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 MOTION FOR DEFAULT

By motion dated July 14, 1998, Complainant in this matter, the Director of the Environmental Services Division of Region III of the United States Environmental Protection Agency ("EPA"), has requested the issuance of a default order assessing a $5,000 penalty against the Respondent, Mr. G. Lynn Golden of York Springs, Pennsylvania. This motion, made under proposed 40 C.F.R.§ 22.17(a)(1), 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 (not twenty days as stated in Complainant's motion). 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; 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). 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 motion and supporting exhibit 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. But Complainant's motion for a default order assessing a penalty is inconsistent with the Clean Water Act in that it does 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 is inconsistent in the manner in which this mandatory statutory factor is addressed in his filing:

a. In the first of two paragraphs numbered 7 in Complainant's motion, Complainant states that "...the proposed penalty was determined after taking into account...(other factors)...and any economic benefit or savings to Respondent because of the violations..."

b. Later in that same paragraph, Complainant states: "EPA has no basis to calculate what economic benefit, if any, Respondent derived from this violation, and it therefore is not a component of the proposed penalty." (Emphasis added).

c. In the proposed default order, Complainant would have the Presiding Officer state: "...the proposed penalty was determined after taking into account...(other factors)...and any economic benefit or savings to Respondent because of the violations..." and later in the same paragraph state : "EPA has no basis to calculate what economic benefit, if any, Respondent derived from this violation, and it therefore is not a component of the proposed penalty."

Complainant has not considered the economic benefit, if any. Complainant has not determined that there has been no

benefit. To do so would imply illogically that there was no economic motive to the alleged wetland filling. Complainant "has no basis to calculate economic benefit," according to the motion. Apparently, Complainant has no notion of the economic benefit derived by the Respondent from the alleged violations. No facts, no estimates, no opinions. Economic benefit is not a "component" of Complainant's proposed penalty. How can the Presiding Officer consider the mandatory statutory factor?

May the Agency assess a default penalty in this situation, without observing the due process requirements set forth in Katzson Bros., Inc. v USEPA, 839 F. 2d 1396 (Tenth Circuit, 1988)? In Katzson Bros., an EPA-assessed default penalty of $4,200 was reversed and remanded because the penalty assessor (the Regional Administrator) failed to analyze adequately the factual bases of the statutorily-mandated penalty assessment factors. The Katzson Bros court was also concerned with the relative severity of the assessed penalty ($4,200 of a $5,000 statutory maximum), but the basis for the remand was the inadequate consideration of mandatory statutory penalty assessment factors. Default judgments are not favored by modern courts; modern courts are also reluctant to enter and enforce judgments unwarranted by the facts. Jackson v Beech, 636 F.2d 831 (D.C. Circuit, 1980). To issue a

default order at this stage of this case might invite a remand.

A situation identical to this case was presented in the Matter of Gulfstream Development Corporation, EPA Docket No. CWA-III-070, another case involving unlawful filling of wetlands. Procedural guidance governing that case, proposed 40 C.F.R. Part 28, 56 Fed. Reg. 29,996 (July 1, 1991), called for a quasi-automatic default process, bifurcated into a liability stage and a remedy stage. In Gulfstream, liability was determined by the Presiding Officer without any motion by the Complainant, and a default order as to liability was entered in the record. In the same order, the Presiding Officer directed Complainant to submit a written argument in support of the proposed penalty, as required by the proposed Part 28 procedures. Initially, Complainant was unable to provide any information regarding economic benefit. The Presiding Officer acknowledged that in wetland cases, economic benefit can be difficult to calculate with precision, but suggested strongly to the Complainant that economic benefit was susceptible to estimation. Complainant did provide the Presiding Officer with a reasonable estimate, which was used by the Presiding Officer in his Recommended Decision to the Regional Administrator, and by the Regional Administrator in

his Final Decision, as the basis for consideration of this statutory penalty factor. Without some consideration of each of the statutory factors, the Presiding Officer would not have been able to recommend a penalty to the Regional Administrator.

Proposed Part 22 procedures do not have either the quasi-automatic default as to liability process or the bifurcated penalty argument submission step. As stated above, proposed 40 C.F.R. § 22.17 requires the Presiding Officer, upon a finding of default, to issue a default order assessing the penalty proposed by the Complainant unless to do so would be inconsistent with the Act. As discussed above, I find that the absence of information in the record regarding economic benefit, a factor that must be considered in assessment of a penalty, makes issuance of a default order inconsistent with the Act.

Complainant's motion for default order is therefore **DENIED.**

Date: July 17, 1998

/S/
BENJAMIN KALKSTEIN
Presiding Officer