

IN THE MATTER OF:)
)
ROCKING BS RANCH, INC.)
)
Respondent)
)

Docket No. CWA-07-1074

MOTION FOR DEFAULT AS TO PENALTY AND LIABILITY

Rocking BS Ranch, Inc., Respondent, has failed to submit an Answer and Request for a Hearing in response to the Administrative Complaint (“Complaint”) filed by the Complainant on December 5, 2007. The Complaint was issued under Section 309(g) of the Clean Water Act (herein “the CWA”), 33 U.S.C. § 1319(g) for violations of Section 301 of the CWA, 33 U.S.C. § 1311. Due to the Respondent’s failure to submit an Answer, pursuant to 40 C.F.R. § 22.17, the United States Environmental Protection Agency Region 6 (“EPA” or “Complainant”) files this Motion for Default requesting issuance of a Default Order against the Respondent. In addition to seeking liability for violations of the CWA, the Complainant is seeking civil penalties in the amount of \$16,800. In support of this motion, the Complainant states and argues as follows:

I. PROCEDURAL BACKGROUND

1. **Governing Procedures.** This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (“rules of Practice”), 40 C.F.R. § 22.1 et seq.

2. **Filing of the Complaint.** In accordance with 40 C.F.R. §§ 22.5(a) and 22.14, on September 24, 2008, the original Complaint and one copy was filed with, and received by, the Regional Hearing Clerk, EPA Region 6. On December 5, 2007, the amended Complaint and one copy was filed with, and received by, the Regional Hearing Clerk, EPA Region 6.

3. **Service of the Complaint.** In accordance with 40 C.F.R. § 22.5(b), on September 28, 2008, and December 5, 2007, the Complainant delivered a copy of the Complaint, via certified mail with return receipt requested, to the Respondent. The original and amended Complaints were mailed to: Mr. Bert Bishop, Rocking BS Ranch, Inc., 8644 East 127th, Wetumka, Oklahoma 74883.

4. **Proof of Service.** Rocking BS, Inc., received a copy of the original Complaint. Brixie Bishop signed the green receipt card, Article No. 7001-0360-0003 6672 7105. There is no date in the space for “date of delivery;” however, it appears that the post office stamped-date the card on October 2, 2007. On December 11, 2007, Rocking BS, Inc., received a copy of the amended Complaint (see attached green receipt card, Article No. 7001 0360 0003 6672 7068). Under 40 C.F.R. § 22.5(b)(1)(iii), the Complainant respectfully requests the Presiding Judicial Officer to admit into evidence, the attached

green receipt cards dated October 2, 2007 and December 11, 2007, as proof of service. *See In re Haydel*, 2000 WL 436240, Docket No. CWA-VI-99-1618 (EPA Region VI) (Certified mail return receipt card is adequate proof of service). The individual whose signature appears on the green receipt cards for the Complainant, Brixie Bishop, is a proper representative of Rocking BS Ranch, Inc. under 40 C.F.R. § 22.5(b). *See also Katzen Bros., Inc. v. U.S. EPA*, 839 F.2d 1396, 1399 (10th Cir. 1988) (Individual authorized to pick up mail, such as personal secretary, is considered a proper business representative to satisfy service to Respondent.).

5. Answer to the Complaint. As per 40 C.F.R. § 22.15, the Respondent must file an answer to the complaint with the Regional Hearing Clerk, Region 6, within thirty (30) days after service of the complaint if the Respondent: contests any material fact upon which the complaint is based; contests the proposed penalty, compliance, or corrective action order; or contends they are entitled to judgment as a matter of law.

6. Filing of the Answer. As of February 9, 2009, the Respondent has not filed with the Regional Hearing Clerk, an Answer to the amended Complaint.

7. Request for Extension. As per 40 C.F.R. § 22.7(b), a party may request from the Presiding Judicial Officer an extension of time for filing any document. As of February 9, 2009, the Respondent has not filed with the Regional Hearing Clerk, Region 6, any request for an extension of time to file a response as required under

8. Time Elapsed Since Service of Complaint. The Complainant EPA has afforded the Respondent every opportunity to respond to the Complaint, however, as of February 9, 2009, approximately 424 days have passed since the amended Complaint was served without a response from the Respondent. Complainant has three two status reports with the Regional Hearing Clerk and copies were mailed to the Respondent. The status reports stated that Complainant intends to file a Motion for Default.

II. STATUTORY AUTHORITY

9. Section 309(g) of the CWA, 33 U.S.C. § 1319(g), authorizes the Administrator of the United States Environmental Protection Agency (EPA) to issue an Administrative Complaint for the unlawful discharge of a pollutant by a person, i.e. discharge without a permit in violation of Section 301 of the CWA, 33 U.S.C. § 1311.

10. Prima Facie Case – Liability. In order for a default order to be entered against the Respondent, the Presiding Officer must conclude the Complainant has established a prima facie case of liability against the Respondent. *See In re Atkinson*, 1998 WS 422231, Docket No. RCRA-9006-VIII-97-02 (PA Region VIII). Under 40 C.F.R. § 22.17(a), to establish a prima facie case, the Complainant must establish by a preponderance of the evidence that each element of the violation has occurred. *See In re Haydel*, 2000 WL 436240, Docket No. CWA-VI-99-1618 (EPA Region VI). As per the factual allegations outlined in the Complaint (*See* Complaint No. CWA-06-2007-1974),

the Respondent violated Section 301, 33 U.S.C. § 1311. Specifically, the following elements of the Complainant's cause of action have been met:

- a. Respondent is a corporation incorporated under the laws of the State of Oklahoma and as such is a "person" as defined by Section 502(5) of the CWA, 33 U.S.C. § 1362(5), and 40 C.F.R. § 122.2 (Complaint No. CWA-06-2007-1974)
- b. Respondent is the owner or operator of a swine facility located about three miles south and eight miles east of Wetumka, Hughes County, Oklahoma. (Complaint No. CWA-06-2007-1974)
- c. The swine facility was a "point source" of a "discharge" of "pollutants" to the receiving waters of Middle Creek.
- d. Middle Creek is a "water of the United States" within the meaning of Section 502 of the CWA, 33 U.S.C. § 1362.
- e. On April 4, 2007, Complainant received an inspection report from the Oklahoma Department of Agriculture, Food & Forestry (ODAFF) which had conducted an inspection on January 23, 2007, of the facility.
- f. ODAFF documented an unauthorized discharge that occurred on January 23, 2007, that originated from the lagoon which then entered an unnamed tributary which discharges into Middle Creek.
- g. Each day of unauthorized discharge was a violation of Section 301 of the CWA, 33 U.S.C. § 1311.
- h. Under Section 309(g)(2)(A) of the CWA, 33 U.S.C. § 1319(g)(2)(A), the 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.
- i. EPA filed the original Complaint on September 24, 2007. Pursuant to 40 C.F.R. § 22.14(c), Complainant may amend the complaint once before an answer is filed. To date, EPA has not received an answer from the Respondent.

11. Respondent's Admission of Facts Alleged. As per 40 C.F.R. §§ 22.15(d) and 22.17(a), failure of the Respondent to admit, deny or explain any material factual allegation contained in the Complaint constitutes an admission of each factual allegation and a waiver of the Respondent's right to contest such factual allegations. As stated above, to date, the Respondent has not replied to the amended Complaint filed on December 5, 2007. Thus, the Respondent has, by default, admitted all of the facts alleged in the amended Complaint. *See In re Palimere, et al*, 2000 WL 33126605, Docket No. RCRA-III-9006-050 (EPA Region III). (Respondent's default constitutes an admission of facts alleged, therefore, the Complainant need not submit evidence to prove a prima facie case on liability for a default order).

12. Finding of Respondent Liability. Subsequently, under 40 C.F.R. § 22.16(c), the Complainant requests the Presiding Judicial Officer issue a Default Order against the Respondent, Rocking BS, Inc., finding the Respondent liable for violations of the CWA as previously stated.

IV. PENALTY ASSESSMENT

13. **Civil Penalty.** In addition to liability, the Complainant is seeking assessment of a civil penalty in the amount of \$16,800 for violations of Section 301 of the CWA, 33 U.S.C. § 1311.

14. **Prima Facie Case – Civil Penalty.** Under 40 C.F.R. §§ 22.17(c) and 22.27(c), a Default Order functions as an Initial Decision and becomes a Final Order 45 days after its service. As per 40 C.F.R. § 22.24, the Complainant EPA bears the burden of proof for justifying its calculations of penalties. Under Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3), the Complainant considered the following factors in determining the amount of penalty:

- a. the nature, circumstances, extent and gravity of the violation or violations
- b. violator's ability to pay
- c. prior history of violations
- d. degree of culpability
- e. economic benefit
- f. such other matters as justice may require

15. **Declaration Attached for Penalty Calculation.** Attached to this Default Motion is the Declaration of Jeremy Seiger. This declaration outlines in detail how the Complainant calculated the civil penalty using each of the statutory factors listed above. Pursuant to 40 C.F.R. §§ 22.5(a) and 22.17(b), the Complainant EPA respectfully requests the Presiding Judicial Officer to admit into evidence, the attached Declaration of Jeremy Seiger, as evidence to support the Complainant's penalty amount.

16. **Assessment of Civil Penalty.** Under the facts outlined above and pursuant to 40 C.F.R. § 22.27(b), the Complainant requests the Presiding Judicial Officer approve assessment of a civil penalty in the amount of \$16,800 against the Respondent for violations of the Clean Water Act.

THEREFORE, in accordance with 40 C.F.R. § 22.1 *et seq.*, the Complainant moves that, based on the aforementioned facts and law, the Presiding Judicial Officer issue a Default Order in this matter, enter a judgment against the Respondent, and Order that the Respondent pay the civil penalty proposed in the amended Complaint.

Respectfully submitted,

Ellen Chang Vaughan

Ellen Chang Vaughan
Assistant Regional Counsel
Region 6, 6RC-EW
1445 Ross Ave.
Dallas, TX 75202

Chang-vaughan.ellen@epa.gov

(214) 665-7328 (Tel.)

(214) 665-3177 (Fax)

Feb. 10, 2009
Date

CERTIFICATE OF SERVICE

I hereby certify that the original of the foregoing Motion for Default Order was hand-delivered and filed with the Regional Hearing Clerk, EPA Region 6, 1445 Ross Ave., Dallas, Texas 75202-2733, and a true and correct copy of such Motion for Default Order was placed in the United States mail, postage prepaid, certified mail, return receipt requested, on this 10th day of February 2009, addressed to the following:

Bert Bishop
Rocking BS Ranch
8644 E. 127 Road
Wetumka, OK 74833

Ellen Chay Kayhan

IN THE MATTER OF:)

ROCKING BS RANCH, INC.)

Respondent)

) Docket No. CWA-06-2007-1974
)
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DECLARATION OF GREGORY TURPIN

I, GREGORY TURPIN, make the following statement truthfully from personal knowledge, under penalty of perjury, in accord with 28 U.S.C. § 1746.

1. I make this statement in my capacity as an Environmental Programs Specialist employed in the Agricultural Environmental Management Services (AEMS) Division of the Oklahoma Department of Agriculture, Food, and Forestry.
2. I joined the AEMS Division in June, 2005. As such, I am responsible for activities regarding Concentrated Animal Feeding Operations (CAFO). This includes ensuring compliance with the Federal and State CAFO regulations.
3. CAFO inspections consist of a physical inspection of the facility and surrounding waterbodies and record/document review. During an inspection, I may assess the structural integrity, condition and availability of retention control structures, waste disposal equipment, solid sedimentation ponds, staff gauges and liquid levels, and maintenance facilities. If there is a discharge of pollutants from the facility into a waters of the U.S., I will walk the path of the discharge if feasible. I also review records and management plans to determine if the facility is in compliance with its National Pollutant Discharge Elimination System permit.
4. On January 23, 2007, I conducted an inspection of Rocking BS Ranch located about three miles south and eight miles east of Wetumka, Hughes County, Oklahoma
5. I inspected the small retention control structure at the facility and identified a breach of the berm. I observed a discharge of effluent from the lagoon at the northeast corner. There was a steady stream of effluent which I followed for approximately one mile. I was not able to walk the entire flowpath all the way down to Middle Creek due to excessive vegetative growth. However, the effluent stream was approximately 6 feet wide and 2 inches deep as it flowed from the lagoon. Further observations identified the effluent stream was approximately 2-3 feet wide and 1-2 inches deep as the flow path continued.

Greg Turpin
Greg Turpin

Executed this 2nd day of February 2009 in Oklahoma City, Oklahoma.

Teena G. Gunter



IN THE MATTER OF:)
)
ROCKING BS RANCH, INC.) Docket No. CWA-06-2007-1974
)
Respondent)
)

DECLARATION OF JEREMY SEIGER

1. I, JEREMY SEIGER, make the following statement truthfully from personal knowledge, under penalty of perjury, in accord with 28 U.S.C. § 1746.
2. I make this statement in my capacity as an Environmental Scientist employed in the Water Resources section of the Compliance Assurance Enforcement Division of the United States Environmental Protection Agency, Region 6 (“EPA”).
3. I joined the Water Resources section in 2005. As such, I am responsible for activities regarding Concentrated Animal Feeding Operations (CAFO). This includes ensuring compliance and enforcing the Federal and State CAFO regulations.
4. I am one of the EPA, Region 6 enforcement officers assigned to review information related to the Clean Water Act (CWA) at Rocking BS, Inc. (“Respondent”). In my capacity as an enforcement officer for EPA, I am familiar with CWA.
5. As one of the enforcement officers for the matter against Respondent, I calculated the penalty based on a consideration of the required statutory factors in Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3) for the Complaint that was issued against Respondent.
6. Section 309(g)(2) authorizes the Administrator of EPA to assess administrative civil penalties of \$11,000 per day during which a violation continues, up to a maximum of \$32,500.
7. Section 301(a) of the CWA, 33 U.S.C. § 1319(a), prohibits any person to discharge a pollutant from a point source to waters of the United States without a permit issued under Section 402 of the CWA, 33 U.S.C. § 1342.
8. Pursuant to Section 402 of the CWA, 33 U.S.C. § 1342, EPA issued NPDES General Permit and Reporting Requirements for Discharges from Concentrated Animal Feeding Operations (the CAFO general permit) which became effective on March 10, 1993, and is defined in part by 40 C.F.R. Part 122.g
9. On January 23, 2007, an Oklahoma Department of Agriculture, Food and Forestry (ODAFF) inspector observed an unauthorized discharge occurring from the west lagoon and entering an unnamed tributary to Middle Creek and then into Middle Creek.

10. Because Respondent owns and operates a CAFO that discharges pollutants into waters of the U.S., Respondent is required by Section 402(p) of the CWA and 40 C.F.R. Part 122 to make application for permit coverage for the facility, and to comply with each applicable permit condition in the operation of the facility.

11. A review of the EPA database in which NPDES permit applications are recorded indicates that the facility does not have permit coverage.

12. On September 13, 2007, EPA sent Respondent a Cease and Desist Administrative Order ordering the Respondent to stop all discharges of pollutants from its lagoon.

13. On September 28, 2007, EPA filed an Administrative Complaint against Respondent seeking a penalty of \$16,800. On December 5, 2007, EPA filed an amended Complaint against Respondent seeking a penalty of \$16,800.

14. The original and the amended Complaint alleged that Respondent discharged pollutants from its west lagoon into a water of the United States.

A. The Statutory Factors

15. The CWA enumerates in Section 309(g)(3), 33 U.S.C. § 1319(g)(3), the factors that the court and EPA must consider in the assessment of any civil penalty. The first four statutory factors deal with the violation itself and consider the "nature, circumstances, extent and gravity" of the CWA violation. The next four factors involve circumstances surrounding the violator's act and include the violator's ability to pay, any prior history of CWA violations, the degree of culpability, and economic benefit (if any) derived from the violation. The final factor considered is "such other matters as justice may require."

16. One of the main goals of assessing a penalty against a violator is deterrence. The deterrence factor is divided into two components. The first component, gravity, which reflects the seriousness of violation, includes the economic impact on the violator, the duration of violation and the number of wells in violation. The second component, economic benefit, recovers the economic benefit resulting from noncompliance. For this case, I calculated a penalty of \$16,800 for one violation.

1. Gravity Component

17. The gravity component accounts for seriousness of violation, economic impact on the violator, duration of violation, and number of wells in violation. It is the punitive component of the penalty. When determining the gravity of the violation, it is proper to examine the severity of the violation. This includes considering the presence or absence of actual or possible environmental harm associated with the violation and the importance of the violation to the regulatory scheme.

a. Seriousness of the Violation

18. Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3), requires that EPA consider the seriousness of the violation. When Congress enacted the CWA, its goal was to restore and maintain the chemical, physical and biological integrity of the U.S. waters and this was to be achieved partially by prohibiting the discharge of pollutants into waters of the U.S. The pollutants which are typical of CAFOs are process-generated wastewater, liquid manure and sludge. CAFOs utilize retention control structures or lagoons to store and treat the process-generated wastewater, liquid manure and sludge which falls under agricultural waste. Agricultural waste is listed as a pollutant pursuant to Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

20. Phosphorus and nitrogen are nutrients which are present in animal manure. In excessive amounts, phosphorus and nitrogen can adversely affect water quality by killing aquatic life. Discharges of sludge, process-generated wastewater, and liquid manure into surface waters can cause contamination which may result in high BOD. When BOD is high, there is less available oxygen which in turn causes aquatic life to die. BOD can affect plants by encouraging the growth of one species while limiting the growth of another resulting in algal blooms.

21. Respondent's discharge of animal wastes/wastewater into surface waters may cause environmental harm. This undermines the statutory purpose of the CWA which is to restore and maintain the chemical, physical and biological integrity of our waters.

b. Economic Impact on the Violator

22. Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3), requires that EPA consider the economic impact on the violator. This particular factor takes into account the different impacts of a penalty on violators by looking into their financial capability and the size of the business or municipality. It also considers Respondent's ability to pay a penalty. An inability to pay defense can only be invoked when the violator can prove it cannot pay the assessed penalty. Respondent has not submitted any documents to support an inability to pay claim on this matter.

c. Adjusting the Gravity Component

23. The gravity component adjustment factor allows EPA to take into account the differences between cases and to apply the gravity component to these different facts. This adjustment factor promotes the fair and equitable treatment of the regulated community by increasing or decreasing the gravity component. Under the adjusting the gravity component, there are some factors that distinguish different cases. These factors are: any history of such violations and any good-faith efforts to comply with the applicable requirements.

d. History of Violations

24. Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3), requires that EPA consider the factor, such other matters as justice require. Because Respondent did not have a history of noncompliance, I assessed a value of \$0.

e. Good-faith Efforts to Comply

25. Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3), requires that EPA consider the level of cooperation. The level of cooperation can be used to either increase or mitigate the gravity component. If the violator is not trying to come into compliance or is acting in bad faith, the gravity component may increase. EPA should consider how quickly the violation was corrected and how fast the damage was mitigated before the enforcement action was commenced. The agency must also take into regard, the degree of effort the violator put forth to remedy the violation and to respond to the enforcement action.

f. Such Other Matters as Justice May Require

26. Section 309(d) of the CWA, 33 U.S.C. § 1319(d), requires that EPA consider the factor, such other matters as justice may require. That particular factor was not used in the calculation of the penalty in this matter.

2. The Economic Benefit Component

27. Section 309(d) of the CWA, 33 U.S.C. 1319(d), requires that EPA consider the economic benefit of noncompliance. The purpose of the economic benefit factor is to remove any economic advantage the facility may have gained as a result of noncompliance. Computing the economic benefit involves three parts as follows: 1) capital investments, 2) one-time, non-depreciable expenditure and 3) annually recurring costs.

28. Capital investments are those expenditures that are one-time depreciable costs which have been put off by the violator's failure to promptly comply with the regulations. By not spending the money initially to achieve compliance, the violator accrued an economic benefit.

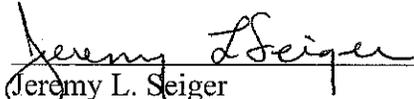
29. One-time non-depreciable expenditures are the type of non-depreciable expenditures (such as the purchase of land) that the violator should have implemented but did not do so. The violator gained an economic benefit by not putting to use these type of non-depreciable expenditures.

30. Annual recurring costs are the type of expenditures which occur on a regular basis associated with environmental control measures. These type of expenses are equivalent to operating and maintenance costs.

31. In this matter, I did not calculate the economic benefit for the penalty.

D. Conclusion

32. In calculating the penalty based on one violation, I used the statutory factors. These include: the seriousness of the violation, the economic benefit resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator and such other matters as justice may require. The penalty I calculated was \$16,800.

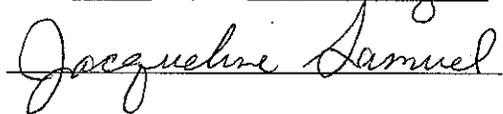


Jeremy L. Seiger

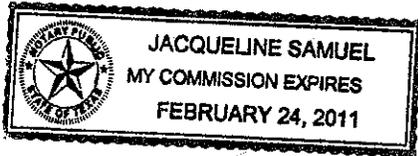
Executed this 9th day of February 2009 in Dallas, Texas.

Subscribed and sworn to before me, the undersigned Notary Public,

This 9th day of February, 2009



Jacqueline Samuel



07 DEC 14 PM 1:42

PROVISIONAL HEARING CLERK
EPA REGION VI

CWA - 06 - 2007 - 1974 / Amended Complaint / OK 4000216

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Mr. Bert Bishop
Rocking BS Ranch, Inc.
8644 East 127th
Wetumka, OK 74883

COMPLETE THIS SECTION ON DELIVERY

A. Signature Agent Addressee
Brixie Bishop

B. Received by (Printed Name) C. Date of Delivery
 BRIXIE BISHOP 12/16/07

D. Is delivery address different from item 1? Yes No
 If YES, enter delivery address below:

3. Service Type
 Certified Mail Express Mail
 Registered Return Receipt for Merchandise
 Insured Mail C.O.D.

4. Restricted Delivery? (Extra Fee) Yes

2. Article Number
(Transfer from service label)

7001 0360 0003 6672 7068

MAILED

07 OCT -9 AM 11:20

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EPA REGION VI

CWA-06-2007-1974 / Complaint / OK4006216

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1. Article Addressed to:

Mr. Bert Bishop
 Rocking BS Ranch, Inc.
 8644 East 127th
 Wetumka, OK 74883

COMPLETE THIS SECTION ON DELIVERY

- A. Signature Agent
 X *Drixie Bishop* Addressee
- B. Received by (Printed Name) Date of Delivery
 DRIXIE BISHOP 10/7/07
- D. Is delivery address different from item 1?
 If YES, enter delivery address below

8644 E 127th
 74883

3. Service Type

- Certified Mail Express Mail
 Registered Return Receipt for Merchandise
 Insured Mail C.O.D.

4. Restricted Delivery? (Extra Fee) Yes

2. Article Number
 (Transfer from service label)

7001 0360 0003 6672 7105