UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the matter of	)	
	)	
WALLACE W. STONE	)	[CWA] Docket No. VII-97-0024
	)	
Respondent	)	

ORDER DEFERRING ACTION ON MOTION FOR DEFAULT ORDER

On May 13, 1998, Complainant filed a motion for a default order to be issued against Respondent Wallace W. Stone (Respondent) for failure to comply with the Prehearing Order of the undersigned in violation of Rule 22.17 (a) (2), 40 C.F.R. § 22.17 (a) (2). No response was received from Respondent. Although Respondent has violated Rule 22.17(a)(2), an order assessing liability cannot be issued because the evidence presented so far does not establish that Respondent violated the Clean Water Act.

BACKGROUND

The Complaint in this matter was filed on August 11, 1997. The Complaint alleged that Respondent had violated Section 301(a) of the Clean Water Act (CWA), 33 U.S.C. § 1311(a), by discharging pollutants from a point source into waters of the United States without a permit as required under Section 404 of the CWA, 33 U.S.C. § 1344. Complainant proposed a penalty of $40,518. Respondent answered the Complaint, denying all of the allegations in the Complaint and requesting a hearing.

On December 31, 1997, the undersigned issued an order setting dates for the parties to submit their respective prehearing exchanges. Complainant submitted its initial prehearing exchange on February 24, 1998. Respondent submitted nothing on the date set for submission either of (1) his prehearing exchange or (2) "a statement that [he] is electing to forego the presentation of answering evidence and is electing to cross-examine EPA witnesses." Therefore, Respondent has failed "to comply with a prehearing or hearing order of the Presiding Officer . . ." 40 C.F.R. § 22.17.[(1)] Complainant's motion for a default order followed thereafter.

EPA's consolidated rules of practice that apply to this proceeding explain,

"Default by respondent constitutes, for purposes of the pending action only, 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. Because Respondent defaulted, the facts as presented by Complainant would normally be accepted as unchallenged. A default judgment, however, must be based upon substantial evidence in the case and must be warranted by the facts. 5 U.S.C. § 706(2)(E)&(F). A default order must include "findings of fact showing the grounds for the order, conclusions regarding all material issues of law or discretion, and the penalty which is recommended to be assessed. 40 C.F.R. § 22.17(c). Even when all of Complainant's assertions are presumed true, therefore, an order on default still requires Complainant to establish that Respondent has violated the statute.

As will be explained, Complainant does not appear to allege enough facts to show that Respondent violated the CWA. Complainant will, therefore, be ordered either to show cause why the case, as pled, should not be dismissed, or to amend the Complaint and/or supplement its prehearing exchange to support the assertion that Respondent violated the CWA.

DISCUSSION

The following facts are set forth in the Complaint and Complainant's prehearing exchange. The Respondent, Wallace W. Stone, is an individual who owns property located at the Lake of the Ozarks, Camden County, Missouri, near lake mile 23.7. On or about September 11, 1994, Respondent submitted an application to the United States Army Corps of Engineers (Corps) for a permit to excavate approximately 18 cubic yards of material at the Lake of the Ozarks near lake mile 30.9 + 0.6 in Camden County, Missouri. On or about January 6, 1995, the Corps advised Respondent that his proposed excavation of 18 cubic yards at lake mile 30.9 + 0.6 would be authorized by nationwide permit 18. At some time between February and April 1995, Lake Ozark Construction Company, acting on behalf of Respondent, excavated approximately 800 cubic yards of lake bed material at lake mile 30.9 + 0.6, thus greatly exceeding the volume of 18 cubic yards allowed by nationwide permit 18. Excavation was performed by the use of earth-moving equipment. By letter dated May 24, 1995, the Corps notified Respondent that the excavation at lake mile 30.9 + 0.6 was not authorized by the Corps and directed Respondent to do no more work in Corps jurisdiction. Contrary to this directive, Respondent , at some time in January or February 1996, excavated lake bed material at the Lake of the Ozarks near lake mile 23.7 and redirected drainage at the head of the cove, with the use of earth-moving equipment. Respondent did not obtain a CWA, section 404 permit authorizing it to discharge pollutants at lake mile 23.7.

Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants from a point source into the waters of the United States except when in compliance with, *inter alia*, a permit to discharge dredged or fill material issued by the Corps pursuant to section 404 of the CWA, 33 U.S.C. § 1344.

Respondent, an individual, is a "person" within the meaning of section 502(5) of the CWA, 33 U.S.C. § 1362(5). The lake bed material that was excavated by Respondent, or one acting on behalf of Respondent, at lake mile 23.7, is dredged material and a "pollutant" within the meaning of section 502(6) of the CWA, 33 U.S.C. § 1362(6). The earth-moving equipment used by Respondent, or one acting on behalf of Respondent, at lake mile 23.7, is a "point source" within the meaning of section 502(14) of the CWA, 33 U.S.C. § 1362(14). At all times relevant to this administrative action, the Lake of the Ozarks has been "waters of the United States," as defined by 40 C.F.R. §§ 122.2 and 230.3(s), and "navigable waters" within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7).

The problem with Complainant's case arises from the assertion that Respondent *discharged* a pollutant into a water of the United States. The CWA defines a "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). The U.S. Court of Appeals for the District of Columbia Circuit recently concluded that the redeposit of incidental fallback resulting from dredging activities is not considered a discharge under the CWA. *National Mining Assoc. et al. v. U.S. Army Corps of Eng'rs, et al.*, No. 97-5099, 1998 U.S. App. LEXIS 13009 (D.C. Cir. 1998). Upholding the district court's

decision, which invalidated regulations known as "the Tulloch Rule," the court of appeals explained, ". . . the straightforward statutory term 'addition' cannot reasonably be said to encompass the situation in which material is removed from the waters of the United States and a small portion of it happens to fall back." *National Mining Assoc. et al.*, 1998 U.S. App. LEXIS at *13. The court continued, "Because incidental fallback represents a net withdrawal, not an addition, of material, it cannot be a discharge." *Id.* There cannot be an addition of dredged material, therefore, when there is no addition of material. *Id.* at *14.

Complainant asserts that "the excavation of lake bed material at lake mile 23.7 with earth-moving equipment resulted in the discharge of dredged and fill material into waters of the United States." Complaint at ¶14. Excavation of dredged material is regulated by the Corps pursuant to Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403, which makes it illegal "to excavate or fill" in the navigable waters of the United States without the Corps' approval. In order to establish a violation of the Clean Water Act, the *National Mining Assoc.* decision makes it clear that Complainant must allege facts to show that an addition larger than incidental fallback occurred.

Complainant's prehearing exchange indicates that witnesses viewed "a considerable amount of lake bed material pushed upon the bank of the lake" and that the area where the material was discharged may have been wetlands, which are also waters of the United States. *See, e.g.*, C.Phe. at 3, 5-6, 10. Although the court of appeals recognized that such "sidecasting" of excavated material into a wetland is regulated under the CWA, it is not clear from the Complaint in this proceeding that Complainant is alleging such a violation. *See, National Mining Assoc. et al.*, 1998 U.S. App. LEXIS at *7. Complainant's summaries and documents do not, by themselves, show that any regulated discharge occurred. Because the Complaint and prehearing exchange do not adequately describe Respondent's discharges, liability cannot be established by the current record.

CONCLUSION AND ORDER

By failing to file a response to the undersigned's December 31, 1997 order requiring Respondent to submit on or before March 25, 1998, either (1) his prehearing exchange or (2) "a statement that (he) is electing to forego the presentation of answering evidence and is electing to cross-examine EPA witnesses," Respondent has failed "to comply with a prehearing or hearing order of the Presiding Officer . . . ." In addition, Respondent failed to answer Complainant's May 13, 1998 motion for a default order. However, because the existing record does not reflect all the facts necessary to show that Respondent discharged a pollutant into waters of the United States, a judgment on default is not possible at this time, despite Respondent's failure "to comply with a prehearing or hearing order of the Presiding Officer."

Complainant is ordered, no later than October 5, 1998, either to: (1) show cause why the case, as pled, should not be dismissed, or (2) file a motion to amend the Complaint and/or supplement its prehearing exchange to support the assertion that Respondent violated the CWA. Complainant is also ordered to explain how its filings will affect the proposed penalty. Respondent may respond to Complainant's submission, no later than October 22, 1998. Pending receipt of further information from Complainant, action on the motion for default is deferred.

_Charles E. Bullock
Administrative Law Judge

Dated: September 4, 1998
Washington, D.C.

1. "A party may be found to be in default . . . (2) after motion or sua sponte, upon failure to comply with a prehearing or hearing order of the Presiding Officer." 40

C.F.R. § 22.17.

IN THE MATTER OF WALLACE W. STONE

, Respondent
CWA Docket No. VII-97-0024

CERTIFICATE OF SERVICE

I certify that the foregoing Order Deferring Action on Motion for Default Order, dated September 4, 1998, was sent in the following manner to the addressees listed below:

Original by Regular Mail to:

Ms. Venessa Cobbs
Regional Hearing Clerk
U.S. Environmental Protection
Agency, Region VII
726 Minnesota Avenue
Kansas City, KS 66101

Copy by Regular Mail to:

Counsel for Complainant:

Audrey Asher, Esquire
Senior Assistant Regional Counsel
U.S. Environmental Protection
Agency, Region VII
726 Minnesota Avenue
Kansas City, KS 66101

Copy by Certified Mail, Return Receipt Requested and by Regular Mail to:

Respondent:

Mr. Wallace W. Stone
Route 1, Box 732
Osage Beach, MO 65065

_____
Marion Walzel
Legal Assistant

Dated: September 4, 1998