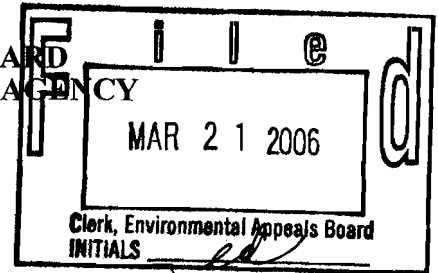


BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.



In re: _____
Gaskey Construction Corp.
Docket No. CWA-06-2004-2335

CWA Appeal No. 06-02

**ORDER ELECTING TO REVIEW SUA SPONTE
AND REMANDING TO REGIONAL JUDICIAL OFFICER**

On February 6, 2006, the Regional Judicial Officer for U.S. EPA Region 6, Michael C. Barra (“RJO”), issued an “Initial Decision and Default Order” in this matter against Gaskey Construction Corporation (“Gaskey”). *See* Initial Decision and Default Order (Feb. 6, 2006) (“Default Order”). The Default Order finds Gaskey in default because he failed to file an answer to an administrative complaint filed by U.S. EPA, Region 6 (the “Region”) alleging that Gaskey discharged pollutants from its construction site into waters of the United States without a permit in violation of section 301 of the Clean Water Act. 33 U.S.C. § 1311. For this violation, the Default Order assesses an administrative penalty of \$10,155. Because Gaskey failed to file a timely answer to the complaint, we agree with the RJO that a default judgment is appropriate in this matter; nonetheless, we grant review and remand this matter to the RJO for clarification on the penalty assessment.¹

In assessing the penalty, the RJO appears to have relied, for the most part, on the Region’s penalty calculation. In particular, the RJO cites to a summary prepared by Everett H. Spencer, a Region 6 enforcement officer, explaining the reasoning behind the penalty. This summary is set forth

¹ Although the Board ordinarily requests briefing when granting review, where, as here, the perceived error or lack of clarity derives from an RJO’s default order itself and the Board does not consider that additional briefing will be of assistance absent a clarification from the RJO, a direct remand without further briefing is appropriate.

in an affidavit attached to the Region's July 1, 2005 memorandum in support of its motion for default in this matter. *See* Attachment G to Memorandum of Law in Support of Complainant's Motion for Default Order as to Liability and Penalty (July 1, 2005) (hereinafter "Affidavit"). According to the Affidavit, Mr. Spencer "calculated a penalty of \$10,155 for five counts of violations which consists of five months of failure to have * * * permit coverage." Affidavit at 8. According to the Affidavit, this includes "\$155 in economic benefit and \$10,000 for the gravity of the *violations*." *Id.* (emphasis added). In his default order, however, the RJO states that he "find[s] no basis for Mr. Spencer's considering that this case involves five violations because [Gaskey] operated without the required permit for five months." Default Order at 16. Nevertheless, the RJO, without explanation, adopts the Region's proposed \$10,000 gravity-based penalty. Absent further explanation, the Board can not determine whether the RJO appropriately assessed the penalty in this case. We note further that the RJO states that the "economic benefit in this case was not significant." *Id.* Nevertheless, the Default Order, again without explanation, adopts the Region's \$155 economic benefit calculation. Finally, the RJO states that although the Region's penalty calculation did not make any adjustments to the penalty for other factors as justice may require,² "I did consider [Gaskey's] general recalcitrance in its dealings with EPA concerning the violation under this factor." *Id.* The Board is unable to determine from this statement exactly what "recalcitrance" the RJO is referring to or what effect this "recalcitrance" had on the penalty assessment. In addition, to the extent that the RJO adjusted the penalty for "other factors as justice may require," the Board is unable to determine whether such an

² Clean Water Act section 309(g), 33 U.S.C. § 1319(g), provides that the EPA may assess civil penalties for violations of CWA section 301. The statute provides that the amount of the penalty must be based on "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." 33 U.S.C. § 1319(g)(3).

adjustment was consistent with Board precedent. *See, e.g., In re Phoenix Constr. Servs., Inc.*, 11 E.A.D. 379, 414-15 (EAB 2004).

Under these circumstances, the Board remands the penalty portion of the Default Order. On remand, the RJO must either provide further explanation and analysis regarding his rationale for the \$10,155 penalty assessment or adjust the penalty in light of this decision and fully explain the rationale for such an adjustment.

So ordered.³

Dated: *March 21, 2006*

ENVIRONMENTAL APPEALS BOARD

By: *Kathie A. Stein*
Kathie A. Stein
Environmental Appeals Judge

³ The panel deciding this matter is comprised of Environmental Appeals Judges Edward E. Reich, Kathie A. Stein, and Anna L. Wolgast.

CERTIFICATE OF SERVICE

I hereby certify that copies of the forgoing Order Electing Review Sua Sponte And Remanding to Regional Judicial Officer in the matter of Gaskey Construction Corp., CWA Appeal No. 06-02, were sent to the following persons in the manner indicated:

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Dated: MAR 22 2006


Annette Duncan
Secretary