

IN RE FRANK ALO

CWA Appeal No. 22-01

ORDER REMANDING TO PRESIDING OFFICER

Decided July 22, 2022

Syllabus

This case arises from an administrative complaint filed by the U.S. EPA Region 9 (“Region” or “Complainant”) against Mr. Frank Alo (“Respondent”) for alleged violations of section 301(a) of the Clean Water Act (“CWA”), 33 U.S.C. § 1311(a). The case involves the alleged discharge of fill material into waters of the United States without authorization under CWA section 404, 33 U.S.C. § 1344. Following Respondent’s failure to file an answer to the complaint, the Region filed a motion for partial default on liability, and, on June 15, 2022, the Regional Judicial Officer (the Presiding Officer in this matter) issued an order styled “Initial Decision and Order on Motion for Partial Default (Liability)” (hereinafter “June 2022 Order”). The June 2022 Order found Respondent to be in default and liable as a matter of law for the violations alleged in the complaint. The order further referred the issue of an appropriate penalty to the Complainant for further action. Finally, the order provided notice of appeal rights attendant to an initial decision.

Held: The Environmental Appeals Board remands the June 2022 Order to the Regional Judicial Officer. The order does not constitute an initial decision because it does not resolve all outstanding issues and claims in the proceeding. The issue of penalty in the proceeding is still open, and the complaint reflects that the Region seeks a penalty amount not to exceed the statutory maximum. Accordingly, the June 2022 Order is not an initial decision, and appeal rights have not yet begun to run.

Before Environmental Appeals Judges Aaron P. Avila, Wendy L. Blake, and Kathie A. Stein.

Opinion of the Board by Judge Blake:

On July 2, 2021, the U.S. EPA Region 9 (“Region”) filed a complaint against Mr. Frank Alo (“Respondent”) alleging violations of section 301(a) of the Clean Water Act (“CWA”), 33 U.S.C. § 1311(a), and seeking “a civil administrative penalty against Respondent in an amount not to exceed the statutory maximum penalty of \$282,293.” Complaint, Notice of Proposed Penalty, and Notice of Opportunity for Hearing ¶¶ 4, 7, 14-15, 19 (July 2, 2021) (“*Compl.*”). Respondent failed to file an answer to the complaint, and the Region moved for partial default on the issue of liability, seeking a default order finding that Respondent had failed to answer and was

liable for violating CWA section 301(a), 33 U.S.C. § 1311(a). Complainant’s Motion for Partial Default (Liability) 10, 15 (Feb. 3, 2022).

On June 15, 2022, the Regional Judicial Officer (the Presiding Officer in this matter) issued an order styled “Initial Decision and Order on Motion for Partial Default (Liability)” (hereinafter “June 2022 Order”). The Environmental Appeals Board (“Board”) reviewed the June 2022 Order and the record before the Regional Judicial Officer pursuant to its authority under 40 C.F.R. §§ 22.27(c)(4), .30(b).¹

In the June 2022 Order, the Regional Judicial Officer found Respondent to be in default for failure to file a written answer to the complaint and that Respondent’s failure to file an answer “is grounds for an entry of a default order as to liability against Respondent.” June 2022 Order at 5-6. The order also referred “[t]he issue of an appropriate penalty” to the “Complainant for further action.” *Id.* at 1, 6. The order concluded by stating, in relevant part:

This Default Order constitutes an Initial Decision, in accordance with 40 C.F.R. § 22.27(a) of the Consolidated Rules. This Initial Decision shall become a Final Order forty-five (45) days after its service upon a party, and without further proceedings unless: (1) a party moves to reopen the hearing; (2) a party appeals the Initial Decision to the Environmental Appeals Board; (3) a party moves to set aside a default order [that] constitutes an initial decision; or (4) the Environmental Appeals Board elects to review the Initial Decision on its own initiative. Within thirty (30) days after the Initial Decision is served, any party may appeal any adverse order or ruling of the Presiding Officer by filing an appeal with the Environmental Appeals Board. 40 C.F.R. § 22.27(a).²

Id. at 6 (emphasis added).

The June 2022 Order is not, however, an initial decision “in accordance with 40 C.F.R. § 22.27(a),” or any other provision of 40 C.F.R. part 22. Part 22 defines the term “initial decision” to “mean[] the decision issued by the Presiding Officer pursuant to §§ 22.17(c), 22.20(b) or 22.27 resolving all outstanding issues in the proceeding.” 40 C.F.R. § 22.3(a) (emphasis added). The regulatory provisions addressing default, at issue here, specifically provide that an order is considered an initial decision if it “resolves all outstanding issues and claims in the proceeding.” *Id.* § 22.17(c); accord, *In re JHNY, Inc.*, 12 E.A.D. 372, 381 n.14 (EAB 2005) (noting that default order at issue was the “‘initial decision’ in th[e] case, because it impose[d] liability and assesse[d]

¹ The Board has determined that briefing by the parties would not materially assist the Board’s deliberations. 40 C.F.R. § 22.30(b).

² Although the Regional Judicial Officer’s June 2022 Order cites 40 C.F.R. § 22.27(a) in the last sentence of the above-quoted paragraph, the reference should be to 40 C.F.R. § 22.30(a).

a penalty against [the respondent], thus resolving all outstanding issues and claims”); *see also* Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits, 64 Fed. Reg. 40,138, 40,155 (July 23, 1999) (noting that a default order is not an initial decision unless it resolves “all issues and claims in the proceeding”). Further, the regulatory provisions governing initial decisions specify that an initial decision shall contain, among other things, “conclusions regarding all material issues of law or discretion, as well as reasons therefor, and, if appropriate, a recommended civil penalty assessment.” 40 C.F.R. § 22.27(a).

Here, the June 2022 Order resolved only whether Respondent was in default and liable for the violations alleged in the complaint. June 2022 Order at 6. The issue of penalty in the case is still outstanding, and the complaint reflects that the Region seeks a penalty amount not to exceed the statutory maximum in the case. *Id.* at 1, 6 (referring the penalty issue to the Complainant for further action); Compl. ¶ 19.³ Where a civil penalty is sought, the Presiding Officer must make certain determinations, including whether the amount of the penalty is “based on the evidence in the record” and consistent with “any penalty criteria set forth in the Act.” 40 C.F.R. § 22.27(b); *see also id.* (stating that “[i]f the respondent has defaulted, the Presiding Officer shall not assess a penalty greater than that proposed by complainant in the complaint, * * * or the motion for default, whichever is less”). As the June 2022 Order does not resolve all outstanding issues and claims in the proceeding, it does not constitute an initial decision.

Accordingly, the Board remands the June 2022 Order to the Regional Judicial Officer. On remand, the Regional Judicial Officer must correct the title of the June 2022 Order, eliminate any language therein characterizing the order as an initial decision, and issue and serve the amended order in accordance with 40 C.F.R. § 22.6.⁴ These corrections are important because direct consequences flow from the issuance of an initial decision, including a party’s right to appeal the initial decision within the time specified in the regulations. *Id.* § 22.30(a). In this case, appeal rights have not yet begun to run. *Id.*; *see also id.* § 22.27(c) (specifying when an initial decision becomes final). Moving forward, an initial decision in this matter shall comply with all applicable 40 C.F.R. part 22 regulations. *See, e.g., id.* §§ 22.17(c), .27.

So ordered.

³ While part 22 provides for Board review of interlocutory orders and rulings under very specific circumstances, 40 C.F.R. § 22.29, that provision is not at issue here.

⁴ The Board, through this order, makes no determination on the Regional Judicial Officer’s default and liability findings.