UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

In the Matter of:	)	
	)	Docket No. CWA-05-2005-0016 JUL 13 P2:17
Leonard Sockness, d/b/a	)	
Sockness Septic Service	)	
	)	Proceeding to Assess a Class II Civil Penalty
	)	Pursuant to Section 309(g) of the Clean
	)	Water Act, 33 U.S.C. § 1319(g)
	)	
	)	
Respondent.	)	
	)	

Initial Decision and Default Order

Background

This is an administrative action brought pursuant to section 309(g) of the Clean Water Act (CWA), 33 U.S.C. § 1319(g), and governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits (Consolidated Rules) codified at 40 C.F.R. Part 22. Complainant, the Director of the Water Division, Region 5, United States Environmental Protection Agency (EPA Region 5) filed a Complaint on September 21, 2005, to assess a Class II civil penalty against Respondent Leonard Sockness, doing business as Sockness Septic Service. The Complaint alleges that Respondent violated section 405(e) of the CWA and its implementing regulations. Specifically, Complainant alleges that Respondent has failed to comply with the recordkeeping requirements of 40 C.F.R. § 503.17(b) (Count I) and failed to comply with the vector attraction reduction requirements of 40 C.F.R. § 503.15(d) (Count II). Complainant proposes a civil penalty of $50,000 for Count I and $30,000 for Count II, for a total of $80,000.

Complainant has filed a Motion for Default Order requesting that the Presiding Officer find the Respondent liable for the violations alleged in the Complaint and to assess the $80,000 penalty as proposed in the Complaint. 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. . . .
>
> (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 the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act. . . .

Pursuant to the Consolidated Rules and based upon the record in this matter and the following Findings of Fact, Conclusions of Law and Recommended Civil Penalty Assessment, Complainant's Motion for Default order is hereby GRANTED.

Findings of Fact

Pursuant to sections 22.17(c) and 22.27(a) of the Consolidated Rules, 40 C.F.R. §§ 22.17(c) and 22.27(a), and based on the entire record in this case, I make the following findings of fact:

1. Section 405(e) of the CWA, 33 U.S.C. § 1345(e), provides, in part, that "it shall be unlawful for any person to dispose of sludge from a publicly owned treatment works or any other treatment works treating domestic sewage for any use for which regulations have been established pursuant to subsection (d) of this section, except in accordance with such regulations."

2. Pursuant to section 405(d) of the CWA, 33 U.S.C. § 1345(d), the Administrator promulgated "Standards for the Use or Disposal of Sewage Sludge" on February 19, 1993, which have been codified at 40 C.F.R. Part 503, with amendments.

3. Section 503.2 of Title 40 C.F.R. provides that "[c]ompliance with the standards in this part shall be achieved as expeditiously as practicable, but in no case later than February 19, 1994."

4. Section 503.3(b) of Title 40 C.F.R. provides: "No person shall use or dispose of sewage sludge through any practice for which requirements are established in this part except in accordance with such requirements."

5. Pursuant to 40 C.F.R. § 503.1(b), the provisions of 40 C.F.R. Part 503 apply, in pertinent part, to any person who applies sewage sludge to the land.

6. Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1), provides that: "Whenever, on the basis of any information available the Administrator finds that any person has violated. . . [section 405 of the CWA, 33 U.S.C. § 1345], . . . the Administrator. . . may, after consultation with the State in which the violation occurs, assess a . . . class II civil penalty under [section 309(g) of the CWA, 33 U.S.C. § 1319(g)]."

7. Respondent conducted business as Sockness Septic Service in Stanley, Wisconsin.

8. In the course of conducting his business, Respondent collected liquid and solid material from domestic septage tanks, cesspools, portable toilets or other waste collection devices.

9. EPA Region 5 issued an Information Request to Respondent on December 15, 2004, under the authority of section 308(a) of the CWA, 33 U.S.C. § 1318(a).

10. Respondent responded to the Information Request by letter on January 6, 2005. In that response, Respondent listed numerous dates in 2003 and 2004 on which he applied septage to agricultural land.

11. Upon review of that response, EPA Region 5 determined the response to be incomplete and issued a follow-up letter to Respondent seeking additional information on January 27, 2005.

12. Respondent received the January 27, 2005, letter on January 29, 2005. Respondent provided no response to that letter.

13. EPA Region 5 issued a second follow-up letter to Respondent on March 4, 2005, which was received by Respondent on a date uncertain. Respondent provided no response to that letter.

14. EPA Region 5 notified Respondent of a potential enforcement action by letter dated May 12, 2005, and offered Respondent the opportunity to submit information concerning any inability to pay a penalty.

15. Respondent received the May 12, 2005 letter on a date uncertain. Respondent provided no response to that letter.

16. Section 503.17(b) of Title 40 C.F.R. provides:

> When domestic septage is applied to agricultural land, forest, or a reclamation site, the person who applies the domestic septage shall develop the following information and shall retain the information for five years:
> (1) The location, by either street address or latitude and longitude, of each site on which domestic septage is applied.
> (2) The number of acres in each site on which domestic septage is applied.
> (3) The date domestic septage is applied to each site.
> (4) The nitrogen requirement for the crop or vegetation grown on each site during a 365 day period.
> (5) The rate, in gallons per acre per 365 day period, at which domestic septage is applied to each site.
> (6) The following certification statement [text omitted].
> (7) A description of how the pathogen requirements in either § 503.32(c)(1) or

(c)(2) are met.
(8) A description of how the vector attraction reduction requirements in § 503.33(b)(9), (b)(10), or (b)(12) are met.

17. During 2003, Respondent applied domestic septage to agricultural land on the following dates: June 26-27 and 30; July 8, 14 and 16; August 11-16, 18-23, 25-27 and 29; September 8-11, 15-20, 22-26 and 29-30; October 1-3, 6-10, 13-14, 16-17, 20-25 and 27-31; November 1, 4, 10-14, 19-21, 26 and 28; and December 1, 3-6, 8, 11, 13-15, 17-19, 22-24, 26-27 and 29-31.

18. During 2004, Respondent applied domestic septage to agricultural land on the following dates: January 2, 5-9, 12-13, 15-17, 20-21, 23-24 and 26-30; April 9, 12, 15-16, 20, and 29-30; May 3-7; July 1; August 7; September 7-10, 13-14, 20, 22-24, and 29-30; October 4, 6, 12-13, 15, 21-22 and 26; November 8-10, 15-18, 24 and 26; and December 15-17, 20-21, and 23.

19. With regard to each instance in which Respondent applied domestic septage to agricultural land as set forth in paragraphs 15 and 16, Respondent failed to develop and retain the information required by 40 C.F.R. § 503.17(b).

20. Section 503.15(d) of Title 40 C.F.R. provides that the vector attraction reduction requirements of 40 C.F.R. § 503.33(b)(9), (b)(10), or (b)(12) shall be met when domestic septage is applied to agricultural land, forest or a reclamation site.

21. Section 503.33(b)(9) of Title 40 C.F.R. provides that sewage sludge shall be injected below the surface of the land.

22. Section 503.33(b)(10) of Title 40 C.F.R. provides that sewage sludge applied to the land surface shall be incorporated into the soil within six hours after application.

23. Section 503.33(b)(12) of Title 40 C.F.R. provides that the pH of domestic septage shall be raised to 12 or higher by alkali addition and, without the addition or more alkali, shall remain at 12 or higher for 30 minutes.

24. With regard to each instance in the winter months of 2003 and 2004 in which Respondent applied domestic septage to agricultural land as identified in paragraphs 15 and 16, Respondent did not meet the vector attraction reduction requirements of 40 C.F.R. § 503.33(b)(9), (b)(10), or (b)(12) as required by 40 C.F.R. § 503.15(d).

25. Complainant filed the Administrative Complaint in this matter with the Regional Hearing Clerk on September 21, 2005.

26. A copy of the Complaint was sent by certified mail, return receipt requested, to Respondent on September 21, 2005.

27. The copy of the Complaint was delivered to and signed for by Leonard Sockness on October 20, 2005.

28. Respondent did not file an answer to the Complaint within 30 days of receipt and has not filed an answer as of this date.

29. Complainant filed a Motion for Default Order on February 10, 2006, and served that motion on Respondent by certified mail, return receipt requested.

30. Respondent did not file a response to the motion within 15 days and has not filed a response as of this date.

31. On March 28, 2006, the Presiding Officer issued an Order to Show Cause and Order to Supplement Record, which was sent by certified mail, return receipt requested, to Respondent on that date.

32. The return receipt signed by Leonard Sockness was received by the Presiding Officer on April 21, 2006.

33. As of this date, Respondent has not responded to the Presiding Officer's Order of March 28, 2006.

Conclusions of Law

Based on my review of the record and the foregoing findings of fact, and pursuant to section 22.27(a) of the Consolidated Rules, I make the following conclusions of law:

1. Respondent is a "person" as that term is defined by section 502(5) of the CWA, 33 U.S.C. § 1362(5) and 40 C.F.R. § 503.9(q).

2. The materials referred to in Findings of Fact Paragraph 6 are "domestic septage" as defined in 40 C.F.R. § 503.9(f) and "sewage sludge" as defined at 40 C.F.R. § 503.9(w).

3. The sources from which Respondent collected materials identified in Findings of Fact Paragraph 6 were "treatment works treating domestic sewage" within the meaning of Section 405(e) of the CWA, 33 U.S.C. § 1345(e) and "treatment works" as defined at 40 C.F.R. § 503.9(aa).

4. With regard to each instance in which Respondent applied domestic septage to agricultural land as identified in Paragraphs 15 and 16, Respondent failed to develop and retain information required by 40 C.F.R. § 503.17(b).

5. With regard to each instance in which Respondent applied domestic septage to agricultural land as identified in Paragraphs 15 and 16, Respondent's failure to develop and retain information as required by 40 C.F.R. § 503.17(b) constitutes a separate violation of 40 C.F.R. § 503.17(b).

6. By violating 40 C.F.R. § 503.17(b), Respondent violated Section 405(e) of the CWA, 33 U.S.C. § 1345(e), subjecting Respondent to civil penalties under Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1).

7. With regard to each instance in the winter months of 2003 and 2004 in which Respondent applied domestic septage to agricultural land, Respondent failed to comply with the vector attraction reduction requirements of 40 C.F.R. § 503.33(b)(9), (b)(10) or (b)(12) as required by 40 C.F.R. § 503.15(d).

8. Each application of domestic septage to agricultural land in the winter months constitutes a separate violation of 40 C.F.R. § 503.15(d).

9. By violating 40 C.F.R. § 503.15(d), Respondent violated Section 405(e) of the CWA, 33 U.S.C. § 1345(e), subjecting Respondent to civil penalties under Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1).

10. The Complaint in this proceeding was lawfully and properly served upon Respondent in accordance with 40 C.F.R. § 22.5(b)(1).

11. Respondent was required by section 22.15(a) of the Consolidated Rules, 40 C.F.R. § 22.15(a), to file an answer to the Complaint within thirty days from the date of service of the Complaint

12. Respondent's failure to file an answer to the Complaint constitutes an admission of all facts alleged in the Complaint and a waiver of Respondent's right to a hearing on such factual allegations. 40 C.F.R. § 22.17(a).

13. Complainant's Motion for Default Order was lawfully and properly served on Respondent in accordance with 40 C.F.R. § 22.5(b)(2).

14. Respondent was required by section 22.16(b) of the Consolidated Rules, 40 C.F.R. § 22.16(b), to file any response to the motion within fifteen days of service.

15. Respondent's failure to respond to the motion is deemed to be a waiver of any objection to the granting of the motion pursuant to 40 C.F.R. § 22.16(b).

16. Respondent is in default in this proceeding and has waived its right to contest the factual allegations in the complaint.

17. The record in this matter shows no good cause why a default order should not be issued. 40 C.F.R. § 22.17(c).

18. Respondent is liable for a civil penalty as set forth below.

Recommended Civil Penalty Assessment

The Clean Water Act enumerates specific factors that the Agency shall consider when assessing an administrative penalty pursuant to section 309(g). They 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.

33 U.S.C. § 1319(g)(3). The Act does not, however, "prescribe a precise formula by which these factors must be computed" nor does it provide any guidance regarding the relative weight to be given to any of them. *See In re Phoenix Construction Services, Inc.*, 11 E.A.D. 379, 394 (EAB 2004) citing *In re Advanced Elecs., Inc.*, 10 E.A.D. 385, 399 (EAB 2002). In addition, the Consolidated Rules at § 22.27 provide in part:

> (b) *Amount of civil penalty.* 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 in the record 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. 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 Presiding Officer decides to assess a penalty different in amount from the penalty proposed by complainant, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease. 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.

With regard to CWA section 405 matters, the Agency has not issued any civil penalty guidelines. The Environmental Appeals Board has explained that, in circumstances such as these where the Agency has not developed a specific penalty policy it is appropriate for the Presiding Officer, in calculating a penalty, to examine each of the statutory factors directly. *See In re Phoenix Construction Services, Inc.*, 11 E.A.D. at 395.

Complainant maintains that "[t]he evidence supporting the penalty assessment is

contained in the factual admissions resulting from the default and from the Information Request Response. . . ."[1] In addition, Complainant has submitted two statements[2] of Valdis Aistars, an environmental engineer in the Water Division of EPA Region 5, who was the agency representative who determined the recommended penalty in the Administrative Complaint. Mr. Aistars states that, in determining the recommended penalty, he considered the information available to Complainant and he applied the CWA statutory penalty factors. He states that the facts which he considered and the application of those facts to the statutory penalty factors are discussed in Complainant's Memorandum at pages 4-12. Mr. Aistars also states:

> Based on the facts in this matter and their application to the statutory penalty factors, I determined that an overall penalty of $80,000 was appropriate in this matter. . . . Because the Administrative Complaint contains two Counts, I split the overall penalty of $80,000 in to separate penalties for each Count. Based on the number of violations and relative importance of each count, I assigned a $50,000 recommended penalty to Count I and a $30,000 recommended penalty to Count II.[3]

The facts relating to the penalty assessment are as follows:

1. Nature, circumstances, extent and gravity of violations

Count I: recordkeeping (40 C.F.R. 503.17(b)): The record establishes that Complainant land applied approximately 801,650 gallons of septage during 2003 and 2004. Portions of this total were land applied on each of 164 days of application during that two year period. Respondent failed on each of these 164 occasions to develop and retain the information required by 40 C.F.R. 503.17(b). Failure to comply with the recordkeeping requirements of the Part 503 regulations impedes EPA's ability to determine compliance with other parts of the Part 503 program. Thus these are serious violations of the CWA. *See United States v. Smithfield Foods, Inc.*, 972 F. Supp. 338, 348 (E.D. Va. 1997).

Count II: vector attraction reduction requirements (40 C.F.R. 503.15(d)): The regulations

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[1] Complainant's Memorandum in Support of Motion for Default Order (Complainant's Memorandum) at 4.

[2] Complainant labels Mr. Aistar's statements as "declarations". The statements, however, do not include the language of 28 U.S.C. § 1746 that would render them the legal equivalent of a sworn affidavit. Thus, these submissions are treated as statements and do not carry the evidentiary weight of either a sworn affidavit or an unsworn declaration under penalty of perjury. They are, however, appropriately considered as "other evidence" under Consolidated Rules § 22.16(a).

[3] Declaration of Valdis Aistars, dated April 20, 2006, at paras. 4 and 5.

provide alternative means of compliance with the vector attraction requirements of 40 C.F.R. § 503.15(d). That is, when domestic septage is applied to agricultural land, the person applying the septage can choose the procedures of either (b)(9), (b)(10) or (b)(12) of 40 C.F.R. § 503.33 to achieve compliance. While the information Respondent has provided is not entirely clear, it appears from the information response that Respondent did not meet the requirements of either (b)(9) or (b)(12).[4] Respondent did state that "[i]n the fall most of the septic was plowed or disked." Complainant has given Respondent the benefit of the doubt and interprets this statement to mean that the septage applied in the fall was "incorporated into the soil within six hours of application" within the meaning of 40 C.F.R. § 503.33(b)(10). Thus, Complainant concludes that Respondent failed to comply with § 503.15(d) during the "winter months," which it reasonably interprets as November, December and January, for a total of 68 violations.[5]

The vector attraction reduction violations are serious because these requirements are designed to reduce the attractiveness of domestic septage to vectors such as flies, rodents, birds and other potential disease carrying organisms.[6] These violations therefore can have a direct impact on public health.

2. Ability to pay

In its letter dated May 12, 2005, to Respondent, Complainant notified Respondent that it was considering filing a complaint for civil penalties against him. Complainant advised Respondent that the CWA authorizes it to impose substantial penalties for violations of the Act and that if Respondent believed it was unable to pay a penalty amount, it should complete a financial questionnaire and submit financial information in support of such a claim. Respondent did not respond to the letter, thus, the record contains no evidence of Respondent's inability to pay a penalty under the Act, despite Complainant's efforts to obtain such evidence.

3. Prior history of violations

Complainant is not aware of any prior CWA violations by Respondent, and the record contains

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[4] In his response to EPA's Information Request (Exhibit 2 to Attachment D), Respondent describes his method of applying the septage to the land. His description contains no statement that reasonably demonstrates compliance with the injection requirements of 40 C.F.R. § 503.33(b) (9). He states that "[n]o pH was taken" and thus he could not be in compliance by means of 40 C.F.R. § 503.33(b)(12).

[5] Complainant counted 59 days of application during the winter months, those being November and December of 2003 and January, November and December of 2004. The Presiding Officer counts 68. This slight discrepancy does not require a recalculation of the overall penalty figure involving 232 violations.

[6] Complainant's Memorandum at 10.

no evidence of such.

4. Degree of culpability

As Complainant points out, any person operating in a regulated environment is charged with knowledge of the applicable regulations. Given that the Part 503 regulations predate Respondent's operations by several years, Respondent is deemed to have a heightened culpability for these regulations.

5. Economic benefit or savings

The record contains no evidence of any economic benefit or savings Respondent may have realized by virtue of these violations and Complainant states that the proposed penalty does not reflect an economic benefit.

6. Other factors as justice may require

Complainant is unaware of any other factors that should be considered in assessing a penalty in this matter.

Complainant has, in this case, given adequate consideration to each of the statutory penalty factors and the Presiding Officer concludes that the penalty assessed by Complainant is consistent with the record in this proceeding and the CWA.

DEFAULT ORDER

Respondent is hereby ORDERED, as follows:

1. Respondent is assessed a civil penalty in the amount of eighty thousand dollars ($80,000);

2. Respondent shall, within thirty calendar days after this Default Order has become final, forward a cashier's or certified check, in the amount of eighty thousand dollars ($80,000), payable to the order of the "Treasurer, United States of America." Respondent shall mail the check to the following address:

U.S. EPA Region 5
P.O. Box 70753
Chicago, IL 60673

In addition, Respondent shall mail a copy of the check to the following address:

Regional Hearing Clerk
U.S. Environmental Protection Agency
Region V
77 W. Jackson Blvd.
Chicago, IL 60604

and

Valdis Aistars
Water Enforcement and Compliance Assurance Branch (WC-15J)
Water Division
U.S. EPA Region 5
77 West Jackson Blvd.
Chicago, IL 60604-3590

A transmittal letter identifying the case name and docket number should accompany both the remittance and the copies of the check.

3. This Default Order constitutes an Initial Decision, as provided in 40 C.F.R. § 22.17©. 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 proceedings 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.

IT IS SO ORDERED.

Dated: July 13, 2006

Marcy A. Toney
Regional Judicial Officer
Region 5

In the Matter of Leonard Sockness, d/b/a Sockness Septic Service, Respondent.
Docket No.CWA-05-2006-0010

CERTIFICATE OF SERVICE

I certify that the foregoing Order, dated July 13, 2006, was sent this day in the following manner:

Original hand delivered to:

Regional Hearing Clerk
U.S. Environmental Protection
Agency, Region 5
77 West Jackson Boulevard
Chicago, IL 60604-3590

Copy hand delivered to
Attorney for Complainant:

Charles V. Mikalian
U. S. Environmental Protection
Agency, Region 5
Office of Regional Counsel
77 West Jackson Boulevard
Chicago, IL 60604-3590

Copy by U.S. Certified Mail
Return Receipt Requested to:

Leonard Sockness
Sockness Septic Service
N15048 Fernwell Avenue
Stanley, WI 54768

Dated: 7/13/06

By: Darlene Weatherspoon
Secretary