

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE REGIONAL ADMINISTRATOR
REGION 10

IN THE MATTER OF:)	Docket No. 10-95-0039 OPA
)	
JOE C CORPORATION and)	Proceeding to Assess
MICHAEL T. BANKS,)	Class I Administrative
Huntington Beach, CA)	Penalty Under Clean Water
)	Act Section 311,
RESPONDENTS)	33 U.S.C. §1321
)	
)	

ORDER DIRECTING ENTRY OF RESPONDENTS' DEFAULT AS TO LIABILITY

This is a proceeding for the assessment of a Class I administrative penalty under Section 311(b)(6)(B)(i) of the Clean Water Act, 33 U.S.C. §1321(b)(6)(B)(i). 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 procedural guidance for Class I administrative penalty proceedings under Section 311 of the Clean Water Act, 33 U.S.C. §1321, (the "Consolidated Rules").

This Order directs entry of Respondents' liability under Section 28.21(a) of the Consolidated Rules and directs Complainant to submit written argument regarding assessment of an appropriate civil penalty under Section 28.21(b) of the Consolidated Rules.

PROCEDURAL BACKGROUND

The Program Manager of the Response and Investigations Branch of the Hazardous Waste Division of Region 10 of the United States Environmental Protection Agency (Complainant) initiated this action on March 20, 1995, by issuing to Joe C Corporation and Michael T. Banks (Respondents) an administrative complaint under Section 28.16(a) of the Consolidated Rules. After two attempts to serve the Complaint by certified mail, the Complaint was served personally on Michael T. Banks as President of Joe C Corporation on June 24, 1995 in Huntington Beach, California. Exhibits A, B, and C to EPA's Motion to Supplement Administrative Record dated August 23, 1995.

The administrative complaint contained recitations of statutory authority and allegations regarding Respondents' discharge of oil from the Tugboat Joe C into or upon the Duwamish River in a manner alleged to be in violation of the Clean Water Act. The administrative complaint provided notice of a proposed penalty in the amount of \$5,000. The letter accompanying the administrative complaint provided notice that failure to respond to the administrative complaint within thirty days would result in the entry of a default order, and informed Respondents of their right to a hearing and of the opportunity to seek an extension of the thirty day period for filing a response.

By memorandum dated June 20, 1995, the Regional Counsel for EPA Region 10 designated me as Presiding Officer in this proceeding.

UNTIMELY RESPONSE

Under Section 28.20 of the Consolidated Rules, Respondents had thirty days (unless extended) from receipt of the administrative complaint to file a response:

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

(1) The administrative complaint

(b) Extension of respondent's deadline. For the purpose of engaging in informal settlement negotiations between the complainant and respondent the deadline for the respondent to file a response pursuant to paragraph (a)(1) of this section shall be extended:

(1) For any period stipulated by the complainant and respondent (but in no event for longer than ninety days following such deadline), by filing such stipulation with the Hearing Clerk within thirty days after respondent's receipt of the administrative complaint

The initial deadline under Section 28.20(a) for filing a response was July 24, 1995. The Record does not contain any stipulations extending the response deadline as allowed under Section 28.20(b)(1).

No response has been filed to date by either of the Respondents. Both Respondents have therefore failed to respond to the administrative complaint in a timely fashion.

On September 8, 1995, I issued an Order to Show Cause to the Respondents, allowing them until September 29, 1995 to file a

written explanation of the circumstances or reasons surrounding the Respondents' apparent failure to file a timely response. The Respondents did not respond to the Order.

As a consequence of the failure to file a timely response to the administrative complaint, each Respondent has waived its opportunity to appear in this action for any purpose. See Section 28.20(e) of the Consolidated Rules. Respondents' 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.

CAUSE OF ACTION

To state a cause of action against a Respondent under Section 311 of the Clean Water Act, 33 U.S.C. §1321, Complainant must allege that:

(1) Respondent is an owner, operator, or person in charge of any vessel . . .

(2) From which oil or a hazardous substance is discharged . . .

(3) Into or upon the navigable waters of the United States or adjoining shorelines . . .

(4) In such quantities as may be harmful as determined under Section 311(b)(4) of the Clean Water Act, 33 U.S.C. §1321(b)(4).

For purposes of Section 311(b), such discharges are defined in 40 C.F.R. §110.3 to include discharges of oil that (1) violate applicable water quality standards or (2) cause a film or sheen upon or discoloration of the surface of the water or adjoining shorelines or cause a sludge or emulsion to be deposited beneath the surface of the water or upon the adjoining shorelines.

The Complainant has stated a cause of action in the administrative complaint. In Paragraphs 3 and 4 of the administrative complaint Complainant alleged that Respondent Michael T. Banks is a person and is the person in charge and/or operator of a vessel within the meaning of Section 311(a)(3) of the Clean Water Act, 33 U.S.C. §1321(a)(3). In Paragraphs 3 and 4 of the administrative complaint Complainant alleged that Respondent Joe C Corporation is a corporation organized under the laws of the State of California and is a person who owns a vessel within the

meaning of Section 311(a)(3) of the Clean Water Act, 33 U.S.C. §1321(a)(3). In Paragraph 7 of the administrative complaint Complainant alleged that on July 18 and 19, 1994 Respondents discharged 700 gallons of oil from Joe C Tugboat, into or upon the Duwamish River. In Paragraph 8 of the administrative complaint Complainant alleged that the Duwamish River is a water of the United States within the meaning of Section 502(7) of the Clean Water Act, 33 U.S.C. §1362(7), and 40 C.F.R. §110.1, (defining "navigable waters.") In Paragraph 9 of the administrative complaint Complainant alleged that Respondents' discharge of oil from Joe C Tugboat caused a sheen upon or discoloration of the surface of the Duwamish River and/or a sludge or emulsion to be deposited beneath the surface of the Duwamish River, and therefore was in a quantity that has been determined may be harmful under 40 C.F.R. §110.3.

The foregoing factual allegations are sufficient to state a cause of action.

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 Respondents' default as to liability in the administrative record of this proceeding. Section 28.21(a)(1) of the Consolidated Rules. Under Section 28.20(d) of the Consolidated Rules, uncontested allegations in the administrative complaint as to liability are deemed admitted by the Respondents.

Accordingly, by this Order I direct the Regional Hearing Clerk for EPA Region 10 to enter Respondents' default as to liability. Upon entry of this Order, the allegations in the administrative complaint as to liability shall be deemed recommended findings of fact and conclusions of law in accordance with Section 28.21(a)(1) of the Consolidated Rules.

ORDER

The Regional Hearing Clerk for EPA Region 10 is directed to enter the Respondents' default as to liability in the record of this proceeding.

DETERMINATION OF REMEDY

In accordance with Section 28.21(b) 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 Respondents, ability to pay, any prior history of such violations, the degree of culpability, the economic benefit or savings (if any) Respondents enjoyed resulting

from the violation(s), and such other matters as justice may require.

/s/
Steven W. Anderson
Presiding Officer

Dated: November 6, 1995