

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

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IN THE MATTER OF:)
)
Dockmaster, Inc.) Docket No. CWA-08-2011-0002
) Proceeding under Section 301(a) and
) 404 of the Clean Water Act,
Respondent.) 33 U.S.C. § 1311(a) and 1344
)

FILED
EPA REGION VIII
HEARING CLERK

DEFAULT INITIAL DECISION AND ORDER

This proceeding arises under the authority of sections 301(a) and 404 of the Clean Water Act (“CWA”), 33 U.S.C. §§ 1311(a) and 1344. This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, and the Revocation or Suspension of Permits (“Consolidated Rules” or “Part 22”), 40 C.F.R. §§ 22.1-22.32.

I. BACKGROUND

On October 28, 2010, the United States Environmental Protection Agency, Region 8 (“EPA” or “Complainant”) filed a Penalty Complaint and Notice of Opportunity for Hearing (“Complaint”). The Complaint names Dockmaster, Inc. (“Dockmaster” or “Respondent”) and alleges on November 7-9, 2007, it discharged dredge and fill material into Flathead Lake, near Lakeside, Montana without a permit in violation of the Clean Water Act (“CWA” or “Act”).¹ The Complaint proposed that Respondent pay a \$10,000 penalty. EPA mailed a copy of the Complaint to Respondent at the correct address but wrong town on October 29, 2010.² On November 15, 2010, the Complaint was re-sent to the correct address and town.³ According to the domestic return receipt card indicating service for certified mail received by Dockmaster an answer to the Complaint was due no later than December 18, 2010.

Pursuant to 40 C.F.R. § 22.15(a), a respondent must file an answer to a complaint within 30 days of service of the complaint. On December 22, 2010, Complainant sent a letter reminding Respondent that an answer must be filed within 30 days and notified Dockmaster that EPA “is entitled to file a motion for default asking the Regional Judicial Officer to assess the entire \$10,000 penalty against Dockmaster.”⁴ The letter also provided additional time, until

¹ See, Complaint, pp. 1-5, ¶¶ 1-27. In a companion case for the same violations, Complainant reached an agreement with two other Respondents, Docket No. CWA-08-2010-0038. See, Complaint, p. 5, ¶29.

² See, Exhibits 1 and 2 of Complainant’s Motion for Default on Liability and Memorandum in Support.

³ See, Exhibit 3 of Complainant’s Motion for Default on Liability and Memorandum in Support which shows that the Registered Agent, Glenda Walton, signed for the Complaint on December 18, 2010.

⁴ The Motion for Default requests this court to rule on liability only. Therefore, no assessment on the appropriate penalty will be made in this Initial Decision and Order.

January 10, 2011, for Respondent to file an answer. The letter was sent certified mail and was refused by Respondent.⁵

The Complaint iterates Respondent's obligations with respect to responding to the Complaint, including filing an answer. (See, Complaint, p. 8). Specifically, the Complaint states:

By failing to request a hearing or to file a written answer within the thirty (30) day time limit, Respondent may waive the right to contest any of the allegations set forth in this complaint and/or be subject to a default judgment pursuant to 40 C.F.R. §22.17 imposing the full penalty proposed in this complaint. (emphasis in original document).

An answer from Dockmaster has not been filed with the Regional Hearing Clerk to date.

On January 19, 2011, Complainant filed a Motion for Default on Liability ("Default Motion") and Memorandum in Support of Complainant's Motion for Default on Liability ("Memo in Support"). In its Default Motion, Complainant requests this Court to find Dockmaster liable for violating section 301(a) of the Act, 33 U.S.C. §1311(a). Specifically, the Complaint alleges that Dockmaster discharged approximately 400 cubic feet of soil, dirt, clay, gravel and rocks from a barge into Flathead Lake, a navigable water of the United States, without authorization. The discharges occurred without a permit November 7-9, 2007. The Respondent has not filed a reply to Complainant's Motion.⁶ A decision on the Default Motion is, therefore, ripe and appropriate.

II. DEFAULT ORDER

This proceeding is governed by the Consolidated Rules of Practice, 40 C.F.R. Part 22 (Consolidated Rules). Section 22.17 of the Consolidated Rules provides in part:

(a) *Default.* A party may be found to be in default: after motion, upon failure to file a timely answer to the complaint Default by respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations. . .

(b) *Motion for default.* A motion for default may seek resolution of all or part of the proceeding. Where the motion requests the assessment of a penalty or the imposition of other relief against a defaulting party, the movant must specify the penalty or other relief sought and state the legal and factual grounds for the relief requested.

(c) *Default order.* When the Presiding Officer finds that a default has occurred, he shall issue a default order against the defaulting party as to any or all parts of

⁵ See, Exhibit 5 of Complainant's Motion for Default on Liability and Memorandum in Support.

⁶ See, 40 C.F.R. § 22.16(b). A party has 15 days after service to respond to any written motion.

the proceeding unless the record shows good cause why a default order should not be issued. If the order resolves all outstanding issues and claims in the proceeding, it shall constitute the initial decision under these Consolidated Rules of Practice. The relief proposed in the complaint or in 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.

It is appropriate at this juncture for this court to rule on the Default Motion.

III. FINDINGS OF FACT

Pursuant to 40 C.F.R. §§ 22.17(c) and 22.27(a) of the Consolidated Rules, and based upon the record before me, I make the following findings of fact:

- 1) Dockmaster is a Montana Corporation doing business in Montana.
- 2) From Approximately November 7, 2007 to November 9, 2007, Dockmaster discharged approximately 400 cubic feet of soil, dirt, clay, gravel, and rocks from a barge into Flathead Lake, South of Caroline Point, near Lakeside, Montana.
- 3) The discharge occurred using an excavator that was placed on the deck of a barge.
- 4) The barge is owned by Respondent, Dockmaster.
- 5) The excavator on the barge was operated by Dockmaster employees.
- 6) The soil, dirt, clay, gravel and rocks were wastes comprised from residual building material from the demolition of a crib dock and/or construction of a replacement dock near the shore of Flathead Lake.
- 7) The dock is owned by Montana Eagle Development, a respondent in a separate action.
- 8) Flathead Lake has supported and is capable of supporting commercial navigation.
- 9) The soil, dirt, clay, gravel and rocks remain in Flathead Lake.
- 10) The work performed in paragraph 2 above was not authorized by any permit.
- 11) The U.S. Corps of Engineers (“Corps”) determined in a letter dated January 7, 2005, that repair to the existing dock and structures on Flathead Lake was authorized by Department of Army Nationwide Permit 39: Residential, Commercial and Institutional Developments.

- 12) The Corps authorized Montana Eagle Development to place approximately 0.2018 of an acre of total fill below the ordinary high water mark for the project.
- 13) The discharges described in paragraph 2 above exceeded the January 7, 2005 authorization through Nationwide Permit 39 by the Corps.
- 14) On October 28, 2010, EPA filed a Penalty Complaint and Notice of Opportunity for Hearing.
- 15) On November 15, 2010, Complainant re-sent the Complaint to Glenda Walton, Registered Agent for Dockmaster, to the correct address and town in Montana.
- 16) On November 18, 2010, Ms. Walton received the Complaint according to the return receipt card.
- 17) On December 22, 2010, EPA notified Dockmaster, in writing, that the date to file an answer had passed and EPA was entitled to file a motion for default. Dockmaster was put on notice that if an answer was not filed by January 10, 2011, EPA intended to file such motion.
- 18) On January 19, 2011, Complainant filed a Motion for Default on Liability.
- 19) No response to the Motion for Default on Liability was filed.

IV. Conclusions of Law

Pursuant to 40 C.F.R. §§ 22.17(c) and 22.27(a) of the Consolidated Rules, and based upon the record before me, I make the following conclusions of law:

1. Respondent, Dockmaster is a corporation and therefore a “person” with the meaning of section 502(5) of the Act, 33 U.S.C. § 1362(5) and 40 C.F.R. §122.2.
2. Soil, dirt, clay, gravel and rocks consisting of wastes from building materials are “dredged material” and/or “fill material” as defined in 33 C.F.R. § 323.2(c) and 33 C.F.R. § 323.2(e), and “pollutants” as defined by section 502(6) of the Act, 33 U.S.C. § 1362(6) and 40 C.F.R. §122.2.
3. The placement of dredged and fill material into Flathead Lake, is a “discharge of pollutants” as defined by section 502(12) of the Act, 33 U.S.C. § 1362(12) and 40 C.F.R. §122.2.
4. The excavator and barge are “point sources” as defined by section 502(14) of the Act, 33 U.S.C. § 1362(14) and 40 C.F.R. §122.2.

5. Flathead Lake is a “navigable water” as defined by section 502(7) of the Act, 33 U.S.C. § 1362(7) and a “water of the United States” as defined by 33 C.F.R. §328.3(a).
6. Pursuant to section 404, 33 U.S.C. § 1344, the Secretary of the Army, acting through the Corps, is authorized to issue permits for the discharge of dredged or fill material into navigable waters of the United States.
7. Pursuant to 33 C.F.R. § 323.3(a), unless exempted by 33 C.F.R. § 323.4, a permit is required for the discharge of dredged or fill material.
8. Dockmaster discharged pollutants from a point source into navigable waters of the United States without authorization by a permit issued pursuant to section 404, constituting a violation of section 301(a), 33 U.S.C. § 1311(a) of the Act.
9. Pursuant to 40 C.F.R. § 22.5(b)(1), Complainant has demonstrated that it has complied with the service requirements.
10. 40 C.F.R. § 22.14 provides that an answer to a complaint must be filed within thirty (30) days after service of the complaint.
11. 40 C.F.R. § 22.17 provides that a party may be found to be in default, after motion, upon failure to file a timely answer to the complaint.
12. This default constitutes an admission, by Dockmaster, of all facts alleged in the Complaint and a waiver, by Dockmaster, of its rights to contest those factual allegations pursuant to 40 C.F.R. § 22.17(a).

DEFAULT ORDER

In accordance with 40 C.F.R. § 22.17(c), “the relief proposed in the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act.” Based on the record and the Findings of Fact set forth above, I hereby find that Dockmaster is in default and liable as a matter of law for the discharge of dredge and fill material into Flathead Lake on November 7-9, 2007.

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 original and one copy of a notice of appeal and an accompanying appellate brief with the Environmental Appeals Board. 40 C.F.R. §

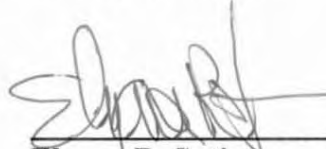
22.27(a). If a party intends to file a notice of appeal to the Environmental Appeals Board it should be sent to the following address:

U.S. Environmental Protection Agency
Clerk of the Board
Environmental Appeals Board (MC 1103B)
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-0001

Where a respondent fails to appeal an Initial Decision to the Environmental Appeals Board pursuant to § 22.30 of the Consolidated Rules, and that Initial Decision becomes a Final Order pursuant to § 22.27(c) of the Consolidated Rules, **RESPONDENT WAIVES ITS RIGHT TO JUDICIAL REVIEW.**

Each party shall bear its own costs in bringing or defending this action.

SO ORDERED This 8th Day of March, 2011.



Elyana R. Sutin
Presiding Officer

CERTIFICATE OF SERVICE

The undersigned certifies that the original of the attached **DEFAULT INITIAL DECISION AND ORDER** in the matter of **DOCKMASTER, INC.; DOCKET NO.: CWA-08-2011-0002** was filed with the Regional Hearing Clerk on March 8, 2011.

Further the undersigned certifies that a true and correct copy of the document was delivered to Peggy Livingston, Enforcement Attorney, U. S. EPA Region 8; 1595 Wynkoop Street, Denver, CO 80202-1129. True and correct copies of the aforementioned document were placed in the United States mail return receipt requested on March 8, 2011 to:

Glenda Walton, Registered Agent
Dockmaster, Inc.
517 Cleveland Street, SW
Ronan, MT 59864-2906

And

Glenda Walton, Registered Agent
Dockmaster, Inc.
517 Cleveland Street, SW
Polson, MT 59860

3-8-2011
DATE

Kathi Glewin for
Tina Artemis
Paralegal/Regional Hearing Clerk