

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6
DALLAS, TEXAS

FILED
2009 JUL 27 PM 4:03
REGIONAL HEARING CLERK
EPA REGION VI

IN THE MATTER OF:)
)
Rocking BS Ranch, Inc.,) Docket No. CWA-06-2007-1974
)
Respondent.)

INITIAL DECISION AND DEFAULT ORDER

This is a proceeding under Section 309(g) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(g), for violation of Section 301 of the CWA, 33 U.S.C. § 1311, by discharging pollutants into waters of the United States without a permit. The proceeding is governed by procedures set forth in the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Consolidated Rules") codified at 40 C.F.R. Part 22. Complainant, the Director of the Compliance Assurance and Enforcement Division of United States Environmental Protection Agency Region 6, has filed a Motion for Default as to Penalty and Liability ("Motion for Default") seeking a default order finding Respondent, Rocking BS Ranch, Inc., liable for the violations of the CWA alleged in the Amended Administrative Complaint ("Amended Complaint") filed in this matter and assessing a civil penalty in the amount of \$16,800.00 against the Respondent. Pursuant to the Consolidated Rules and the record in this matter and for the reasons set forth below, the Complainant's Motion for Default is hereby **GRANTED EXCEPT TO THE EXTENT THAT THE PROPOSED PENALTY EXCEEDS \$11,000.00.**

BACKGROUND

The Complainant filed the original Administrative Complaint ("Complaint") against Respondent in this matter on September 24, 2007. Section IV of the Complaint, entitled "Failure to File an Answer," provides information concerning Respondent's obligations with respect to responding to the Complaint. Paragraph 14 of Section IV of the Complaint specifically states that:

If Respondent wishes to deny or explain any material allegation listed in the above Findings or to contest the amount of the penalty proposed, the Respondent must file an answer to this complaint within thirty (30) days after service of this complaint

Paragraph 15 of Section IV of the Complaint advises that:

Failure to file an Answer to this Complaint within thirty (30) days of service of the Complaint shall constitute an admission of all facts alleged in the Complaint and a waiver of the right to hearing. Failure to deny or contest any individual material allegation contained in the Complaint will constitute an admission as to that finding or conclusion

Paragraph 16 of Section IV of the Complaint warns that:

If the Respondent does not file an Answer to this complaint within thirty (30) days after service of this complaint, a default order may be issued against the Respondent pursuant to 40 C.F.R. § 22.17.

The Certificate of Service attached to the Complaint includes a certification that a copy of the Complaint was sent by certified mail, return receipt requested on September 24, 2007, addressed to Mr. Bert Bishop, Rocking BS Ranch, 8644 East 127th, Wetumka, Oklahoma. A certified mail return receipt (green card) bearing the docket number of this case and the word "complaint" filed with the Regional Hearing Clerk shows that an article was signed for at the address indicated in the Certificate of Service on October 2, 2007. A properly executed return

receipt constitutes proof of service of the Complaint. Nothing in the return receipt in this case suggests that it was not properly executed, thus proper service of the Complaint may be presumed under the Consolidated Rules.

Respondent has not filed an answer to the Complaint as of the date of this order.

On December 5, 2007, Complainant filed the Amended Complaint. Section IV of the Amended Complaint, entitled "Failure to File an Answer," provides information concerning Respondent's obligations with respect to responding to the Amended Complaint. Paragraph 15 of Section IV of the Complaint specifically states that:

If the Respondent wishes to deny or explain any material allegation listed in the above Findings or to contest the amount of the penalty proposed, the Respondent must file an Answer to this Amended Complaint within thirty (30) days after service of this Amended Complaint

Paragraph 16 of Section IV of the Amended Complaint advises that:

Failure to file an Answer to this Amended Complaint within thirty (30) days of service of the Amended Complaint shall constitute an admission of all facts alleged in the Amended Complaint and a waiver of the right to hearing. Failure to deny or contest any individual material allegation contained in the Amended Complaint will constitute an admission as to that finding or conclusion

Paragraph 17 of Section IV of the Amended Complaint warns that:

If the Respondent does not file an Answer to this Amended Complaint within thirty (30) days after service of this Amended Complaint, a default order may be issued against the Respondent pursuant to 40 C.F.R. § 22.17.

The Certificate of Service attached to the Amended Complaint includes a certification that a copy of the Amended Complaint was sent by certified mail, return receipt requested on December 5, 2007, addressed to Mr. Bert Bishop, Rocking BS Ranch, 8644 East 127th, Wetumka, Oklahoma. A certified mail return receipt (green card) bearing the docket number of

this case and the words "Amended Complaint" filed with the Regional Hearing Clerk indicates that an article was signed for at the address indicated in the Certificate of Service on December 11, 2007. A properly executed return receipt constitutes proof of service of the Amended Complaint. Nothing in the return receipt in this case suggests that it was not properly executed, thus proper service of the Amended Complaint may be presumed under the Consolidated Rules.

Respondent has not filed an answer to the Amended Complaint as of the date of this order.

On June 20, 2008, Complainant filed a Status Report with the Regional Hearing Clerk which reported that Complainant had engaged in settlement discussions with Respondent, that Respondent was to have submitted certain documentation to Complainant, and that Respondent had not submitted the documentation as agreed. Since Respondent had not filed an answer, Complainant reported that Complainant intended to file a motion for default within 60 days. The Certificate of Service attached to the Status Report indicates that a copy of the Status Report was served on Respondent on June 20, 2008.

On October 16, 2008, Complainant filed a Status Report with the Regional Hearing Clerk which reported that Complainant had engaged in settlement discussions with Respondent, that Respondent was to have submitted certain documentation to Complainant, and that Respondent had not submitted the documentation as agreed. Since Respondent had not filed an answer, Complainant reported that Complainant intended to file a motion for default within 30 days. The Certificate of Service attached to the Status Report indicates that a copy of the Status Report was served on Respondent on October 16, 2008.

On January 15, 2009, the Presiding Officer ordered Complainant to report on the status of this matter on or before February 12, 2009.

On February 10, 2009, Complainant filed its Motion for Default. The Certificate of Service attached to the Motion for Default shows that a copy of the Motion for Default was served on the Respondent by certified mail, return receipt requested, on February 10, 2009.

As of the date of this order, the Respondent has not filed an answer to the Complaint or the Amended Complaint or a response to the Motion for Default with the Regional Hearing Clerk.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to sections 22.17(c) and 22.27(a) of the Consolidated Rules, 40 C.F.R. §§ 22.17(c) and 22.27(a), and based on the entire record in this case, I make the following findings of fact and conclusions of law:

1. The Complaint was filed with the Regional Hearing Clerk on September 24, 2007.
2. A copy of the Complaint was mailed to Respondent by certified mail, return receipt requested, on September 24, 2007.
3. A return receipt shows that Respondent received a copy of the Complaint on October 2, 2007.
4. The Complaint in this proceeding was lawfully and properly served upon Respondent in accordance with 40 C.F.R. § 22.5(b)(1).
5. EPA notified ODAFF of the issuance of the Complaint and afforded the State an opportunity to consult with EPA regarding the assessment of an administrative penalty

against Respondent as required by Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1).

6. EPA notified the public of the filing of the Complaint and afforded the public thirty (30) days to comment on the Complaint and on the proposed penalty as required by Section 309(g)(4)(A) of the CWA, 33 U.S.C. § 1319(g)(4)(A). At the expiration of the notice period, EPA had received no comments from the public.
7. Respondent did not file an answer to the Complaint within 30 days of receipt of the Complaint and has not filed an answer as of the date of this Order.
8. Respondent's failure to file an answer to the Complaint constitutes an admission of all facts alleged in the Complaint and a waiver of Respondent's right to a hearing on such factual allegations. 40 C.F.R. § 22.17(a).
9. The Amended Complaint was filed with the Regional Hearing Clerk on December 5, 2007.
10. A copy of the Amended Complaint was mailed to Respondent by certified mail, return receipt requested, on December 5, 2007.
11. A return receipt shows that Respondent received a copy of the Amended Complaint on December 11, 2007.
12. The Amended Complaint in this proceeding was lawfully and properly served upon Respondent in accordance with 40 C.F.R. § 22.5(b)(1).
13. Respondent was required to file an answer to the Amended Complaint within 20 days of the service of the Amended Complaint. 40 C.F.R. § 22.15(a).

14. Respondent did not file an answer to the Amended Complaint within 20 days of receipt and has not filed an answer as of the date of this Order.
15. Respondent's failure to file an answer to the Amended Complaint constitutes an admission of all facts alleged in the Amended Complaint and a waiver of Respondent's right to a hearing on such factual allegations. 40 C.F.R. § 22.17(a).
16. On February 10, 2009, Complainant filed its Motion for Default and served it on the Respondent by certified mail, return receipt requested.
17. Complainant's Motion for Default was lawfully and properly served on Respondent. 40 C.F.R. § 22.5(b)(2).
18. Respondent was required to file any response to the Motion for Default within 15 days of service. 40 C.F.R. § 22.16(b).
19. Respondent did not file an response to Complainant's Motion for Default within 15 days of service and has not filed a response to the Motion for Default as of the date of this Order.
20. Respondent's failure to respond to the Motion for Default is deemed to be a waiver of any objection to the granting of the Motion for Default. 40 C.F.R. § 22.16(b).
21. Respondent is in default for failure to file a timely answer to the Complaint. 40 C.F.R. § 22.17(a).
22. Respondent, Rocking BS Ranch, Inc., is a corporation which was incorporated under the laws of the State of Oklahoma.
23. Respondent is a "person" as defined at section 502(2) of the CWA, 33 U.S.C. § 1362(5), and 40 C.F.R. § 122.2.

24. At all relevant times, Respondent owned or operated a swine facility located about three miles south and eight miles east of Wetumka, Hughes County, Oklahoma ("the Facility"), and was therefore an "owner or operator" within the meaning of 40 C.F.R. § 122.2.
25. At all relevant times, the Facility was a "point source" of a "discharge" of "pollutants" to the receiving waters of Middle Creek, which are "waters of the United States" within the meaning of Section 502 of the CWA, 33 U.S.C. § 1362, and 40 C.F.R. § 122.2.
26. Because Respondent owned or operated a facility that is a point source of discharges of pollutants to waters of the United States, Respondent and the Facility were subject to the CWA and the National Pollution Discharge Elimination System ("NPDES") program.
27. Under section 301 of the CWA, 33 U.S.C. § 1311, it is unlawful for any person to discharge any pollutant from a point source to waters of the United States, except with the authorization of, and in compliance with, an NPDES permit issued pursuant to section 402 of the CWA, 33 U.S.C. § 1342.
28. The EPA received an Oklahoma Department of Agriculture, Food, & Forestry ("ODAFF"), Agriculture Environmental Management Services 2007 NPDES Annual Inspection Report dated April 4, 2007, in which an inspector conducted an on-site inspection of Rocking BS Ranch.
29. During the inspection, the ODAFF inspector documented an unauthorized discharge that occurred on January 23, 2007, (discharge report D-07-030) that originated from the west lagoon, entered an unnamed tributary to Middle Creek and then to Middle Creek.
30. Respondent violated section 301 of the CWA, 33 U.S.C. § 1311, by discharging pollutants to waters of the United States without a permit.

31. Pursuant to Section 309(g)(2)(A) of the CWA, 33 U.S.C. § 1319(g)(2)(A), Respondent is liable for a civil penalty in an amount not to exceed \$11,000 per day for each day during which a violation continues, up to a maximum of \$32,500.

DISCUSSION OF PENALTY

The relief proposed in the Amended Complaint and requested in the Motion for Default includes the assessment of a total civil penalty of \$16,800.00 for the alleged violation. The Consolidated Rules provide that

When the Presiding Officer finds that a default has occurred . . . The relief proposed in the Complaint or the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act.

40 C.F.R. § 22.17(c)

With respect to penalty, the Consolidated Rules provide that the Presiding Officer shall determine the amount of the civil penalty

. . . based on the evidence in the record and in accordance with any penalty criteria set forth in the Act. The Presiding Officer shall consider any civil penalty guidelines issued under the Act.

40 C.F.R. § 22.27(b).

The statutory factors I am required to consider in determining the amount of the civil penalty are

. . . the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require.

Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3).

In considering this case in light of the statutory factors, I have considered the findings of fact and conclusions of law above, the narrative summary explaining the reasoning behind the penalty requested set forth in the Declaration of Jeremy Seiger attached to Complainant's Motion for Default, and the entire record in this case.

In this case, according to Mr. Seiger, the violation consisted of a release of agricultural waste, including liquid manure and sludge from Respondent's swine facility. Animal manure contains phosphorus and nitrogen, which in excessive amounts can kill aquatic life. Discharges of sludge, process generated waste water, in liquid manure into surface water may also cause effects which result in the disruption of plant life, such as limiting the growth of some species and encouraging the growth of others, resulting in algal blooms. Thus, Mr. Seiger found that Respondent's single violation presented the possibility of environmental harm. Mr. Seiger also found that Respondent's violation frustrated the purposes of the Clean Water Act, including the restoration and maintaining of the chemical, physical, and biological integrity of the waters of the United States. For these reasons, Mr. Seiger arrived at a civil penalty of \$16,800 for the violation. Mr. Seiger also indicated that he considered other factors. Mr. Seiger had no evidence of Respondent's inability to pay, and he made no adjustments in his penalty calculation for this factor. Mr. Seiger had no evidence concerning a history of violations by Respondent, and he made no adjustments in his penalty calculation for this factor. Mr. Seiger made no adjustments to his penalty calculation based on an economic benefit resulting from the noncompliance. Mr. Seiger made no adjustments to his penalty calculation for the Respondent's good faith efforts to comply. Finally, Mr. Seiger made no adjustments to his penalty calculation based on the existence of "other factors as justice may require."

Pursuant to 40 C.F.R. § 22.17(c), “[t]he relief proposed in the complaint or the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act.” The Complainant proposes to assess a total civil penalty of \$16,800.00 for the violation alleged in the Amended Complaint. After considering the statutory factors, and the entire record in this case, I find the civil penalty proposed is not inconsistent with the record of this proceeding and the statutory factors. However, the Complainant chose to bring this case as a Class I penalty action. Pursuant to Section 309(g)(2)(A) of the CWA, 33 U.S.C. § 1319(g)(2)(A), Class I penalties may not exceed \$11,000 per violation, up to a maximum of \$32,500 for violations that occurred after March 15, 2004 through January 12, 2009.¹ In this case, Respondent is found liable for a single violation on a single day, January 23, 2007. The penalty proposed by Complainant exceeds the maximum allowable under the statute in this case. Under the circumstances, I find the penalty proposed inconsistent with the Act to the extent that it exceeds \$11,000. Therefore, the penalty assessed in this case will be \$11,000.

¹See the Table of Civil Monetary Penalty Inflation Adjustments at 19 C.F.R. §19.4.

DEFAULT ORDER

Respondent is hereby **ORDERED** as follows:

1. Respondent is assessed a civil penalty in the amount of \$11,000.00.
 - A. Payment of the full amount of the civil penalty assessed shall be made within thirty (30) days after this default order becomes final under 40 C.F.R. § 22.27(c) by submitting a certified check or cashier's check payable to "Treasurer, United States of America," and mailed to:

Regional Hearing Clerk (6C)
U.S. EPA Region 6
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000

A transmittal letter identifying the subject case, including the EPA docket number and Respondent's name and address, shall accompany the check.

- B. Respondent shall mail a copy of the check to:

Lorena S. Vaughn
Regional Hearing Clerk (6RC-D)
U.S. Environmental Protection Agency
Region 6
1445 Ross Avenue
Dallas, TX 75202-2733

and to:

Chief, Water Enforcement Branch
Compliance Assurance and Enforcement Division
U.S. EPA Region 6
1445 Ross Avenue
Dallas, Texas 75202-2733

Ellen Chang-Vaughn

Assistant Regional Counsel (6RC-EW)
U.S. EPA Region 6
1445 Ross Avenue
Dallas, Texas 75202-2733

2. This Default Order constitutes an Initial Decision, as provided in 40 C.F.R. § 22.17(c). This Initial Decision shall become a final order unless (1) an appeal to the Environmental Appeals Board is taken from it by any party to the proceeding within thirty (30) days from the date of service provided in the certificate of service accompanying this order; (2) a party moves to set aside the Default Order, or (3) the Environmental Appeals Board elects, *sua sponte*, to review the Initial Decision within forty-five (45) days after its service upon the parties.

IT IS SO ORDERED.

Dated this 27th day of July 2009.



MICHAEL C. BARRA
REGIONAL JUDICIAL OFFICER

CERTIFICATE OF SERVICE

I, Lorena S. Vaughn, the Regional Hearing Clerk for the Region 6 office of the Environmental Protection Agency, do hereby certify that a TRUE AND CORRECT copy of the Initial Decision and Default Order for CWA 06-2007-1974 was served upon the parties on the date and in the manner set forth below:

Bert Bishop
Rocking BS Ranch
8644 E. 127 Road
Wetumka, OK 74833

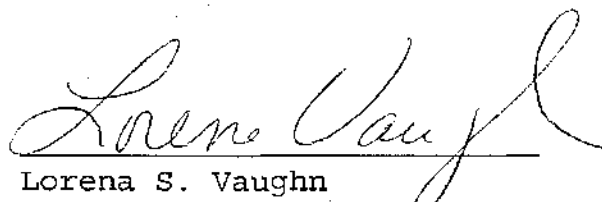
U.S. First Class Mail
Return Receipt Requested

Eurika Durr
Environmental Appeals Board
U.S. Environmental Protection Agency
607 14th Street, NW
Suite 500
Washington, D.C. 20005

Ellen Chang-Vaughan
Assistant Regional Counsel
Environmental Protection Agency
1445 Ross Avenue
Dallas, Texas 75202

HAND-DELIVERED

DATE: 7-27-09


Lorena S. Vaughn
Regional Hearing Clerk