UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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

ORDER DENYING MOTION FOR DEFAULT ORDER AND FINDING THAT COMPLAINANT'S CASE SHOULD NOT BE DISMISSED

For the reasons set forth below, Complainant's motion for a default order shall be denied, and a finding shall be made that Complainant's case should not be dismissed. In addition, this order discusses further procedures to be followed in this case.

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 (C. Phe.). On the date set for submission, Respondent submitted neither (1) his prehearing exchange nor (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, "[d]efault 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, an order on default still requires Complainant to establish that Respondent has violated the statute. .

DISCUSSION

The following facts are set forth in the Complaint and Complainant's initial 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. It is the action allegedly taken by Respondent in January or February of 1996 that is the violation alleged in this Complaint.

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 arose 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. Because incidental fallback represents a net withdrawal, not an addition, of material, it cannot be a discharge." *National Mining Assoc. et al.*, 1998 U.S. App. LEXIS at *13. 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. However, 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.

In an order issued September 4, 1998 by the undersigned, it was noted that 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 was 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. The September 4 order noted further that Complainant's summaries and documents did not, by themselves, show that any regulated discharge occurred. Because the Complaint and prehearing exchange did not adequately describe Respondent's discharges, the September 4 order found that liability could not be established by the record as it then existed. Accordingly, Complainant was 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 was also ordered to explain how its filings would affect the proposed penalty. Respondent was permitted to respond to Complainant's submission no later than October 22, 1998. Pending receipt of further information from Complainant, action on the motion for default was deferred. By order issued October 8, 1998 , Complainant's request to extend the two response dates was granted such that Complainant's submission was now due on or before October 19, 1998 and Respondent's answer thereto was now due on or before November 5, 1998.

Complainant filed its response to the September 4 order on October 19, 1998. Therein Complainant proposed to supplement its prehearing exchange with the additional testimony of Mr. Mark Frazier, Regulatory Project Manager in the Kansas City district office of the U.S. Army Corps of Engineers. Complainant states the supplemental testimony would establish that the use of the bulldozer *per se* and the manner in which the bulldozer was operated indicate that sidecasting and redepositing of material had occurred which was more than incidental fallback. In addition, the supplemental testimony would allege that "lake bed material was redeposited in a location different from the place where it had been dredged." Therefore, Complainant argues that, under applicable precedent, the actions of Respondent, or one under his control, were done "without a permit issued by the Corps under Section 404 of the CWA, in violation of Section 301 of the CWA." In addition, Complainant asserts that Respondent failed to comply with Rule 22.17(a)(2). Accordingly, Complainant again requests that its motion for a default order be granted.

By letter received in this office on November 3, 1998, Respondent states that he is "financially unable to secure the services of an attorney to represent me in this issue. My only alternative is to write you (the undersigned) and attempt to explain my position." Respondent states that "there was no intention of dredging any portion of the Lake of the Ozarks." He states further that " the intent was to clear my lot for the construction of my home on the Lake." He also states that "[n]either depth of the lake nor the width of the cove area was altered by this work and subsequent work on [the] shoreline restored [the] area to its natural beauty."

Respondent included several photographs said to be of the site in question. By letter dated November 4, 1998, my Legal Assistant, Marion Walzel, sent the original of the letter and copies of the photographs to the Regional Hearing Clerk, with a copy being retained by the undersigned, and a copy of the letter and the original copies of the photographs being sent to Complainant. The letter stated further that if the undersigned needed actual photographs at a future date, Respondent would be contacted to provide them.

Complainant filed a response to Respondent's submission on November 19, 1998. Complainant argues that nothing in Respondent's submission is sufficient to rebut the evidence submitted by Complainant. Accordingly, Complainant again urges that a default order be issued against Respondent.

SUFFICIENCY OF THE COMPLAINT

For the reasons stated above, Complainant has supplemented its prehearing exchange to allege that more than incidental fallback of dredged material occurred. Complainant has now alleged that sidecasting and redeposit of material occurred. Thus, the actions alleged to have been taken by Respondent now are consistent with the *National Mining Assoc.* decision. Accordingly, Complainant's case shall not be dismissed.

MOTION FOR DEFAULT

Thus, the issue once again arises as to whether a default judgment should be entered against Respondent. Unlike the situation that existed when the motion for default was filed, Respondent has belatedly become active in this proceeding. This is no longer such a case. Accordingly, Respondent's letter is hereby construed as to be in substantive compliance with the original prehearing order issued by the undersigned. Accordingly, Complainant's motion for a default order is denied. However, while somewhat more lenient standards apply to a *pro se* Respondent, Respondent is put on notice that he is responsible for "complying with the procedural rules and may suffer adverse consequences in the event of noncompliance." *In re Rybond, Inc*., 1996 EPA App. Lexis 16, 31 (1996).

CONCLUSION

In the first or second week of January, the undersigned will schedule a telephone conference to determine the next step to be taken in this proceeding. At that conference, the undersigned will strongly urge that the parties avail themselves of this office's Alternative Dispute Resolution (ADR) procedures and agree to have this case referred to another Administrative Law Judge for mediation. Should the parties not agree to engage in ADR, then further procedures shall be discussed to resolve this case on the merits.

_____
Charles E. Bullock
Administrative Law Judge

Dated: December 17, 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."

IN THE MATTER OF WALLACE W. STONE

, Respondent
CWA Docket No. VII-97-0024

CERTIFICATE OF SERVICE

I certify that the foregoing Order Denying Motion for Default Order and Finding that Complainant's Case Should Not Be Dismissed, dated December 17, 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: December 17, 1998