



UNITED STATES
 ENVIRONMENTAL PROTECTION AGENCY
 REGION 3
 PHILADELPHIA, PENNSYLVANIA



IN THE MATTER OF:)	
)	
Gulfstream Development Corp.)	
Dewey Beach, DE 19930)	DOCKET NO. CWA-III-070
)	
)	
RESPONDENTS)	
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)	

ORDER DIRECTING ENTRY OF RESPONDENT'S DEFAULT AS TO LIABILITY

This is a proceeding for the assessment of a Class I administrative penalty under Subsection 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g). The proceeding is governed by the Environmental Protection Agency's Proposed 40 C.F.R. Part 28--CONSOLIDATED RULES OF PRACTICE GOVERNING THE ADMINISTRATIVE ASSESSMENT OF CLASS I CIVIL PENALTIES UNDER THE CLEAN WATER ACT, THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT, AND THE EMERGENCY PLANNING AND COMMUNITY RIGHT-TO-KNOW ACT, AND THE ADMINISTRATIVE ASSESSMENT OF CIVIL PENALTIES UNDER PART C OF THE SAFE DRINKING WATER ACT, 56 Fed. Reg. 29,996 (July 1, 1991), issued October 29, 1991 as superceding procedural guidance for Class I administrative penalty proceedings under Subsection 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g) ("Consolidated Rules"). **This ORDER directs entry of Respondent's liability under § 28.21(a) of the Consolidated Rules and directs Complainant to submit written argument regarding assessment of an appropriate civil penalty under § 28.21(b) of the Consolidated Rules.**

PROCEDURAL BACKGROUND

The Environmental Services Division Director of Region III of the United States Environmental Protection Agency (Complainant) initiated this action on April 17, 1992, issuing to Gulfstream Development Corp. (Respondent) an administrative complaint under § 28.16(a) of the Consolidated Rules. The administrative complaint was served by certified mail, which Respondent received on April 23, 1992. The administrative complaint contained

recitations of statutory authority and allegations regarding Respondent's landclearing and wetlands filling activities in the Bahamas Beach Cottages Subdivision along Assawoman Canal in Sussex County, Delaware. The administrative complaint made reference to pertinent provisions of the Clean Water Act, provided notice of a proposed penalty of \$7,500.00 and notice that failure to respond to the administrative complaint within thirty days would result in the entry of a default order and informed Respondent of its opportunity to request a hearing. Complainant transmitted a copy of the Consolidated Rules with the administrative complaint. The notice of opportunity to request a hearing included in the administrative complaint gave very explicit instructions on procedures for filing a hearing request and made reference to the enclosed Consolidated Rules.

By ORDER OF ASSIGNMENT dated April 23, 1992, EPA's Regional Administrator designated the Presiding Officer in this proceeding.

Gulfstream Development Corp. failed to respond to the administrative complaint in a timely fashion. On May 29, 1992, Respondent's President, Robert J. Harris, Jr., filed with the Regional Hearing Clerk a letter dated May 5, 1992, which stated: "In accordance with the Administrative Complaint issued to Gulfstream Development Corporation, I hereby request a hearing on the proposed civil penalties assessed with the Complaint."

UNTIMELY RESPONSE

Under § 28.20 of the Consolidated Rules, Respondent had thirty days from its receipt of the administrative complaint to file a response:

Respondent's deadline. The respondent shall file with the Hearing Clerk a response within thirty days after receipt of the ... administrative complaint.

Since the certified mail return receipt for the administrative complaint was signed on April 23, 1992, the deadline for the filing of the response was May 26, 1992. [Under § 28.7(a) of the Consolidated Rules the thirty-day period began on April 24, 1992, and the deadline was automatically extended to April May 26, 1992 because the thirty days ended on Memorial Day weekend, May 23-25, 1992.] As a consequence of its failure to file a timely response to the administrative complaint, **Respondent has waived its opportunity to appear in this action for any purpose.** See Section 28.20(e) of the Consolidated Rules.

Respondent's failure to file a timely response to the administrative complaint also automatically triggers the default

proceedings provision of the Consolidated Rules. Section 28.21(a) of the Consolidated Rules provides:

Determination of Liability. If the Respondent fails timely to respond pursuant to §28.20(a) or (b) of this Part...the Presiding Officer, on his own initiative, shall immediately determine whether the complainant has stated a cause of action.

STATUTORY BACKGROUND

The objective of the Clean Water Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Subsection 101(a) of the Clean Water Act, 33 U.S.C. § 1251(a). One key provision of the Act is the prohibition on unauthorized discharges of pollutants: "Except as in compliance with this section and sections 1312, 1316, 1317, 1318, 1342 and 1344 of this title, the discharge of any pollutant by any person shall be unlawful." Subsection 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a).

Section 309 of the Clean Water Act, 33 U.S.C. § 1319, provides for administrative, civil and criminal enforcement actions against person who have violated the prohibition of Subsection 301(a). Administrative penalties may be assessed under Subsection 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g): "Whenever on the basis of any information available-(A) the Administrator finds that any person has violated section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title...the Administrator...may, after consultation with the State in which the violation occurs, assess a class I civil penalty or a class II civil penalty under this subsection." Before assessing a Class I civil penalty, the Administrator must give the person to be assessed such penalty written notice of the proposed penalty and the opportunity to request, "within 30 days of the date the notice is received by such person," a hearing. Subsection 309(g) (2) (A) of the Clean Water Act, 33 U.S.C. § 1319(g) (2) (A) (emphasis added).

CAUSE OF ACTION

To state a cause of action against Respondent under Subsection 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g), Complainant must allege that:

Respondent is a person;

Respondent discharged a pollutant from a point source to waters of the United States; and

Respondent did not have a Clean Water Act permit authorizing

the discharge(s).

The Complainant has stated a cause of action in the administrative complaint. In Paragraph II.1. of the administrative complaint Complainant alleged that Respondent is a person within the meaning of Subsection 502(5) of the Clean Water Act, 33 U.S.C. § 1362(5). In Paragraph II.2. of the administrative complaint Complainant alleged that property located in Bahamas Beach Cottages Subdivision along Route 361 and Assawoman Canal, Sussex County, Delaware, contains wetlands which are waters of the United States within the meaning of Subsection 502(7) of the Clean Water Act, 33 U.S.C. § 1362(7), 33 C.F.R. § 323.2(a), 40 C.F.R. § 122.2. In Paragraph II.5. of the administrative complaint Complainant alleged that Respondent or persons acting on behalf of Respondent discharged fill material into the wetlands by use of various machinery. Finally, in Paragraph II.16. of the administrative complaint Complainant alleged that Respondent did not have a permit issued by the United States Army Corps of Engineers under Section 404 of the Clean Water Act, 33 U.S.C. § 1344, authorizing the discharge of fill material. The foregoing factual allegations suffice to state a cause of action. Complainant has supplemented them by additional allegations that recite the history of the case (Paragraphs II.3, II.4., II.6-12.), with other "allegations" of mixed fact and law [Paragraph II.13.: fill material is a pollutant; Paragraph II.14: machinery is a point source; Paragraph II.15: Subsection 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), prohibits unpermitted discharges of pollutants from point sources to waters of the United States] and with assertions of Respondent's legal liability [Paragraph II.17: Respondent violated Subsection 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a); Paragraph II.18: Respondent is liable for an administrative penalty under Subsection 309(g)(2)(A) of the Clean Water Act, 33 U.S.C. § 1319(g)(2)(A)].

ENTRY OF DEFAULT AS TO LIABILITY

Having determined that Complainant has stated a cause of action in the administrative complaint, the Presiding Officer must direct the Regional Hearing Clerk to enter Respondent's default as to liability in the administrative record of this proceeding. SeeSection 28.21(a)(1) of the Consolidated Rules. Accordingly, by this ORDER the Presiding Officer directs the Regional Hearing Clerk to enter Respondent's default as to liability in the record of this proceeding. Upon entry of this ORDER, the factual allegations of the administrative complaint as to liability (Paragraphs II.1., II.2., II.5., II.16.) shall be deemed recommended findings of fact and the "allegations" of mixed fact and law (Paragraphs II.13, II.14, II.15) and the assertions of liability (Paragraphs II.17, II.18) shall be deemed recommended

conclusions of law. Id.

Had Respondent filed its response to the administrative complaint in a timely fashion, it would still be in default as to liability because its response does not deny liability, does not dispute any allegation of fact or conclusion of law as to liability and does not specify any factual or legal grounds for Respondent's defense, as set forth in § 28.2(u) of the Consolidated Rules. Respondent's untimely response to the administrative complaint merely requested a hearing on the proposed civil penalty.

In the administrative complaint Complainant clearly informed Respondent of the need to specify factual and legal issues Respondent intended to place in dispute and factual or legal circumstances or argument supportive of any defenses. Under § 28.20(d) of the Consolidated Rules, uncontested allegations in the administrative complaint are deemed admitted by the Respondent. Accordingly, Respondent's untimely response to the administrative complaint admitted liability and purported only to oppose the proposed penalty. As stated above, Respondent's failure to file a timely response to the administrative complaint waived Respondent's opportunity to appear in this action for any purpose under § 28.20(e) of the Consolidated Rules.

ORDER

The Regional Hearing Clerk is directed to enter the Respondent's default as to liability in the record of this proceeding.

DETERMINATION OF REMEDY

In accordance with Section 28.21(c) of the Consolidated Rules, **Complainant shall submit within thirty days of receipt of the entry of default a written argument (with any supporting documentation) regarding the assessment of an appropriate civil penalty, limited to the nature, circumstances, extent and gravity of the violation(s) and, with respect to Respondent, ability to pay, any prior history of such violations, the degree of culpability, the economic benefit or savings (if any) Respondent enjoyed resulting from the violation(s), and such other matters as justice may require.**

Date: 6/15/92
BENJAMIN KALKSTEIN

_____/s/_____
Presiding Officer