

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IV
345 Courtland Street
Atlanta, Georgia 30365

IN THE MATTER OF:	:
	: DOCKET NO. CWA-IV 93-520
City of Atlantic Beach, FL	:
NPDES Permit No. FL0038776	: Proceeding to Assess Class I
	: Civil Penalty Under
	: Section 309(g) of the Clean
RESPONDENT	: Water Act, 33 U.S.C. § 1319(g)

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 subsection 28.21(a) of the Consolidated Rules, directs Complainant to submit written argument regarding assessment of an appropriate civil penalty under Subsection 28.21(b) of the

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Consolidated Rules and directs the removal of untimely filed documents and certain settlement-related material from the administrative record.

PROCEDURAL BACKGROUND

The Water Management Division Director of Region IV of the United States Environmental Protection Agency (Complainant) initiated this action on June 16, 1993, issuing to the City of Atlantic Beach, Florida (Respondent) an administrative complaint under Subsection 28.16(a) of the Consolidated Rules. The administrative complaint was served by certified mail, and Respondent received it on July 7, 1993. The administrative complaint contained recitations of statutory authority and allegations regarding Respondent's operation of a wastewater treatment facility at 1100 Sandpiper Lane, Atlantic Beach, Florida. According to the administrative complaint, Respondent failed to comply with the pH and flow monitoring requirements of National Pollutant Discharge Elimination System (NPDES) Permit No. FL0038776, in violation of Subsection 308(a) of the Clean Water Act, 33 U.S.C. § 1318(a). The administrative complaint made reference to pertinent enforcement provisions of the Clean Water Act, provided notice of a proposed penalty of \$20,000.00 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

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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.

The City of Atlantic Beach failed to respond to the administrative complaint in a timely fashion. On August 10, 1993, counsel for the Respondent posted a Response and Request for Hearing, which the Regional Hearing Clerk received on August 13.

By ORDER OF ASSIGNMENT dated August 23, 1993 EPA's Regional Administrator designated the Presiding Officer in this proceeding.¹ Counsel for Complainant filed a Default Motion on October 25, 1993, and on November 8, 1993, Respondent's counsel filed a Motion to Accept (the August 10 Response and Request for Hearing) as Timely Filed and a Response to Default Motion.

UNTIMELY RESPONSE

Under Subsection 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.

This thirty-day time limit is statutorily-based:

¹ By memorandum dated October 13, 1993 the Regional Administrator designated another Presiding Officer to act in this matter until November 15, 1993. The Regional Administrator redesignated the undersigned Presiding Officer by memorandum dated November 23, 1993.

...Before issuing an order assessing a civil penalty under this subparagraph, the Administrator...shall give to the person to be assessed such penalty written notice of the Administrator's...proposal to issue such order and the opportunity to request, within 30 days of the date the notice is received by such person, a hearing on the proposed order.

Subsection 309(g)(2)(A) of the Clean Water Act, 33 U.S.C.

§ 1319(g)(2)(A) (emphasis added).

Since the certified mail return receipt for the administrative complaint was signed by Respondent's authorized employee on July 7, 1993, the deadline for the filing of the response was August 9, 1993. Counsel for Respondent has suggested that the Presiding Officer has discretion to extend the deadline. According to the preamble to the Federal Register publication of proposed Part 28, "[t]he Presiding Officer may not extend a respondent's deadline." 56 Fed. Reg. 30,011 (July 1, 1991). Under Subsection 28.7(a) of the Consolidated Rules the thirty-day period began on July 8, 1993, and under Subsection 28.7(c) of the Consolidated Rules Respondent could have met the 30-day deadline by placing its Response and Request for Hearing in the mail on or before August 9, 1993. As recited above, Respondent's counsel did not post the Response and Request for Hearing until August 10, 1993, one day late. 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 Subsection 28.20(e) of the Consolidated

Rules. Accordingly, Respondent's Motion to Accept as Timely Filed is DENIED.

Respondent's failure to file a timely response to the administrative complaint also automatically triggers the default proceedings provision of the Consolidated Rules. Subsection 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

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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 owned or operated a point source discharging to waters of the United States at all times relevant to the administrative complaint;

Respondent was issued a National Pollutant Discharge Elimination System (NPDES) permit for the discharge of pollutants to waters of the United States;

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

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Respondent violated a term or condition of the NPDES permit authorizing the discharge.

The Complainant has stated a cause of action in the administrative complaint. In Paragraph II.3. 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.4. of the administrative complaint Complainant alleged that Respondent owns and operates a wastewater treatment facility, a point source within the meaning of Subsection 502(14) of the Clean Water Act, 33 U.S.C. 1362(14). In Paragraph II.7. of the administrative complaint Complainant alleged that Respondent had been issued NPDES Permit No. FL0038776 for the discharge of pollutants to waters of the United States. In Paragraphs II.9. and II.10. of the administrative complaint Complainant alleged that Respondent discharged pollutants to waters of the United States. In Paragraphs II.9. and II.10. of the administrative complaint Complainant alleged that Respondent violated pH and flow monitoring requirements of its NPDES Permit.

The foregoing factual allegations suffice 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 Respondent's default as to liability in the administrative record of this proceeding. See

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Subsection 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.3., II.4., II.7., II.8., II.9., II.10.) shall be deemed recommended findings of fact and the "allegations" of law (Paragraphs II.13, II.14, II.15) and the assertions of liability (Paragraphs II.5., II.6., II.11.) shall be deemed recommended conclusions of law. Id.

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 Subsection 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. To this extent, Complainant's Motion for Default is GRANTED.

DETERMINATION OF REMEDY

In accordance with Subsection 28.21(c) of the Consolidated Rules, Complainant shall submit within thirty days of receipt of

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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.

SETTLEMENT MATERIAL AND RESPONDENT'S FILINGS

Under Subsection 28.4(c)(5) of the Consolidated Rules the Presiding Officer has a duty to police the administrative record to assure that no documents or testimony relating to settlement of the instant action or of any other action are introduced into the administrative record. Further, since the Respondent waived its opportunity to appear in the action for any purpose by failing to respond timely to the administrative complaint, none of the Respondent's filings belong in the administrative record. Accordingly, the Presiding Officer hereby directs the Regional Hearing Clerk to exclude from the administrative record the following: Respondent's August 10, 1993 Response and Request for Hearing and its attachments; Respondent's November 8, 1993 Motion to Accept as Timely Filed; Respondent's November 8, 1993 Response to Default Motion; the second, third and fourth sentences of Paragraph 4 of Complainant's October 25, 1993 Motion for Default; the second, third and fourth sentences of Paragraph 4 of Counsel

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for Complainant's October 25, 1993 affidavit, attached to the Complainant's Motion for Default; and Counsel for Respondent's letters of April 13 and October 5, 1993, attached to the Complainant's Motion for Default.

Date: DEC 22 1993

Benjamin Kalkstein
BENJAMIN KALKSTEIN
Presiding Officer