



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

MAY 11 2012

HAND DELIVERED

REPLY TO THE ATTENTION OF:

Ms. LaDawn Whitehead
Regional Hearing Clerk
United States
Environmental Protection Agency-Region V
77 West Jackson Blvd. - 19th Fl.
Chicago, IL 60604-3590


C-14J

Re: U.S. EPA v. Joseph L. Bollig and Sons, Inc.
Docket No. CWA-05-2011-0008 - Complainant's Motion for Default Judgment

Dear Ms. Whitehead:

Enclosed please find an original and one copy of Complainant's Motion for Default Judgment and Proposed Default Order in the above-referenced case. I have served copies of this Status Report with the Administrative Law Judge (ALJ) and a copy on Respondent by certified mail, return receipt requested.

Sincerely yours,


Thomas P. Turner
Assoc. Regional Counsel

Enclosure

cc: Hon. M. Lisa Buschmann, ALJ (mail code: 1900L)
Greg Carlson, Water Division (WW-16J)
Kevin C Chow, Assoc. Regional Counsel (C-14J)

Joseph L. Bollig and Sons, Inc.
c/o: William T. Curran, Esq.
Curran, Hollenbeck & Orton, SC
111 Oak Street, PO Box 140
Mauston, WI 53948-0140

FEBRUARY 11 2012 11:50 AM
**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5**

In The Matter Of)	Docket No. CWA-05-2011-0008
)	
Joseph L. Bollig and Sons, Inc.,)	Hon. M. Lisa Buschmann
New Lisbon, Wisconsin,)	Administrative law Judge
)	
Respondent.)	
)	
)	

COMPLAINANT'S MOTION FOR DEFAULT JUDGMENT

In accordance with the Prehearing Order issued by this Honorable Court on February 29, 2012, Complainant, the United States Environmental Protection Agency ("U.S. EPA"), through its undersigned attorneys, moves for a default judgment against the Respondent, Joseph L. Bollig and Sons, Inc., pursuant to Section 22.17 of the Consolidated Rules of Practice, 40 C.F.R. § 22.17, based on the reasons set forth below:

1. U.S. EPA filed its initial Prehearing Exchange on March 30, 2012, pursuant to the schedule established in this Court's Prehearing Order at Section I(D), p. 3.
2. Pursuant to the same Prehearing Order, Respondent was directed to file the original and one copy of its Prehearing Exchange with the Regional Hearing Clerk, one copy with this Court, and one copy with Complainant on April 27, 2012. Respondent's Prehearing Exchange was not received by the U.S. EPA, Region 5 Regional Hearing Clerk until April 30, 2012. (Complainant attaches a copy of the e-mail communication from Ms. LaDawn Whitehead, the Regional Hearing Clerk, indicating that the Respondent's Prehearing Exchange was not received as of the early afternoon of Monday, April 30, 2012, as Exhibit A.) Further, Complainant would note that based upon the on-line record issued by the Regional Hearing Clerk on April 30, 2012, Respondent's Prehearing Exchange also was filed without a copy to the

Regional Hearing Clerk, and lacked a Certificate of Service, as directed in the Prehearing Order at Section III, p. 4.

3. Pursuant to Section 22.5(a) of the Consolidated Rules of Practice, 40 C.F.R. § 22.5(a)(*filing of documents*), “(1) The original and one copy of each document intended to be part of the record shall be filed with the Regional Hearing Clerk when the proceeding is before the Presiding Officer,...[A] document is filed when it is received by the appropriate Clerk,” and “...(3) A certificate of service shall accompany each document filed or served in the proceeding.” Respondent’s Prehearing Exchange was filed late, incorrectly, and without proper proof of service. Thus, Respondent’s Prehearing Exchange filing was in violation of both the Consolidated Rules of Practice and this Court’s Prehearing Order. As such, Complainant moves that the allegations contained in the August 18, 2011 Complaint be deemed admitted by Respondent. 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. Section 22.17(a) of the Consolidated Rules of Practice, 40 C.F.R. § 22.17(a). Further, Complainant moves pursuant to Section 22.17(a) of the Consolidated Rules of Practice, 40 C.F.R. § 22.17(a), that the proposed penalty of \$60,000 as set forth in the Complaint, shall be due and payable by Respondent without further proceedings sixty (60) days after a final order is issued.

4. Pursuant to this Court’s February 29, 2012, Prehearing Order (at Section VI, pp. 5-6, “Procedures for Motions and Extensions of Time”), on May 10, 2012, Complainant contacted Respondent and sought to inquire as to whether Respondent would object to this Motion. Respondent has stated that he is not in agreement, and reserves the right to review and reply to this Motion.

WHEREFORE, Complainant moves for a default judgment against the Respondent pursuant to Section 22.17 of the Consolidated Rules of Practice, 40 C.F.R. § 22.17. Complainant also encloses a Proposed Default Order with this Motion.

IN THE ALTERNATIVE, should this Court not grant Complainant's Motion for Default Judgment and allow Respondent's Prehearing Exchange to stand, Complainant then moves to strike certain portions of Respondent's Prehearing Exchange, as delineated in the accompanying Motion to Strike Portions of Respondent's Initial Prehearing Exchange.

Respectfully submitted,



Thomas P. Turner
Kevin C. Chow
Associate Regional Counsel
U.S. Environmental Protection
Agency, Region 5 (C-14J)
77 West Jackson Boulevard
Chicago, Illinois 60604-3590
312/886-6613
312/353-6181

CERTIFICATE OF SERVICE

I hereby certify that the original and one copy of the attached Complainant's Motion for Default Judgment was filed with the Regional Hearing Clerk, U.S. EPA, Region 5, and that true, accurate and complete copies of Complainant's Motion for Default Judgment were served by Certified Mail, Return Receipt Requested, on Administrative Law Judge M. Lisa Buschmann and Mr. William Curran, Counsel for Respondent, on the date indicated below.

Administrative Law Judge

The Honorable M. Lisa Buschmann
Office of the Administrative Law Judges
U.S. Environmental Protection Agency
Mail Code 1900L
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Counsel for Respondent

William T. Curran, Esq.
Curran, Hollenbeck & Orton, SC
111 Oak Street, P.O. Box 140
Mauston, WI 53948-0140



Thomas P. Turner
Associate Regional Counsel

Dated in Chicago, Illinois, this 11 day of May, 2012.



FORN... SHARING CLERK

{In Archive} Re: U.S. EPA v. Joseph L. Bollig and Sons, Inc. No. CWA-05-2011-0008 - Question of on-line availability of pleadings

Ladawn Whitehead to: Thomas Turner
Cc: Kevin Chow

04/30/2012 12:59 PM

From: Ladawn Whitehead/R5/USEPA/US
To: Thomas Turner/R5/USEPA/US@EPA
Cc: Kevin Chow/R5/USEPA/US@EPA

History: This message has been replied to and forwarded.
Archive: This message is being viewed in an archive.

Hi, Tom-

I have not received the Respondent's Prehearing Exchange document as of 12:57 pm today.

La Dawn Whitehead
Records Management Specialist
Regional Hearing Clerk
U.S. EPA - Region 5 (E-19J)
Office of Enforcement and Compliance Assurance
77 West Jackson Boulevard, Chicago, Illinois 60604-3590
Phone # (312) 886-3713
Fax # (312) 692-2405

Thomas Turner Hi Ms. Whitehead, I am one of the ORC staff att... 04/30/2012 12:38:24 PM

From: Thomas Turner/R5/USEPA/US
To: Ladawn Whitehead/R5/USEPA/US@EPA
Cc: Kevin Chow/R5/USEPA/US@EPA
Date: 04/30/2012 12:38 PM
Subject: U.S. EPA v. Joseph L. Bollig and Sons, Inc. No. CWA-05-2011-0008 - Question of on-line availability of pleadings

Hi Ms. Whitehead,

I am one of the ORC staff attorneys assigned to the above-referenced case. Respondent's Prehearing Exchange was due on April 27, 2012. I was wondering whether: i) Respondent submitted a document on Friday, April 27, 2012; and, ii) if so, is a copy available on-line at this time? If so, would you please tell me how to get to the website? Thanks very much. Tom Turner, ORC, e-mail or 312/886-6613

*Complainant's
Motion for
Default
Judgment
Exhibit A*

RECEIVED
REGIONAL CLERK
JUL 11 2011 11:59
**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5**

In The Matter Of)	Docket No. CWA-05-2011-0008
)	
Joseph L. Bollig and Sons, Inc.,)	Hon. M. Lisa Buschmann
New Lisbon, Wisconsin,)	
)	
Respondent.)	
)	
)	

PROPOSED DEFAULT ORDER

This proceeding for the assessment of a civil penalty was initiated on August 18, 2011 under the authority vested in the Administrator of the United States Environmental Protection Agency ("U.S. EPA") by Section 309(g) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(g). The Administrator delegated this authority to the Regional Administrator of U.S. EPA, Region 5, who duly redelegateed this authority to the Water Division Director, U.S. EPA, Region 5, who issued the Complaint. The Complaint charges Respondent, Joseph L. Bollig and Sons, Inc. ("Respondent" or "Bollig") with one count of violating Section 404 of the CWA for the unpermitted discharge of pollutants into a wetland - a navigable water of the United States.

On May 11, 2012, Complainant filed a motion for a default judgment against the Respondent pursuant to Section 22.17 of the Consolidated Rules of Practice, 40 C.F.R. § 22.17. Under 40 C.F.R. § 22.5(a), a Respondent must file and certify service of documents in the following manner, "(1) The original and one copy of each document intended to be part of the record shall be filed with the Regional Hearing Clerk when the proceeding is before the Presiding Officer,...[A] document is filed when it is received by the appropriate Clerk," and "... (3) A certificate of service shall accompany each document filed or served in the proceeding." Further, and as pointed out by Complainant, pursuant to Section 22.17(a) of the

Consolidated Rules of Practice, 40 C.F.R. § 22.17(a), “[A] party may be found to be in default: ...upon failure to comply with the information exchange requirements of § 22.19(a) or an order of the Presiding Officer;...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.” Accordingly, Complainant also made a motion that the allegations contained in the Complaint be deemed admitted by Respondent. Complainant also moved, pursuant to Section 22.17(a) of the Consolidated Rules of Practice, 40 C.F.R. § 22.17(a), that the proposed penalty of \$60,000 as set forth in the Complaint be due and payable by Respondent without further proceedings sixty (60) days after a final order is issued. This Court grants this portion of Complainant’s May 11, 2012 Motion as well.¹

The following findings of fact and conclusions of law as to issues of liability and penalty are made pursuant to Section 22.17(c) of the Consolidated Rules of Practice, 40 C.F.R. § 22.17 (c).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Respondent in this proceeding is:

Joseph L. Bollig and Sons, Inc. (“Bollig”)
N5990 State Road 58
New Lisbon, Wisconsin 53950

2. Section 404 of the CWA, 33 U.S.C. § 1344, authorizes the Secretary of the Army, acting through the Chief of Engineers, U.S. Army Corps of Engineers (“Corps”), to issue permits for the discharge of dredged or fill material into navigable waters.

¹ Pursuant to 40 C.F.R. § 22.17, this Default Order constitutes, for purposes of the pending action only, an admission of all facts alleged in the complaint and a waiver of Respondent’s right to a hearing on such factual allegations.

3. Section 301 of the CWA, 33 U.S.C. § 1311, prohibits the discharge of pollutants into navigable waters except in compliance with, inter alia, a permit issued under Section 404 of the CWA, 33 U.S.C. § 1344.

4. The term "discharge of pollutants" is defined as "any addition of any pollutant to navigable waters from any point source...." 33 U.S.C. § 1362(12).

5. A "point source" is defined as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

6. A "pollutant" is defined as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6).

7. "Wetlands" are defined as "those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." 40 C.F.R. § 230.3(t).

8. The Respondent in this proceeding, Bollig, worked through an arrangement with the Mauston-New Lisbon Union Airport to perform clearing of a seven (7) acre forested and scrub-shrub wetland area located immediately southwest of the principal Airport airstrip in the southeast quarter, Section 28, Township 16 North, Range 3 East, Town of Lisbon, Juneau County, Wisconsin.

9. Beginning in approximately February 2008 and continuing into approximately March 2009, and at times better known to Bollig, Bollig, working on behalf of the Airport, performed or directed the discharge of dredged and fill material and organic debris from excavators and bulldozers into approximately seven (7) acres of forested and scrub/shrub wetland occupying the portion of Airport property described above in Paragraph 8.

10. The destruction of the and/or alteration to wetlands identified in paragraph 8, above could affect the physical, biological, chemical, and/or ecological integrity of the downstream water courses, including but not limited to the integrity of the Lemonweir River, a historical Traditional Navigable Water.

11. The wetlands identified in paragraph 8, above are "waters of the United States" as defined at 40 C.F.R. § 230.3(s) and "navigable waters" as defined at Section 502(7) of the CWA, 33 U.S.C. § 1362(7).

12. Respondent did not have a permit issued under Section 404 of the CWA, 33 U.S.C. § 1344, for the discharge of pollutants as described in paragraph 9, above.

13. The Respondent is a "person" within the meaning of the definition set forth in Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

14. The machinery referenced in paragraph 9, above constitute "point sources" within the meaning of the definition set forth in Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

15. The discharged material referenced in paragraph 9, above constitutes "pollutants" within the meaning of the definitions set forth in Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

16. The placement of the material in the wetlands referenced in paragraph 9, above constitutes a "discharge of pollutants" within the meaning of the definition set forth in Section 502(12) of the CWA, 33 U.S.C. § 1362(12).

17. Each discharge by Respondent of pollutants into navigable waters of the United States without the required permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, constitutes a day of violation of Section 301 of the CWA, 33 U.S.C. § 1311.

18. Each day the discharged material remains in the wetland without the required permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, constitutes a day of violation of Section 301 of the CWA, 33 U.S.C. § 1311.

19. Pursuant to Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1), U.S. EPA, Region 5, has consulted Mr. Bruce Baker, Administrator, Division of Water, Wisconsin Department of Natural Resources, regarding the assessment of this administrative penalty.

20. Pursuant to the February 29, 2012 Prehearing Order of this Court, U.S. EPA filed its Prehearing Exchange in this matter on March 30, 2012. Consistent with this Court's Prehearing Order and Section § 22.15(a) of the Consolidated Rules of Practice, 40 C.F.R. § 22.15(a), in order to avoid being found in default, Respondent was required to file the original and one copy of its Prehearing Exchange with the Regional Hearing Clerk, one copy with this Court, and one copy with Complainant on April 27, 2012. Respondent's Prehearing Exchange was not received by the U.S. EPA, Region 5 Regional Hearing Clerk until April 30, 2012. Further, Respondent's Prehearing Exchange also was filed without a copy to the Regional Hearing Clerk, and lacked a Certificate of Service, as directed in the Prehearing Order at Section III, p. 4.

21. On May 11, 2012, Complainant filed a motion for a default judgment against the Respondent pursuant to Section 22.17 of the Consolidated Rules of Practice, 40 C.F.R. § 22.17.

22. Pursuant to Section 22.17(a) of the Consolidated Rules of Practice, 40 C.F.R. § 22.17(a), “[A] party may be found to be in default: ...upon failure to comply with the information exchange requirements of § 22.19(a) or an order of the Presiding Officer;...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.” Based upon the failure of Respondent to comply with this Court’s Prehearing Order and Section 22.15(a) of the Consolidated Rules of Practice, 40 C.F.R. § 22.15(a), Complainant moved that the allegations contained in the Complaint be deemed admitted by Respondent. Further, Complainant moved pursuant to Section 22.17(a) of the Consolidated Rules of Practice, 40 C.F.R. § 22.17(a), that the proposed penalty of \$60,000 as set forth in the Complaint, be due and payable by Respondent without further proceedings sixty (60) days after a final order is issued.

23. Pursuant to 40 C.F.R. § 22.17(a), Respondent’s default constitutes an admission of all the facts alleged in the complaint and a waiver of Respondent’s right to a hearing on such factual allegations.

PENALTY

24. Pursuant to Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), the Administrator may assess a civil penalty of \$16,000 per day for each day during which the violation continues, up to a total of \$177,500, for violations of, inter alia, Section 301(a) of the CWA, 33 U.S.C. § 1311(a), or any limit or condition in a permit issued under Section 404 of the CWA, 33 U.S.C. § 1344. Based upon the facts alleged in this Complaint, and upon the nature, circumstances, extent and gravity of the violations alleged, and after consideration of

Respondent's ability to pay, prior history of such violations, degree of culpability, economic benefit resulting from the violation and such other matters as justice may require, U.S. EPA proposed to issue a Final Order Assessing Administrative Penalties to Respondent Bollig assessing a penalty in the amount of \$60,000.00.

25. Pursuant to Section 22.17(a) of the Consolidated Rules of Practice, 40 C.F.R. § 22.17(a), the penalty proposed in the complaint shall become due and payable by respondents without further proceedings sixty (60) days after a final order issued upon default. Therefore, the \$60,000 penalty proposed in the complaint is assessed against the Respondent.

ORDER²

Accordingly, IT IS ORDERED, pursuant to Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), that the Respondent, Joseph L. Bollig and Sons, Inc., is assessed a civil penalty of sixty thousand dollars (\$60,000).

Respondent shall pay this penalty by certified or cashier's check payable to "Treasurer, the United States of America," and shall deliver it, with a transmittal letter identifying the Complaint, to:

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

The check must be annotated with the docket number and the name of the case. Copies of transmittal letter and the check shall simultaneously be sent to:

Water Division
Wetlands Regulatory Team (WW-16J)
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

And

Thomas P. Turner
Kevin C. Chow
Associate Regional Counsel
Office of Regional Counsel (C-29A)
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

² Pursuant to 40 C.F.R. § 22.17(b), this Order constitutes an Initial Decision. Unless an appeal is taken pursuant to 40 C.F.R. § 22.30(a) or the Environmental Appeals Board elects to review this decision, *sua sponte*, pursuant to 40 C.F.R. § 22.30(b), this Order shall become the final order of the Environmental Appeals Board in accordance with 40 C.F.R. § 22.27(c).

IT IS SO ORDERED,

STATE OF NEW YORK
JUDICIAL BRANCH
COUNTY OF ...
MAY 1 11 12 AM '12

Dated this _____ day of _____ 2012.

M. Lisa Buschmann
Administrative Law Judge