UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6
DALLAS, TEXAS

In the Matter of:	)	
	)	
Bobby Rowe Energy, Inc.,	)	Docket No. CWA-06-2009-1761
	)	
Respondent.	)	

INITIAL DECISION AND DEFAULT ORDER

This is a proceeding under Section 309(g) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(g), for violations of Section 301 of the CWA, 33 U.S.C. § 1311, by discharging pollutants into waters of the United States without a permit. The proceeding is governed by procedures set forth in the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Consolidated Rules") codified at 40 C.F.R. Part 22. Complainant, the Director of the Compliance Assurance and Enforcement Division of United States Environmental Protection Agency Region 6, has filed a Motion for Default as to Penalty and Liability ("Motion for Default") seeking a default order finding Respondent, Bobby Rowe Energy, Inc., liable for the violations of the CWA alleged in the Administrative Complaint ("Complaint") filed in this matter and assessing a civil penalty in the amount of $20,200.00 against the Respondent. Pursuant to the Consolidated Rules and the record in this matter and for the reasons set forth below, the Complainant's Motion for Default is hereby **GRANTED**.

BACKGROUND

The Complainant filed the Complaint against Respondent in this matter on July 7, 2009.

Section IV of the Complaint, entitled "Failure to File an Answer," provides information concerning Respondent's obligations with respect to responding to the Complaint. Paragraph 16 of Section IV of the Complaint specifically states that:

> If the Respondent wishes to deny or explain any material allegation listed in the above Findings or to contest the amount of the penalty proposed, the Respondent must file an Answer to this Complaint within thirty (30) days after service of this Complaint . . . .

Paragraph 17 of Section IV of the Complaint advises that:

> Failure to file an Answer to this Complaint within thirty (30) days of service of the Complaint shall constitute an admission of all facts alleged in the Complaint and a waiver of the right to hearing. Failure to deny or contest any individual material allegations contained in the Complaint will constitute an admission as to that finding or conclusion . . . .

Paragraph 18 of the Complaint warns that:

> If the Respondent does not file an Answer to this Complaint within thirty (30) days after service, a Default Order may be issued against Respondent pursuant to 40 C.F.R. § 22.17.

The Certificate of Service attached to the Complaint includes a certification that a copy of the Complaint was sent by certified mail, return receipt requested, on July 7, 2009, addressed to Mr. Stephen Rowe, Owner, Bobby Rowe Energy, Inc., P.O. Box 240, Beggs, Oklahoma. A certified mail return receipt (green card) bearing the docket number of this case and the word "complaint" filed with the Regional Hearing Clerk shows that an article was signed for at the address indicated in the Certificate of Service on July 10, 2009. A properly executed return receipt constitutes proof of service of the Complaint. Nothing in the return receipt in this case suggests that it was not properly executed, thus proper service of the Complaint may be presumed under the Consolidated Rules.

Respondent has not filed an answer to the Complaint as of the date of this order.

On November 9, 2009, Complainant filed an Unopposed Status Report and Substitution of Counsel, which reported, among other things, that the parties' attorneys had communicated on November 6, 2009. During the November 6 communication, counsel for Complainant learned that Respondent had filed for bankruptcy Respondent would submit financial documentation for Complainant's consideration. Complainant represented that Respondent was in agreement with the Status Report.

On April 12, 2010, Complainant filed a Status Report in which Complainant reported unsuccessful attempts to communicate with Respondent, that Complainant did not consider settlement of the matter likely, and that Complainant intended to file a motion for default.

On May 26, 2010, Complaint filed its Motion for Default. The Certificate of Service attached to the Motion for Default shows that a copy of the Motion for Default was served on Respondent by certified mail on May 26, 2010.

As of the date of this order, Respondent has not filed an answer to the Complaint or a response to the Motion for Default with the Regional Hearing Clerk.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to sections 22.17(c) and 22.27(a) of the Consolidated Rules, 40 C.F.R. §§ 22.17(c) and 22.27(a), and based on the entire record in this case, I make the following findings of fact and conclusions of law:

1. The Complaint was filed with the Regional Hearing Clerk on July 7, 2009.

2. A copy of the Complaint was mailed to Respondent by certified mail, return receipt requested, on July 7, 2009.

3. A return receipt shows that Respondent received a copy of the Complaint on July 10, 2009.

4. The Complaint in this proceeding was lawfully and properly served upon Respondent in accordance with 40 C.F.R. § 22.5(b)(1).

5. EPA notified the Oklahoma Corporation Commission of the issuance of the Complaint and afforded the State an opportunity to consult with EPA regarding the assessment of an administrative penalty against Respondent as required by Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1).

6. EPA notified the public of the filing of the Complaint and afforded the public thirty (30) days in which to comment on the Complaint and the proposed penalty as required by Section 309(g)(4)(A) of the CWA, 33 U.S.C. § 1319(g)(4)(A). At the expiration of the notice period, EPA had received no comments from the public.

7. Respondent did not file an answer to the Complaint within 30 days of receipt of the Complaint and has not filed an answer as of the date of this order.

8. Respondent's failure to file an answer to the Complaint constitutes 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(a).

9. On May 26, 2010, Complaint filed its Motion for Default and served it on the Respondent by certified mail.

10. Complainant's Motion for Default was lawfully and properly served on Respondent. 40 C.F.R. § 22.5(b)(2).

11. Respondent was required to file any response to the Motion for Default within 15 days of

service. 40 C.F.R. § 22.16(b).

12. Respondent did not file a response to Complainant's Motion for Default within 15 days of service and has not filed a response to the Motion for Default as of the date of this order.

13. Respondent's failure to respond to the Motion for Default is deemed to be a waiver of any objection to the granting of the Motion for Default. 40 C.F.R. § 22.16(b).

14. Respondent is in default for failure to file a timely answer to the Complaint. 40 C.F.R. § 22.17(a).

15. Respondent, Bobby Rowe Energy, Inc., is a corporation which was incorporated under the laws of the State of Oklahoma.

16. Respondent is a "person" as defined at section 502(5) of the CWA, 33 U.S.C. § 1362(5), and 40 C.F.R. § 122.2.

17. At all times relevant, the Respondent owned or operated the oil and gas production facilities below ("the Facilities") and was, therefore, an "owner and operator" within the meaning of 40 C.F.R. § 122.2:

    a. Facility #1 – Southeast Quarter of Section 11, Township 15 North, Range 11 East, Okmulgee County, Oklahoma;

    b. Facility #2 – Northwest Quarter of Section 11, Township 14 North, Range 11 East, Okmulgee County, Oklahoma;

    c. Facility #3 – Southeast Quarter of Section 27, Township 14 North, Range 10 East, Creek County, Oklahoma.

18. At all times relevant, the Facilities were "point sources" of "discharges" of "pollutants," specifically oil field brine, to the receiving waters of two tributaries of Salt Creek and a

tributary of Hopper Creek, which are "waters of the United States" within the meaning of Section 502 of the CWA, 33 U.S.C. § 1362, and 40 C.F.R. § 122.2.

19. Because Respondent owned or operated facilities which acted as point sources of discharges of pollutants to waters of the United States, Respondent and the Facilities are subject to the CWA and the National Pollutant Discharge Elimination System ("NPDES") program.

20. Under Section 301 of the CWA, 33 U.S.C. § 1311, it is unlawful for any person to discharge any pollutant from a point source to waters of the United States, except with the authorization of, and in compliance with, an NPDES permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

21. According to the NPDES program, the discharge of oil field brine to "waters of the United States" is a non-permitted discharge.

22. On September 4, 2008, Facility #1 was inspected by an EPA field inspector. The inspector observed that oil field brine had been discharged from Facility #1, located at Latitude 35° 47.41' North and Longitude 96° 6.24' West, to a tributary of Salt Creek, located at Latitude 35° 47.29' North and Longitude 96° 6.24' West. The inspector observed that the facility's secondary containment had overflowed brine and a flow path was observed between the facility and the discharge point of entry. The inspector determined pools of brine located on this flow path measured over 80,000 parts-per-million ("ppm") Total Soluble Salts ("TSS"). The inspector also determined that the water located at the discharge point of entry into the tributary of Salt Creek was contaminated from brine discharges which measured 28,000 ppm TSS.

23. On September 4, 2008, Facility #2 was inspected by an EPA field inspector. The inspector observed that oil field brine had been discharged from Facility #2, located at Latitude 35° 42.40' North and Longitude 96° 6.87' West, to a tributary of Salt Creek, located at Latitude 35° 42.51' North and Longitude 96° 6.87' West. The inspector observed a brine flow path between the facility and the discharge point of entry. The inspector determined fluids located on this flow path measured over 80,000 ppm TSS. The inspector also determined the water located at the discharge point of entry into the tributary of Salt Creek was contaminated from brine discharges which measured 45,000 to 79,000 ppm TSS.

24. On September 19, 2008, Facility #3 was inspected by an EPA field inspector. The inspector observed that oil field brine had been discharged from Facility #3, located at Latitude 35° 39.17' North and Longitude 96° 14.20' West, to an unnamed spring-fed creek which flows into a wetlands area and then flows into an unnamed tributary of Hopper Creek. The spring-fed creek is located at Latitude 35° 39.01' North and Longitude 96° 14.14' West. The point of entry where the wetlands area flows into the tributary of Hopper Creek is located at Latitude 35° 38.71' North and Longitude 96° 14.10' West. Fluids located in the secondary containment at the facility measured 65,000 ppm TSS. Fluids located at the point of entry into the unnamed spring-fed creek measured 5,500 ppm TSS. Fluids located at the point of entry into the tributary of Hopper Creek measured 2,000 ppm TSS.

25. Each day of unauthorized discharge was a violation of Section 301 of the CWA, 33 U.S.C. § 1311.

26. Pursuant to Section 309(g)(2)(A) of the CWA, 33 U.S.C. § 1319(g)(2)(A), Respondent is liable for a civil penalty in an amount not to exceed $11,000 per day for each day during which a violation continues, up to a maximum of $32,500.

DISCUSSION OF PENALTY

The relief proposed in the Complaint and requested in the Motion for Default includes the assessment of a total civil penalty of $20,200.00 for the alleged violations. The Consolidated Rules provide that

> When the Presiding Officer finds that a default has occurred . . . The relief proposed in the Complaint or the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act.

40 C.F.R. § 22.17(c)

With respect to penalty, the Consolidated Rules provide that the Presiding Officer shall determine the amount of the civil penalty

> . . . based on the evidence in the record and in accordance with any penalty criteria set forth in the Act. The Presiding Officer shall consider any civil penalty guidelines issued under the Act.

40 C.F.R. § 22.27(b).

The statutory factors I am required to consider in determining the amount of the civil penalty are

> . . . 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.

Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3).

In considering this case in light of the statutory factors, I have considered the findings of fact and conclusions of law above, the narrative summary explaining the reasoning behind the penalty requested set forth in the Declaration of Matthew Rudolph attached to Complainant's Motion for Default, and the entire record in this case.

In this case, Mr. Rudolph considered that the violations consisted of releases of oil field brine into surface waters from three different locations. Oil field brine causes environmental harm because its high salt concentrations can kill vegetation and aquatic life, even at levels far lower than those present in this case. Mr. Rudolph also found that Respondent's violations undermine the purposes of the Clean Water Act, which include restoring and maintaining of the chemical, physical, and biological integrity of the waters of the United States.

Mr. Rudolph also considered information available concerning Respondent's ability to pay. According to Mr. Rudolph, Complainant was told by Respondent's counsel that Respondent had filed for Chapter 11 bankruptcy. Mr. Rudolph found information which indicates that Respondent did file for bankruptcy and that auctions of certain assets had been planned, but Respondent has failed to carry through on promises to provide documentation of its financial status.

Mr. Rudolph also considered Respondent's history of violations, including prior administrative compliance orders and an administrative penalty action against the Respondent for similar violations. Mr. Rudolph considered Respondent's culpability and the economic benefit to the Respondent of noncompliance. Mr. Rudolph indicated that he did not make adjustments to his penalty calculation based upon "other factors as justice may require."

After giving consideration to all of the statutory factors, Mr. Rudolph arrived at a penalty

calculation of $20,200.

Pursuant to 40 C.F.R. § 22.17(c), "[t]he relief proposed in the complaint or the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act." The Complainant proposes to assess a total civil penalty of $20,200.00 for the violations alleged in the Complaint. After considering the statutory factors, and the entire record in this case, I find the civil penalty proposed is not inconsistent with the record of this proceeding and the statutory factors.

DEFAULT ORDER

Respondent is hereby **ORDERED** as follows:

1. Respondent is assessed a civil penalty in the amount of $20,200.00.

   A. Payment of the full amount of the civil penalty assessed shall be made within thirty (30) days after this default order becomes final under 40 C.F.R. § 22.27(c) by submitting a certified check or cashier's check payable to "Treasurer, United States of America," and mailed to:

      Regional Hearing Clerk (6C)
      U.S. EPA Region 6
      Fines and Penalties
      Cincinnati Finance Center
      P.O. Box 979077
      St. Louis, MO 63197-9000

   A transmittal letter identifying the subject case, including the EPA docket number and Respondent's name and address, shall accompany the check.

   B. Respondent shall mail a copy of the check to:

      Lorena S. Vaughn
      Regional Hearing Clerk (6RC-D)

U.S. Environmental Protection Agency
Region 6
1445 Ross Avenue
Dallas, TX 75202-2733

and to:

Chief, Water Enforcement Branch
Compliance Assurance and Enforcement Division
U.S. EPA Region 6
1445 Ross Avenue
Dallas, Texas 75202-2733

Ellen Chang-Vaughn
Assistant Regional Counsel (6RC-EW)
U.S. EPA Region 6
1445 Ross Avenue
Dallas, Texas 75202-2733

2. This Default Order constitutes an Initial Decision, as provided in 40 C.F.R. § 22.17(c). This Initial Decision shall become a final order unless (1) an appeal to the Environmental Appeals Board is taken from it by any party to the proceeding within thirty (30) days from the date of service provided in the certificate of service accompanying this order; (2) a party moves to set aside the Default Order, or (3) the Environmental Appeals Board elects, *sua sponte*, to review the Initial Decision within forty-five (45) days after its service upon the parties.

SO ORDERED, this 6th day of July 2010.

MICHAEL C. BARRA
REGIONAL JUDICIAL OFFICER

CERTIFICATE OF SERVICE

I, Lorena S. Vaughn, the Regional Hearing Clerk, do hereby certify that a true and correct copy of the foregoing Initial Decision and Default Order for Docket No. Class I - CWA 06-2009-1761 was provided to the following persons on the date and in the manner stated below:

Mr. Stephen Rowe, Owner
Bobby Rowe Energy, Inc.
P.O. Box 240
Beggs, OK 74421

CERTIFIED MAIL

Ellen Chang-Vaughan
U.S. Environmental Protection Agency
Office of Regional Counsel
1445 Ross Avenue
Dallas, Texas 75202-2733

HAND DELIVERED

Lorena S. Vaughn
Regional Hearing Clerk

7-6-10
Date