

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

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STILL ROOM
EPA REGION 8
MERCER COUNTY OFFICE

IN THE MATTER OF:)
)
Lake Sakakawea & Associates, LLC)
2500 9th Avenue NW Apt. 1)
Mandan, ND 58554-1526)
)
Respondent.)
)
Proceeding to assess Class II penalty)
Section 309(g) of the Clean Water)
Act, 33 U.S.C. § 1319(g))
_____)

Docket No. CWA-08-2011-0017

INITIAL DECISION AND DEFAULT ORDER

This proceeding arises under the authority of section 309(g) of the Clean Water Act (CWA or the Act), 33 U.S.C. § 1319(g). 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. Complainant has moved for a Default Order finding Respondent, Lake Sakakawea & Associates, LLC, liable for violations of sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342. Complainant requests assessment of a civil penalty in the full amount of \$84,000 as proposed in the Administrative Complaint and Notice of Opportunity for Hearing.

I. BACKGROUND

Lake Sakakawea & Associates, LLC (LSA or Respondent) is a limited liability corporation doing business in the State of North Dakota. On October 12, 2007, Respondent submitted a Storm Water Pollution Prevention Plan (SWPPP) to the North Dakota Department of Health (NDDH) and a copy to the U.S Environmental Protection Agency (EPA or Complainant). The SWPPP was for the Eagle Catch Casino and Resort Construction Site (Site) development. The Site is located in Section 17, Township 146 North, Range 88 West, Mercer County, North Dakota, within the exterior boundaries of the Fort Berthold Indian Reservation.

On December 21, 2007, Respondent submitted a Notice of Intent (NOI) to EPA for construction under the National Pollutant Discharge Elimination System (NPDES) General Permit for Storm Water Discharges from Construction Activity (Permit) authorizing discharges of storm water associated with large and small construction activities that result in land disturbance equal to or greater than one acre.¹ On December 28, 2007, Permit #NDR10A581

¹ NPDES General Permit for Storm Water Discharges from Construction Activity, 33 U.S.C. 1342(p), effective July 1, 2003 and effective at all times relevant to this matter.

was issued to cover construction on the Site.² The Permit allows for discharges into surface waters of the United States if done in compliance with the conditions of the Permit. See, Memo in Support at 2. Complainant states the receiving water for the Site's storm water, snow melt, surface drainage, and run off is Lake Sakakawea, North Dakota. See, Memo in Support at 2. The lake is a navigable water and a water of the United States as defined by the Act and its implementing regulations. 33 U.S.C. § 1367(7); 40 C.F.R. § 22.2.

In the spring of 2008, Respondent began construction activities at the Site on a 25 acre Indian Allotment held by Dale Little Soldier, President of LSA. Specifically, Respondent started Phase I of the planned development project including site work and road construction consisting of clearing and grading. See, Memo in Support at 3. Complainant states the construction activities at the Site resulted in approximately 12 acres of land disturbance. See, Memo in Support at 3. Construction activities at the Site ceased in the fall of 2008 prior to the completion of Phase I. *Id.* On June 24, 2009, a U.S. Corps of Engineers Inspector inspected the Site and observed, among other things, no erosion control measures, erosion around the perimeter of the disturbed area, growth of noxious weeds, no topsoil, vegetation, or reseeded and un-stabilized site conditions. See, Memo in Support at 3.

On September 29, 2009, the NDDH received complaints that were forwarded to EPA related to the Site including extensive erosion and growth of noxious weeds resulting from the removal of top soil and ineffective sediment control. See, Memo in Support at 3.

On December 3, 2009, EPA issued a Request of Information (Request) to Respondent pursuant to section 308 of the Act, 33 U.S.C. §1318. After several attempts, over the course of six months, to deliver the Request via certified mail as well as reminders that a response was required by the Respondent, Complainant did not receive any information from Respondent until July 15, 2010.³ See, Memo in Support at 4. Respondent's response contained an incomplete Storm Water Pollution Prevention Plan (SWPPP) showing failure to comply with certain Permit requirements. See, Memo in Support at 4. The response also stated that "Respondent could not find certain information including, but not limited to, the self-inspection dates and corresponding reports." *Id.*

On June 22, 2011, Complainant filed an Administrative Complaint and Notice of Opportunity for Hearing (Complaint) against Respondent. In its Complaint, EPA alleged that Respondent violated sections 301(a) and 402 of the Act, 33 U.S.C. §§1311(a) and 1342, for failure to comply with the terms and conditions of its Permit and the Act. On July 11, 2011, Complainant re-sent the Complaint to Respondent due to lack of delivery. See, Memo in Support at 5. Proof of service was complete when Respondent signed the certified mail return receipt (Green Card).⁴ *Id.* Assuming five days for delivery, Respondent should have received the Complaint on July 16, 2011.

² NPDES permits are issued by EPA in Indian Country. The State of North Dakota does not have jurisdiction.

³ According to the Memo in Support, On May 10, 2010, Respondent's consultant indicated that Respondent intended to supply the information to Complainant. However, Respondent did not provide information until July 15, 2010.

⁴ The Green Card states that the Complaint was sent on July 11, 2011; however, it does not have a signature date so it is not clear from the record what day Respondent received the Complaint. However, it was returned and filed in the Regional Hearing Clerk's office on July 21, 2011.

The Complaint explicitly stated on pages 12 and 13 that:

Failure to admit, deny, or explain any material factual allegation in this Complaint will constitute an admission of the allegation.

IF RESPONDENT FAILS TO REQUEST A HEARING, IT WILL WAIVE ITS RIGHT TO CONTEST ANY OF THE ALLEGATIONS SET FORTH IN THE COMPLAINT.

IF RESPONDENT FAILS TO FILE A WRITTEN ANSWER OR PAY THE PROPOSED PENALTY WITHIN THE THIRTY (30) CALENDAR DAYTIME LIMIT, A DEFAULT JUDGMENT MAY BE ENTERED PURSUANT TO C.F.R. § 22.17. THIS JUDGMENT MAY IMPOSE THE FULL PENALTY PROPOSED IN THE COMPLAINT.

Complaint, at 12-13. Respondent was clearly on notice of the requirements to file an answer as early as July 16, 2011. An answer to the Complaint was due on or before August 16, 2011. No answer has been filed with the Regional Hearing Clerk.

On April 3, 2012, Complainant filed a Motion for Default Order (Default Motion) and Memorandum in Support (Memo in Support). On May 24, 2012, this court issued an Order to Clarify and Supplement the Record. The Order required Complainant to clarify an inconsistency between the Complaint and Default Motion relating to the amount of acreage at issue in this matter. The Order also encouraged the parties to supplement the record with further evidence of the alleged violations.⁵ On June 22, 2012, Complainant filed its response to the Order to Clarify and Supplement the Record. To date, EPA has not received any response from Respondent related to the Default Motion or the Order issued by the court.

II. DEFAULT ORDER

This proceeding is governed by the Consolidated Rules of Practice, 40 C.F.R. Part 22 . 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.

⁵ A green card indicates that Dale Little Soldier signed for the May 24, 2012 Order on June 2, 2012.

(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 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

Based upon the record in this proceeding and pursuant to 40 C.F.R. § 22.27, I make the following findings of fact:

1. Respondent, Lake Sakakawea & Associates, LLC, is and was at all relevant times a North Dakota limited liability company doing business in the State of North Dakota located at 2500 9th Avenue NW, Apartment 1, Mandan, North Dakota, 58554.
2. Respondent engaged in construction activities at the Eagle Catch Casino & Resort Site, a 25 acre Indian Allotment held by Dale Little Soldier, located in Section 17, Township 146 North, Range 88 West, Mercer County, North Dakota, with the exterior boundaries of the Fort Berthold Indian Reservation.
3. On October 12, 2007, Respondent submitted to the North Dakota Department of Health NPDES Program and EPA a copy of a SWPPP for the Site.
4. On December 21, 2007, Respondent submitted a Notice of Intent (NOI) to EPA for construction requesting authorization to discharge storm water at the Site.
5. On December 28, 2007, Respondent had Permit coverage for the Site (No. NDR10A581). Part 3 of the Permit requires development of a Storm Water Pollution Prevention Plan (SWPPP) to control and reduce pollutants in storm water discharges from construction activities. The SWPPP must be completed prior to the Notice of Intent. Part 3.4, 3.6 and 3.13 of the Permit sets forth requirements for the SWPPP, including the selection of controls and measures, known as Best Management Practices (BMPs), to prevent or reduce water pollution. Part 3.1 and 3.4 of the Permit requires the SWPPP be amended and maintained. Part 3.10 of the Permit requires that inspections be conducted in accordance with one of two schedules provided and specified in the SWPPP and requires that inspection reports be made as specified, and retained as part of the SWPPP.
6. Respondent commenced construction activities at the Site in the spring of 2008.

- Specifically, Respondent commenced Phase I of the planned development project including, but not limited to site work and road construction consisting of clearing, grading and disturbance.
7. Respondent's construction activities resulted in the disturbance of approximately 12 acres of land.
 8. Construction activities at the Site ceased in the fall of 2008 prior to the completion of Phase I of construction.
 9. On June 24, 2009, an authorized representative of the U.S. Army Corps of Engineers inspected the Site and observed, among other things, the following:
 - a. No erosion control measures;
 - b. Erosion around the perimeter of the disturbed area;
 - c. Growth of noxious weeds;
 - d. No topsoil, vegetation or reseeding; and
 - e. Unstabilized site conditions.
 10. On September 29, 2009, NDDH conveyed to EPA complaints regarding the Site expressed to the Mercer County Commission. The conditions were similar to those noted in Paragraph 9. The Site conditions were potentially threatening, the surrounding slopes and Lake Sakakawea.
 11. On February 1, 2010, EPA issued a Request for Information pursuant to section 308 of the Act, 33 U.S.C. § 1318, requesting Respondent to provide, among other things, copies of the SWPPP, description and site map of BMPs installed at the Site, and all storm water self-inspections conducted at the Site, or, if such reports were not available, the dates of such self inspections.
 12. EPA received a response to the Request on behalf of Respondent, dated July 15, 2010, stating that it could not find certain information, including the self-inspection dates and reports. The response contained a SWPPP, which failed to meet the Permit requirements. In addition, the response contained a SWPPP that described and located BMPs, which were not installed at the Site as observed by the Mercer County Commissioner and/or the Corps of Engineers.
 13. On June 22, 2011, Complainant filed the Complaint in this matter, alleging that Respondent violated sections 301(a) and 402 of the Act, 33 U.S.C. §§1311(a) and 1342, for failure to comply with the terms and conditions of its Permit and the Act. Specifically, the Complaint alleges: 1) Inadequate BMPs in violation of Permit conditions 3.6 and 3.13 and the Act; 2) Failure to conduct site inspections and prepare reports in violation of Permit condition 3.10 and the Act; and, 3) Inadequate SWPPP in violation of Permit conditions 3.1, 3.4 and 3.11 and the Act.
 14. On July 11, 2011, the Complaint was re-delivered via certified mail return receipt requested, and signed for by the Respondent.

15. An answer to the Complaint was due on or before August 16, 2011.
16. On April 3, 2012, Complainant filed a Motion for Default Order and Memorandum in Support.
17. On May 24, 2012, this court issued an Order to Clarify and Supplement the Record.
18. On June 22, 2012, Complainant filed its response to the Order to Clarify and Supplement the Record. To date, EPA has not received any response from Respondent regarding the Motion or the Order issued by the court.

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, Lake Sakakawea & Associates, LLC, is a limited liability corporation and therefore a “person” within the meaning of section 502(5) of the Act, 33 U.S.C. § 1362(5) and 40 C.F.R. § 122.2.
2. Respondent engaged in an “industrial activity” within the meaning of 40 C.F.R. § 122.26(b)(14).
3. Lake Sakakawea is a “water of the United States” and therefore a “navigable water” within the meaning of Section 502(7) of the Act and 40 C.F.R. § 122.2.
4. Runoff and drainage from the Site is “storm water” as defined in 40 C.F.R. § 122.26(b)(13), and storm water contains “pollutants” as defined in § 502(6) of the Act.
5. The Site, constitutes a “point source” within the meaning of § 502(14) of the Act and 40 C.F.R. § 122.2.
6. Storm water discharge from the Site is a “discharge of a pollutant” as defined in § 502(12) of the Act and 40 C.F.R. § 122.2.
7. Pursuant to 40 C.F.R. § 22.5(b)(1), Complainant has demonstrated that it has complied with the service requirements.
8. 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.
9. This default constitutes an admission, by Respondent, of all facts alleged in the Complaint and a waiver, by Respondent, of its rights to contest those factual allegations pursuant to 40 C.F.R. § 22.17(a).

V. ASSESSMENT OF ADMINISTRATIVE PENALTY

Section 309(g) of the Act, 33 U.S.C. § 1319(g), authorizes the Administrator to bring a civil suit for any violation of sections 301 and 402 of the Act, 33 U.S.C. §§1311 and 1342. The Administrator may seek a class I civil penalty of up to \$10,000 per violation with a maximum for all violations not to exceed \$25,000. 33 U.S.C. § 1319(g)(2)(A). For violations that occur on or after March 15, 2004 the dollar amounts the Administrator may assess are \$11,000 per violation with a maximum for all violations not to exceed \$32,500. (See, 40 C.F.R. Part 19).

The Consolidated Rules provide in pertinent part that:

If the Presiding Officer determines that a violation has occurred and the complaint seeks a civil penalty, the Presiding Officer shall determine the amount of the recommended civil penalty based upon the evidence in the record and in accordance with any civil penalty criteria in the Act. The Presiding Officer shall consider any civil penalty guidelines issued under the Act. The Presiding Officer shall explain in detail in the initial decision how the penalty to be assessed corresponds to any penalty criteria set forth in the Act If the respondent has defaulted, the Presiding Officer shall not assess a penalty greater than that proposed by complainant in the complaint, the prehearing information exchange or the motion for default, whichever is less.

40 C.F.R. § 22.27(b).

Pursuant to 33 U.S.C. § 1319(g)(3), in determining the amount of any penalty assessed this court “shall take into account the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, and 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). In both its Complaint and Motion for Default, Complainant requests a civil penalty in the amount of \$84,000.00.

Therefore, this court evaluates these statutory factors and reaches the following decision regarding the penalty:

Nature, Circumstances, Extent and Gravity of the Violation:

The Complaint (at 10) and the Declaration of Natasha Davis (at 2) contain a narrative explanation of the nature, circumstances, extent and gravity of the violations considered by Complainant in assessing the proposed penalty. Complainant notes that:

The Army Corps of Engineers inspected the Site and observed...no erosion control measures; erosion around the perimeter of the disturbed area; growth of noxious weeds; no topsoil, vegetation, or reseeding; and unstablized site conditions. Had the Respondent

implemented their SWPPP and properly installed and maintained their BMPs, the Respondent would have controlled its discharges and minimized sediment erosion threatening surrounding slopes, land owned by the Corps, and Lake Sakakawea.

See, Natasha Davis Declaration at 2.

The EPA and states rely on permit programs to implement the controls necessary to prevent water pollution. Respondent's failure to comply with its Permit, the Act and its implementing regulations jeopardizes the integrity of EPA and states' programs. In addition, the environmental impact of large amounts of sediment entering our nation's waters is a leading cause of water quality impairment in our water ways. See, Natasha Davis Declaration at 3. Complainant used the "Supplemental Guidance to the Interim Clean Water Act Settlement Policy for Violation of the Construction Storm Water Requirements" (Penalty Policy) to apply the statutory factors and to calculate a gravity component of \$64,718.40.

Ability to Pay:

The record contains no information regarding Respondent's financial ability to pay the penalty. Therefore, no adjustment is made to the penalty based upon this statutory factor.

Prior History of Violations:

The Complaint states that this is the first enforcement action EPA has issued to the Respondent as to storm water regulations.

Degree of Culpability:

The Complaint also discusses the culpability of Respondent including hiring a professional engineering firm to consult and provide technical assistance. See, Natasha Davis Declaration at 4.

Economic Benefit:

Complainant described the economic benefit to Respondent by failing to meet all of the requirements of the storm water program, including the cost savings from failure to implement and maintain BMPs and failure to conduct and document Site inspections to ensure continuing implementation of BMPs. See, Memo in Support at 13. The Agency calculated an economic benefit of \$18,792 which consists of 1) the costs of creating an adequate SWPPP and keeping it up to date and complete; 2) the cost of implementing and maintaining BMPs; and, 3) the cost of performing inspections to satisfy the permit requirements. *Id.*

Other Matters as Justice May Require:

Complainant made no adjustments to the penalty for other matters as justice may require.

Complainant is unaware of any such matters, and the record contains no facts that would require an adjustment to the penalty based on this statutory factor.

Total Penalty:

It is concluded that the proposed penalty of \$84,000 (which includes gravity, economic benefit and litigation considerations) is consistent with the record of this case and with the statutory penalty factors of the Clean Water Act.

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, the Findings of Fact set forth above, the statutory factors, and the information in Complainant’s declarations regarding economic benefit and economic impact on the violator, this court is awarding the full amount of the penalty proposed in the Complaint. I hereby find that Respondent is in default and liable for a total penalty of **\$84,00.00**

IT IS THEREFORE ORDERED that Respondent, Lake Sakakawea & Associates, LLC, shall, within thirty (30) days after this Order becomes final under 40 C.F.R. § 22.27(c), submit by cashier’s or certified check, payable to the United States Treasurer, payment in the amount of **\$84,000.00** to the following address:

U.S. Environmental Protection Agency –
Fines and Penalties
Cincinnati Financial Center
P.O. Box, 979077
St. Louis, MO 63197-9000

Contacts: Craig Steffan 513-487-2091
Eric Volck 513-487-2103

Alternatively, Respondent can make payment of the penalty as follows:

WIRE TRANSFERS:

Wire transfers should be directed to the Federal Reserve Bank of New York:

Federal Reserve Bank of New York
ABA = 021030004
Account = 68010727
SWIFT address = FRNYUS33
33 Liberty Street
New York NY 10045
Field Tag 4200 of the Fedwire message should read “ D 68010727 Environmental
Protection Agency “

OVERNIGHT MAIL:

U.S. Bank
1005 Convention Plaza
Mail Station SL-MO-C2GL
St. Louis, MO 63101
Contact: Natalie Pearson
314-418-4087

ACH (also known as REX or remittance express)

Automated Clearinghouse (ACH) for receiving US currency
PNC Bank
808 17th Street, NW
Washington, DC 20074
Contact – Jesse White 301-887-6548
ABA = 051036706
Transaction Code 22 - checking
Environmental Protection Agency
Account 310006
CTX Format

ON LINE PAYMENT:

There is now an On Line Payment Option, available through the Dept. of Treasury.
This payment option can be accessed from the information below:
WWW.PAY.GOV
Enter sfo 1.1 in the search field
Open form and complete required fields.

Respondent shall note on the check the title and docket number of this Administrative action.

Respondent shall serve a photocopy of the check on the Regional Hearing Clerk at the following address:

Regional Hearing Clerk
EPA Region 8
1595 Wynkoop Street
Denver, Colorado 80202

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

Should Respondent fail to pay the penalty specified above in full by its due date, the entire unpaid balance of the penalty and accrued interest shall become immediately due and owing. Pursuant to the Debt Collection Act, 31 U.S.C. § 3717, EPA is entitled to assess interest and penalties on debts owed to the United States and a charge to cover the cost of processing and

handling a delinquent claim. Interest will therefore begin to accrue on the civil penalty, if it is not paid as directed. Interest will be assessed at the rate of the United States Treasury tax and loan rate, in accordance with 40 C.F.R. § 102.13(e).

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.**

SO ORDERED This 6th Day of August, 2012.


Elyana R. Sufin
Presiding Officer


CERTIFICATE OF SERVICE

The undersigned certifies that the original of the attached, **INITIAL DECISION AND DEFAULT ORDER** in the matter of **LAKE SAKAKAWEA & ASSOCIATES, LLC.**; **DOCKET NO.: CWA-08-2011-0017** was filed with the Regional Hearing Clerk on August 8, 2012.

Further, the undersigned certifies that a true and correct copy of the documents were delivered to, Amy Swanson, Senior Enforcement Attorney, U. S. EPA – Region 8, 1595 Wynkoop Street, Denver, CO 80202-1129. True and correct copies of the aforementioned documents were placed in the United States mail certified/return receipt requested on August 8, 2012 to:

Mr. Dale Little Soldier, President
Lake Sakakawea & Associates, LLC.
3765 Highway 1806
Mandan, ND 58554-8240

August 8, 2012


Tina Artemis
Paralegal/Regional Hearing Clerk

