Construction Corporation was the discharger regulated by the Clean Water Act. Moreover, because the instant action is for penalties only, it is absurd to assert that the owner of the property must be joined as a party in order to afford complete relief.

WHEREFORE, Complainant requests that

- 1) Complainant's Motion for Default Order be granted;
- 2) Respondent's Answer be stricken from the record;
- 3) Respondent's Request for a hearing be denied.

Respectfully submitted,



October 29, 2008

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§1319(g)

CERTIFICATE OF SERVICE

I certify that the foregoing "Response Of The EPA To Motion In Opposition To Order In Default, Answer To Complaint And Request For Hearing", In the Matter of Rio Construction, was sent on this 29th day of October, 2008, in the following manner to the addressees listed below:

Copy by Hand:

Helen S. Ferrara
Regional Judicial Officer
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290 Broadway
New York, NY 10007-1866

Original and Copy by Hand:

Karen Maples
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Carlos E. Colón-Franceschi, Esq.
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San Juan, PR 00919-5383

Dated:

October 29, 2008

Ana Madera
Ana Madera, Secretary