BEFORE THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 3
841 Chestnut Building
Philadelphia, Pennsylvania 19107-4431

IN THE MATTER OF:	)
	)
Mr. G. Lynn Golden 345 Old U.S. Route 15 York Springs, Pennsylvania 17327,	) Proceeding to Assess Class I) Administrative Penalty Under) Section 309(g) of the Clean) Water Act, 33 U.S.C. § 1319(g)
	)
	)
RESPONDENT	) Docket No. CWA-III-209
	)

ORDER ON SUPPLEMENTAL MOTION FOR DEFAULT ORDER

By supplemental motion dated October 16, 1998, Complainant in this matter, the Director of the Environmental Services Division of Region III of the United States Environmental Protection Agency ("EPA"), has again requested the issuance of a Default Order assessing a $ 5,000 penalty against the Respondent, Mr. G. Lynn Golden of York Springs, Pennsylvania. This supplemental motion is based upon Respondent's failure to file a written answer to the complaint within the time allotted in proposed 40 C.F.R. § 22.15(a), namely, within thirty days of service of the complaint. Since the complaint was received on March 30, 1998, over 100 days have passed since the complaint was served; no written answer has been filed with the Regional Hearing Clerk; no response to

Complainant's July 14, 1998 motion for Default Order has been filed with the Regional Hearing Clerk; and no response to the supplemental motion for Default Order has been filed with the Regional Hearing Clerk; Respondent is clearly subject to the default provisions of proposed 40 C.F.R. § 22.17.

Where a motion for default requests the assessment of a penalty, the movant must state the legal and factual grounds for the relief requested. Proposed 40 C.F.R. § 22.17(a). The Complainant here has the burden of proving that the proposed civil penalty is appropriate. Proposed 40 C.F.R. § 22.24(a). When the Presiding Officer finds that a default has occurred, he is to issue a Default Order assessing the proposed penalty, unless the record demonstrates that assessment of the penalty is inconsistent with the Clean Water Act. Proposed 40 C.F.R. § 22.17(c).

Complainant's July 14, 1998 motion, supporting exhibit, and its October 16, 1998 supplemental motion clearly establish the legal and factual basis for liability under the Clean Water Act (unlawful filling of wetlands) and the legal and factual basis for finding Respondent in default as to liability.

In denying the July 14, 1998 motion, I found Complainant's motion for a Default Order assessing a penalty

to be inconsistent with the Clean Water Act in that it did not provide the Presiding Officer any basis upon which to consider the economic benefit, if any, the Respondent derived from the alleged violations. Section 309(g)(3) of the Clean Water Act, 33 U.S.C. § 1319(g)(3), clearly requires EPA to take into account, among other factors, the economic benefit (if any) resulting from the violation, in determining the amount of any penalty assessed under Section 309(g) of the Act, 33 U.S.C. § 1319(g).

Complainant's October 16, 1998 supplemental motion[1] states that Complainant has reconsidered the economic benefit to the Respondent of the violation. However, Complainant limited this reconsideration to evidence on the record, and concluded that the economic benefit "realized" by Respondent in this instance is negligible. Complainant states that there is no evidence Respondent sold the parcel in question and no evidence to

[1]The supplemental motion was accompanied by a proposed DEFAULT ORDER, which repeated the incorrect statement that an answer must be filed within twenty (20) days of service. While only twenty (20) days are allowed under 40 C.F.R. § 22.15, contained in EPA's current Rules of Practice for APA cases, thirty (30) days are allowed under Proposed 40 C.F.R. § 22.15(a), which govern non-APA cases such as the Class I cases under CWA 309(g), 33 U.S.C. § 1319(g). Further, the proposed DEFAULT ORDER would have the finding of default made under section 1414 of the Safe Drinking Water Act, 42 U.S.C. § 300g-3. Finally, the proposed DEFAULT ORDER included a footnote reciting material without any basis in the record.

suggest that he received more than the fair market value of the parcel prior to filling the wetland. Nor did Respondent grow crops or receive any money for the use of the filled land. Complainant concludes that "there are no facts available to Complainant" that would demonstrate that Respondent received any "economic remuneration" other than the avoided cost of applying for a permit, and that therefore "economic benefit in this case is negligible." There is no evidence provided of the avoided cost of applying for a permit, yet Complainant bravely inserts in the Proposed Default Order a footnote stating: "The cost of acquiring a permits varies from jurisdiction to jurisdiction but generally runs in the $ 40-$ 60 range."

First, Complainant is not limited to evidence on the record in its responsibility to prove the appropriateness of the civil penalty. In making any motion, proposed 40 C.F.R. § 22.16(a) requires a party to submit "...any affidavit, certificate, other evidence..." supportive of the relief requested; here, that relief is a civil penalty based upon specific statutory factors, including economic benefit. Nothing limits Complainant to evidence on the record; at this stage of the proceeding there literally is no evidence in the record.

Real estate experts are available to investigate the likely enhanced value of the parcel, which logic dictates is where the economic benefit of this violation lies. It defies all reason to suppose that the filling was undertaken without any economic incentive; such activity is not done for mere amusement. And it is not enough that Complainant has ignored the apparent economic benefit. Complainant would have the Presiding Officer base a "token" economic benefit finding on the avoided cost of a permit application. Complainant's suggestion that the vague "footnote" finding regarding the avoided cost of applying for a permit be made in an Order without any support in the record is irresponsible; Complainant's notion that the cost of applying for a permit anywhere but the jurisdiction in which the alleged violations occurred is unacceptable.

Second, a sale of the property to "realize" the economic benefit is not necessary to ascertain this enhanced value. An estimate may be made of the property's value before the filling, and compared with an estimate of the value of the filled property. The difference is the economic benefit of the enhanced value of the parcel. Several seasons of crops, or leasing the parcel for other purposes might add incrementally to the economic benefit, but Complainant fails to carry its

burden of persuasion when it limits its reconsideration to facts on the record and ignores the likely enhanced value of the filled property. The suggestion that economic remuneration is the only form of economic benefit may take is rejected as far too narrow an approach to the consideration of economic benefit in wetland fill cases.

When Complainant fails to present prima facie evidence and analysis sufficient to show that all statutory factors were considered in proposing and appropriate civil penalty, the Presiding Officer cannot serve as a rubber-stamp with respect to Complainant's penalty proposal. In the Matter of Lipscomb Industries, Inc., FIFRA DOCKET NO. 6-028-C (Decision and Order Denying Motion for Default, George Malone, III, Regional Judicial Officer, October 22, 1998).

Because Complainant has not looked beyond the record for evidence of economic benefit, and has applied too narrow a view of what may constitute economic benefit in a wetland fill case, Complainant has failed to meet its burden of persuasion as to the appropriateness of the proposed penalty, and I must again conclude that the record clearly demonstrates that the requested relief is inconsistent with the Act. Proposed 40 C.F.R. § § 22.17(b), 22.24(a). A default order based upon this level of consideration of the CWA statutory factors might

meet the same fate as the default order in Katzson Bros., Inc. v. USEPA, 839 F. 2d 1396 (Tenth Circuit, 1988), as I indicated in my July 17, 1998 Order.[2]

Complainant's supplemental motion for default order is therefor DENIED.

Date: November 16, 1998

/S/
BENJAMIN KALKSTEIN
Presiding Officer

[2]Reference is also made to the discussion in my July 17, 1998 Order of the disfavor with which reviewing courts generally view defaults.