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HEARING CLERK
EPA - REGION 10

BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:

David R. Sweezey,

Anchorage, Alaska

Respondent.

)
) DOCKET NO. CWA 10-2008-0131
)
) MEMORANDUM IN SUPPORT OF
) MOTION FOR DEFAULT ORDER
)
)
)

In support of its Motion for Default Order, Complainant states as follows:

I. INTRODUCTION

This administrative proceeding for the assessment of a civil penalty was initiated in accordance with the authority vested in the Administrator of the United States Environmental Protection Agency ("EPA" or "Complainant") by Section 309(g) of the Clean Water Act ("Act"), 33 U.S.C. § 1319(g). Complainant, Region 10 of the EPA, has been delegated the authority to commence this action. This proceeding is governed by the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits" ("Consolidated Rules"), 40 C.F.R. Part 22.

In accordance with 40 C.F.R. §§ 22.16(a) and 22.17(b), Complainant moves for default. For good cause shown, Complainant respectfully requests that the Presiding Officer issue a

MEMORANDUM IN SUPPORT OF
MOTION FOR DEFAULT ORDER - 1

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U.S. Environmental Protection Agency
1200 Sixth Avenue, Suite 900
Seattle, Washington 98101
(206) 553-1796

1 Default Order against Respondent for failing to comply with the information exchange
2 requirements of 40 C.F.R. § 22.19(a) and the Presiding Officer's prehearing order issued on
3 October 8, 2008. As a consequence of default, Respondent should be held liable for all
4 violations alleged in the complaint and the penalty proposed below should be assessed against
5 him.

6 **II. BACKGROUND**

7 On July 16, 2008, EPA Region 10 filed its Complaint in the above captioned matter.
8 Service was provided to Respondent by a process server. *See* Exhibit 1 – Affidavit of Service by
9 Steve Arturo. On August 27, 2008, Respondent through his attorney, Robert K. Reiman, filed an
10 Answer to the Complaint. *See* Exhibit 2 – Answer. On October 7, 2008, the Presiding Officer in
11 the above-captioned matter issued a Prehearing Order. *See* Exhibit 3 – Prehearing Order.
12

13 The Consolidated Rules, 40 C.F.R. § 22.19(a), state that: "[i]n accordance with an order
14 issued by the Presiding Officer, each party shall file a prehearing information exchange." The
15 Prehearing Order issued in this case required, in relevant part, that:

- 16 1) the parties engage in a settlement conference on or before October 17, 2008, and
17 attempt to reach an amicable resolution of this matter;
- 18 2) the Complainant shall file a status report regarding settlement on or before October
19 24, 2008;
- 20 3) a signed Consent Agreement and Final Order be filed and a copy sent to the Presiding
21 Officer no later than November 14, 2008, if the case settled;
- 22 4) if a Consent Agreement and Final Order is not finalized on or before November 14,
23 2008, the parties shall strictly comply with the prehearing requirements of the
24 Prehearing Order;
- 25 5) pursuant to 40 C.F.R. § 22.19(a), each party shall file with the Regional Hearing
Clerk and serve on the opposing party and Presiding Officer a prehearing exchange;

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- 6) the prehearing exchange shall be filed *in seriatim* fashion;
- 7) on November 14, 2008, the Complainant shall file its Initial Prehearing Exchange;
- 8) on December 5, 2008, the Respondent shall file his Prehearing Exchange, including any direct and/or rebuttal evidence; and
- 9) on December 19, 2008, the Complainant shall file its Rebuttal Prehearing Exchange.

The Prehearing Order also states: “[t]he Respondent is hereby notified that its failure to either comply with the prehearing exchange requirements set forth herein or to state that it is electing only to conduct cross-examination of the Complainant’s witnesses, can result in the entry of a default judgment against it.” See Exhibit 3, p. 4 (emphasis in original).

On September 25, 2008, Complainant met with Respondent in Anchorage, Alaska, in an effort to settle this matter. See Exhibit 4 – Declaration of Ankur Tohan. After that meeting, Complainant attempted to contact Respondent on three occasions to further settlement discussions; however, Respondent did not return any calls. *Id.* On October 24, 2008, Complainant filed a status report regarding settlement negotiations. *Id.*; see Exhibit 5 – Status Report.

On November 7, 2008, Complainant emailed Respondent in an effort to further settlement discussion; again however, Respondent did not reply. On November 14, 2008, Complainant filed its Initial Prehearing Exchange and mailed a true and correct copy, by certified mail, return receipt requested to Respondent’s attorney. See Exhibit 6 – Date Stamp, Certified Mail Receipt, and Certificate of Service. On November 17, 2008, Respondent received the copy in Anchorage, Alaska. See Exhibit 7 – U.S. Postal Service Track & Confirm Document. As of the date of the

1 filing of this Motion, Respondent has not filed its Prehearing Exchange with the Regional
2 Hearing Clerk or delivered a copy to the undersigned counsel. See Exhibit 4.

3 **III. ARGUMENT**

4 **I. A Default Judgment Is Appropriate Where A Respondent Has Failed To Comply** 5 **With 40 C.F.R. § 22.19(a) and a Presiding Officer's Prehearing Order**

6 A default motion is appropriate where a Respondent fails to file a prehearing information
7 exchange in accordance with 40 C.F.R. § 22.19(a) or fails to comply with a Presiding Officer's
8 order. 40 C.F.R. § 22.17(a). For purposes of this proceeding, a default constitutes an admission
9 of all facts alleged in the Complaint and a waiver of Respondent's right to contest such factual
10 allegations. 40 C.F.R. § 22.17(a).

11 Here, Respondent failed to file a prehearing information exchange in accordance with 40
12 C.F.R. § 22.19(a) and the Presiding Officer's order. Therefore, Respondent should be held liable
13 for all violations alleged in the Complaint; and in accordance with 40 C.F.R. § 22.17(b), a
14 penalty should be assessed him. See *In re Frank D. Smith & Sons, Inc.*, Docket No. CWA-02-
15 2005-3801 (ALJ Moran April 26, 2006) (\$41,000 penalty assessed in default for failure to file
16 prehearing exchange); *In re James Bond*, Docket No. CWA-08-2004-0047 (ALJ Biro January
17 11, 2005) (\$19,519 penalty assessed in default for failure to file prehearing exchange).

18 **II. The Complaint Establishes All Prima Facie Elements Of The Alleged Violations**

19 All the factual allegations in the Complaint should be deemed admitted by Respondent, if
20 he is in default. If so, to prevail here Complainant must show that it has met its *prima facie*
21 burden establishing the elements of the violations alleged in the Complaint.

22 The Complaint alleges that Respondent is a person (Complaint ¶¶ 3.9) who owned, leased
23 or otherwise controlled Lots 2 and 3, of the Sly Fox Subdivision, located at 11460 Cobra
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1 Avenue, in Section 24, Township 12 North, Range 3 West, Anchorage, Alaska (Site) (Complaint
2 ¶¶ 3.2). The Complaint alleges that the Site contained waters of the United States, *i.e.*,
3 tributaries and wetlands that flow into a traditional navigable water. Complaint ¶ 3.3. The
4 Complaint also alleges that on or about July 22, 2003, Respondent discharged pollutants from a
5 point source into waters of the United States at the Site without a permit. Complaint ¶¶ 3.4–8,
6 13, 17, 20, 23, and 26. Each day the fill material remained in place constitutes a day of violation
7 of the Act, 33 U.S.C. § 1311(a). There are several hundred violations comprising the five counts
8 alleged in the Complaint because the fill remains in place at the Site.
9

10 The penalty proposed in Part III below can be established by showing at least two days of
11 violation of the Act (*i.e.*, \$11,000 per day for each day during which a violation continues).
12 Therefore, while some question may surround the exact number of days of any one type of
13 violation, given the indisputably large number of violations, any small variation in the number
14 should have no impact on the penalty. As a result, the large number of violations Respondent
15 committed supports and justifies the proposed penalty.

16 **III. The Alleged Facts Support The Proposed Penalty**

17 Section 309(g)(2)(B) of the Act provides for penalties up to \$11,000 per day per
18 violation. 33 U.S.C. § 1319(g)(2)(B); 40 C.F.R. Part 19. The penalty proposed in the Complaint
19 is based on the penalty factors set forth in section 309(g)(3) of the Act, 33 U.S.C. § 1319(g)(3),
20 which states in relevant part:
21

22 In determining the amount of any penalty assessed under this subsection,
23 the Administrator or the Secretary, as the case may be, shall take into
24 account the nature, circumstances, extent and gravity of the violation, or
25 violations, and, with respect to the violator, ability to pay, any prior
history of such violations, the degree of culpability, economic benefit or

1 savings (if any) resulting from the violation, and such other matters as
2 justice may require.

3 In accordance with Section 22.14 of the Part 22 Rules, 40 C.F.R. § 22.14(a)(4)(ii), the
4 Complaint in this matter did not specify a penalty demand. Rather, Complainant decided to
5 consider the information provided by Respondent through the prehearing exchange process
6 before proposing a specific penalty. However, since Respondent has not provided any
7 prehearing information exchange, Complainant assumes that all facts set out in the Complaint are
8 admitted in proposing a penalty of FIFTEEN THOUSAND DOLLARS (\$15,000).

9 In its Initial Prehearing Exchange, Complainant discussed the legal framework it would
10 employ in specifying a proposed penalty amount. In addition, Complainant provided a detailed
11 statement describing the factual information it considers relevant to the assessment of a penalty.
12 Complainant incorporates the analysis and description from its Initial Prehearing Exchange
13 without modification to support the proposed penalty because Respondent has offered no further
14 information to consider. *See* Exhibit 8 – Initial Prehearing Exchange, Section IV, pp. 6–14.

15 For these reasons, Complainant seeks a penalty in the amount of FIFTEEN THOUSAND
16 DOLLARS (\$15,000).

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**MEMORANDUM IN SUPPORT OF
MOTION FOR DEFAULT ORDER - 6**

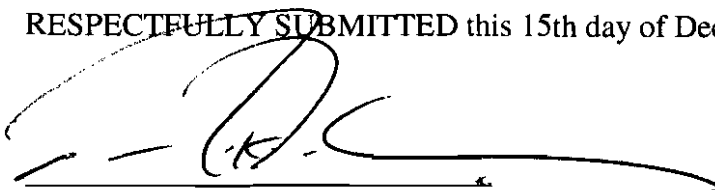
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(206) 553-1796**

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2 **V. CONCLUSION**

3 For the reasons set forth above, Complainant respectfully requests the Presiding Officer
4 enter an Order finding Respondent in default, and assess the penalty proposed in this
5 memorandum.
6

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8 **RESPECTFULLY SUBMITTED** this 15th day of December, 2008.
9

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11 Ankur K. Tohan
12 Assistant Regional Counsel
206.5531796
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5 Original and one copy, hand-delivered:
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7 Carol Kennedy, Regional Hearing Clerk
8 U.S. Environmental Protection Agency, Region 10
9 1200 Sixth Avenue, Mail Stop ORC-158
10 Seattle, WA 98101

11 A true and correct copy, by inter-office mail:

12 The Honorable Susan L. Biro, Chief Administrative Judge
13 Office of Administrative Law Judges
14 U.S. Environmental Protection Agency
15 Mail Code 1900L
16 1200 Pennsylvania Ave., NW
17 Washington, DC 20460-2001

18 A true and correct copy, by certified mail, return receipt requested:

19 Robert K. Reiman, Esquire
20 Law Offices of Robert K. Reiman
21 619 E. Ship Creek Avenue, Suite 250
22 Anchorage, AK 99501

23 Dated:

24 12/15/08

Barbara Legas

Secretary

U.S. EPA Region 10

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MEMORANDUM IN SUPPORT OF
MOTION FOR DEFAULT ORDER - 8

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U.S. Environmental Protection Agency
1200 Sixth Avenue, Suite 900
Seattle, Washington 98101
(206) 553-1796

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2 **CERTIFICATE OF SERVICE**

3 I certify that the foregoing "Memorandum In Support Of Motion For Default" was filed
4 and sent to the following persons, in the manner specified, on the date below:

5 Original and one copy, hand-delivered:

6 Carol Kennedy, Regional Hearing Clerk
7 U.S. Environmental Protection Agency, Region 10
8 1200 Sixth Avenue, Mail Stop ORC-158
9 Seattle, WA 98101

10 A true and correct copy, by inter-office mail:

11 The Honorable Susan L. Biro, Chief Administrative Judge
12 Office of Administrative Law Judges
13 U.S. Environmental Protection Agency
14 Mail Code 1900L
15 1200 Pennsylvania Ave., NW
16 Washington, DC 20460-2001

17 A true and correct copy, by certified mail, return receipt requested:

18 Robert K. Reiman, Esquire
19 Law Offices of Robert K. Reiman
20 619 E. Ship Creek Avenue, Suite 250
21 Anchorage, AK 99501

22 Dated: 12/15/08

Barbara Legas

Secretary
U.S. EPA Region 10

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