UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105

IN THE MATTER OF: FRANK ALO, Respondent.	)	U.S. EPA Docket No. CWA-09-2021-0049 INITIAL DECISION AND ORDER ON DEFAULT JUDGMENT

INTRODUCTION

This proceeding is governed by the *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,* 40 C.F.R. Part 22 (*Consolidated Rules*). The United States Environmental Protection Agency (Complainant) moves for an Partial Default Order for Penalties under § 22.17(b) of the *Consolidated Rules*. Frank Alo (Respondent) did not oppose Complainant's motion. Based on the following findings of fact and conclusions of law, an order on penalties is entered against Respondent. The Order resolves all outstanding issues and claims in this proceeding and therefore constitutes the Presiding Officer's initial decision in this matter.

The *Consolidated Rules*, 40 CFR § 22.17(a), applies to motions for default, and provide in pertinent 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 proceeding only, an admission of all facts alleged in the complaint and a waiver of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations.

> (c) Default Order. When the Presiding Officer finds that 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.

The *Consolidated Rules* at 40 CFR § 22.17(a) require the Presiding Officer to 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. Respondent has made no showing that good cause exists to defeat Complainant's Motion for Default Order.

PROCEDURAL HISTORY

Pursuant to 40 C.F.R. § 22.5(a), Complainant filed an administrative complaint, notice of proposed penalty, and Notice of Opportunity for Hearing (Complaint) against Respondent on July1, 2021. Complainant served the Complaint on Respondent on July 6, 2021, in accordance with 40 C.F.R. § 22.5(b). The Complaint alleges, on or around February 12, 2018, Respondent violated section 301(a) of the Clean Water Act (CWA), 33 U.S.C. § 1311(a) by discharging fill material without authorization under section 404 of the CWA, 33 U.S.C. § 1344, into approximately 0.77 acres of Waters of the United States located on a parcel of real property owned by Respondent and onto four adjacent parcels of land (together referred to as "the Site") in Hauula, Island of Oahu, Hawaii.

On June 15, 2022, the Regional Judicial Officer, serving as the Presiding Officer over this matter, issued an Initial Decision and Order in response to Complainant's Motion for Partial Default (Liability). The Presiding Officer submitted the Initial Decision and Order to the Environmental Appeals Board (EAB). On July 22, 2022, the EAB remanded the matter back to the Presiding Officer holding the Initial Decision had not resolved all outstanding issues and claims in the proceeding i.e., "the issue of an appropriate penalty in this matter," and thus could

not properly be considered an "initial decision" within the meaning of the Consolidated Rules, i.e., 40 C.F.R. § 22.27. *See* EAB Appeal No. CWA 22-01, Dkt. No. 2. The EAB instructed the Presiding Officer to correct the title of the document, to eliminate any language characterizing the document as an initial decision, and to amend the Order in accordance with 40 C.F.R. § 22.6. On February 13, 2023, Complainant filed its Motion For Partial Default For Penalties. On June 5, 2023, the Presiding Officer issued an Order on Motion for Partial Default (Liability) that addressed the issues raised the EAB's remand order. The Presiding Officer now resolves all issues and claims in this proceeding by addressing Complainant's penalty issues in this Initial Decision and Order on Default Judgment.

FINDINGS OF FACT (LIABILITY)

The factual findings on liability, which are set forth in the Presiding Officer's June 5, 2023, Order, are incorporated here by reference.

PENALTY DETERMINATION

The Consolidated Rules authorize the assessment of a penalty in the event of a default provided the Complainant "specify the penalty or other relief sought and state the legal and factual grounds for the requested relief." 40 C.F.R. § 22.27(b). The Consolidated Rules also provide, in pertinent part, "[i]f the respondent has defaulted, the Presiding Officer shall not assess a penalty greater than that proposed in the… motion for default…" *Id.* And: "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." *Id.* at § 22.27(c). Complainant seeks a $115,965 penalty from Respondent based on the following factual and legal grounds.

Statutory Authority and Criteria for Assessment of Civil Penalties Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), authorizes the administrative assessment of civil

penalties in an amount not to exceed $10,000 per day for each day during which the violation continues, up to a maximum total penalty of $125,000. These amounts have increased pursuant to the Civil Monetary Penalty Inflation Adjustment Rule of 2023, 88 Fed. Reg. 986 (Jan. 6, 2023), which provides civil administrative penalties of up to $25,847 per day for each day during which a violation continues, up to a maximum total penalty of $323,081, may be assessed for violations of section 301(a) of the CWA, U.S.C. § 1311(a), that occurred after November 2, 2015 where penalties are assessed on or after January 6, 2023. *See also* 40 C.F.R. § 19.4.

Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3), provides that when EPA determines a penalty it "shall take into account 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 violations, and such other matters as justice may require." An appropriate penalty is one which reflects consideration of each factor the governing statute requires, and which is supported by an analysis of those factors.

Although EPA does not have a penalty policy directly applicable to the CWA's statutory criteria in administrative or civil adjudications, it is well established EPA may reference the general penalty policies discussed below for the limited purpose of applying the CWA statutory factors to the relevant facts to determine a proposed penalty. There are two general EPA penalty policies that Complainant may reference when applying the CWA's statutory penalty criteria at section 309(g)(3), 33 U.S.C. § 1319(g)(3): (1) the "Policy on Civil Penalties: EPA General Enforcement Policy #GM-21" (Feb. 16, 1984) ("GM-21"); and (2) "A Framework for Statute-Specific Approaches to Penalty Assessments: EPA General Enforcement Policy #GM-22" (Feb. 16, 1984) ("GM-22") (hereinafter referred together as the "Penalty Policies"). The Presiding

Officer also may reference policies when assessing Complainant's proposed penalty demand. *B.J. Carney Industries, Inc.*, EPA Docket No. CWA 1090-09-13-309(g). 7 E.A.D. 171, 219, 1997 WL 323716 (EAB 1997).

A. Calculation of Preliminary Deterrence Amount

Complainant addressed and analyzed the following CWA statutory penalty factors, in accordance with the above-referenced penalty policies, to arrive at a proposed "preliminary deterrence amount" in its moving papers:

1. Economic Benefit

The Penalty Policies state penalties should, at a bare minimum, be sufficient to recover the economic benefit of violations. GM-21 at 3-4; GM-22 at 6. When calculating economic benefit, Complainant may also utilize a reasonable approximation of economic benefit. The Penalty Policies suggest considering the avoided and/or delayed costs associated with noncompliance to determine a violator's economic benefit. GM-21 at 3; GM-22 at 9-10.

Here, Complainant claims Respondent realized an economic benefit by avoiding the consultation cost associated with applying for a Corps permit prior to placing fill material in wetlands at the Site. Complainant estimates Respondent realized an economic benefit of $10,000. *See* Declaration of Scott McWhorter ("McWhorter Decl.") ¶12, attached to Complainant's Motion as Exhibit A. Complainant considered the holdings in the following decisions to calculate the economic benefit Respondent received by avoiding consultation costs: (1) *San Pedro Forklift*, Docket No. CWA Appeal No. 12-02, 15 E.A.D. 838, 2013 WL 1784788, *33-34 (EAB April 22, 2013) (finding EPA's use of GM-21 and GM-22 provided EAB "an adequate record upon which to draw to decide a penalty amount"); (2) *Ray and Jeanette Veldhuis*, 2002 EPA ALJ LEXIS 39, 243-244 (ALJ Gunning, June 24, 2002); (3) *Service Oil,*

Inc., 2008 EPA App. LEXIS 35, 38 n. 25 (EAB 2008); (4) *Catskill Mts. Chapter of Trout Unlimited, Inc. v. City of New York*, 244 F. Supp. 2d 41, 50 (N.D.N.Y 2003), quoting *United States v. Allegheny Ludlum Corp*., 187 F. Supp. at 436 (The economic benefit that the violator enjoys as a result of violating the CWA is "[a] critical component of any penalty analysis under the [CWA]"); (5) *United States v. Smithfield Foods, Inc.*,191 F.3d 516, 529 (4th Cir. 1999) (finding that since it is difficult to prove precise economic benefit, "reasonable approximations … will suffice."), followed by *Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico*, 148 F.Supp.3d 563 (E.D. La. 2015); *see also United States v. Municipal Authority of Union Township & Dean Dairy Products, Inc*., 929 F. Supp. 800, 806-807 (M.D. Pa. 1996), aff'd 150 F.3d 259 (3d Cir. 1998) ("It would eviscerate the [CWA] to allow violators to escape civil penalties on the ground that such penalties cannot be calculated with precision"); and (6) the latest available version of EPA's penalty calculation tool, BEN 2022.0.0 ("BEN"). The BEN tool calculates the economic benefit to Respondent as $14,715. *See* McWhorter Decl. ¶13.

2. Nature, Circumstances and Gravity of the Violations

Complainant considered the "nature, circumstances, extent and gravity" of this violation when determining "the seriousness of the violation." McWhorter Decl. ¶14. Pursuant to the criteria set forth in the Penalty Policies, Complainant considered the following factors to determine the seriousness of the violation: (a) actual or possible harm to the environment; (b) the importance of the regulatory requirement at issue to achieving the goal of the statute or regulation; (c) the availability of data from other sources; and (d) Respondent's size and position in the industry. *See* GM-21 at 4, and GM-22 at 14-15.

a. Actual or Possible Harm

To determine the "actual or possible harm" associated with the violation, Complainant considered these factors: (a) amount of pollutant; (b) toxicity of the pollutant; (c) sensitivity of the environment; and (d) length of time the violation continued.

Amount of pollutant: Respondent discharged "approximately 200 truckloads of gravel, asphalt, clay, dirt and other fill material to the wetlands described as waters of the United States on the Site." Complaint ¶8; *see also* McWhorter Decl. ¶15.a. These fill materials constitute "pollutants" under the CWA. Complaint ¶9. Complainant determined this amount of fill is a serious violation of the CWA because the amount and depth of fill was enough that it could lower the water table underlying the Site relative to the ground surface, thus causing permanent loss of plants and animals that need saturated soils to survive. *See* McWhorter Decl. ¶15.a. Therefore, Complainant's preliminary deterrence amount reflects an upward adjustment for the seriousness of Respondent's violation.

Toxicity of pollutant: The fill material that Respondent discharged, includes gravel, asphalt, clay, [and] dirt. Complaint ¶8. When calculating their proposed penalty, Complainant cited provisions in the Penalty Policies that provide violations involving "highly toxic pollutants" are more serious and should result in relatively larger penalties. GM-22 at 3, 15 and 27. Although the fill contained asphalt and "other materials," Complainant is unaware of facts showing the presence of highly toxic pollutants in the fill material discharged by Respondent to the wetlands. For these reasons, Complainant did not increase the preliminary deterrence amount. *See* McWhorter Decl. ¶15.b.

Sensitivity of the environment: As noted by Complainant, the Penalty Policies suggest focusing on the importance of the location where the violation was committed, e.g., "improper discharge into waters near a drinking water intake or a recreational beach is usually more serious than discharge into waters not near any such use." GM-22 at 15. Here, the unauthorized discharge impaired the functions and values of forested wetlands and raised the potential for flooding. *See* McWhorter Decl. ¶15.c These impacts, however, did not appear to be the type of impacts contemplated by the Penalty Policies in determining the seriousness of a CWA violation. For these reasons, Complainant did not increase the preliminary deterrence amount.

Length of time of the violation: Based upon the previous findings of fact, Respondent discharged the fill material to wetlands on the Site, at a minimum, on or around February 12, 2018. Complaint. ¶8. Despite EPA Region 9's June 10, 2021, Administrative Order, which required Respondent to remove the discharged fill material, the fill currently remains in place. *Id.* at ¶12-13. Complainant sites the Penalty Policies, which suggest the duration of a violation may result in an upward adjustment of the penalty. *See* GM-21 at 6; GM-22 at 15, 20. GM-22 also notes "[i]n most circumstances, the longer a violation continues uncorrected, the greater is the risk of harm." GM-22 at 15. Complainant concluded the continued presence of the fill at the site prolonged the harm from the violations because the longer the fill remains in place, the longer it will take to restore wetland functions due to the slow growing nature of wetland systems. *See* McWhorter Decl. ¶15.d. Therefore, Complainant's preliminary deterrence amount reflects an upward adjustment for the seriousness of Respondent's violation.

b. Importance to EPA's Regulatory Scheme

As stated in the Penalty Policies, Complainant should focus on the importance of the regulatory requirement at issue in relation to its ability to achieve the goal of the statute or regulation. *See* GM-21 at 3; GM-22 at 14. In the instant matter, the CWA's statutory goal is to restore and maintain the chemical, physical and biological integrity of the nation's waters. *See* Section 101(a) of the CWA, 33 U.S.C. § 1251(a). In furtherance of this goal, the CWA prohibits the discharge of any pollutant from a point source by any person into a water of the United States unless it complies with the CWA, including the CWA's requirement for obtaining authorization under section 404 to discharge fill to waters of the United States. The 404 permit is important to the regulatory scheme because it requires a consideration of the least environmentally damaging practicable alternative or "LEDPA." *See* "404(b)(1) Guidelines" at 40 C.F.R. § 230.10. Respondent's failure to obtain section 404 authorization prevented the Corps from considering the LEDPA and including requirements that would avoid, minimize, or mitigate impacts to affected wetlands. *See* McWhorter Decl. ¶¶ 15.c and 16. Complainant correctly concludes Respondent violated an important regulatory requirement designed to further the goals of the CWA. Therefore, Complainant's preliminary deterrence amount reflects the determination that the nature of Respondent's violation was highly serious.

c. Availability of Data from Other Sources

Although the Penalty Policies suggest taking into consideration the availability of data from other sources to account for violations of any recordkeeping or reporting requirements where the requirement is the only source of information, *See* GM-22 at 14, Complainant did not take this factor into consideration in determining the seriousness of Respondent's violation

because the violations did not involve recordkeeping or reporting requirements. *See* McWhorter Decl. ¶17.

d. Size of the Violator

The Penalty Policies provide "[i]n some cases the gravity component should be increased where it is clear the resultant penalty will otherwise have little impact on the violator in light of the risk of harm posed by the violation." GM-22 at 20. Complainant concluded the overall proposed penalty will serve to effectively deter Respondent from conducting unauthorized fill activity in the future because Respondent's assets do not appear significant. Although Respondent owns (or owned) a trucking company, this company's incorporation was administratively terminated in 2016 according to Hawaii's Business Registration Division ("HBRD"), indicating it is no longer an active or large business. S*ee* McWhorter Decl. ¶18 and attached HBRD records. Respondent also owns two parcels of real property in Hawaii, one on the Island of Kauai and one that Respondent owns that comprises a portion of the Site. Complainant does not, however, consider Respondent's property holdings so extensive that the proposed penalty will fail to provide sufficient deterrence. *See* McWhorter Decl. ¶19.

3. Preliminary Deterrence Amount

The combination of gravity and economic benefit produces a "preliminary deterrence amount." GM-22 at 2-3. Based upon the nature, extent, and circumstances of the violations, the gravity amount calculated by Complainant is $81,000. McWhorter Decl. ¶20. When this amount is added to the amount calculated for economic benefit ($14,715), the preliminary deterrence amount totals $95,715.

B. Adjustments to the Preliminary Deterrence Amount

As Complainant stated, the "preliminary deterrence amount" calculated above may be adjusted upward or downward by 20% to account for case (or violator)-specific conditions. GM-21 at 4, GM-22 at 6. The Penalty Policies identify a number of case-specific considerations, which correlate with the CWA's penalty considerations at section 309(g)(3), 33 U.S.C. § 1319(g)(3), including: (1) the violator's degree of willfulness and/or negligence, (2) level of cooperation, (3) history of noncompliance, (4) ability to pay, and (5) any other unique factors. *See* GM-21 at 4-5, GM-22 at 17-27.

1. Degree of Willfulness and/or Negligence

The CWA's penalty criteria provisions at section 309(g)(3), 33 U.S.C. § 1319(g)(3), require a consideration of Respondent's "degree of culpability." The Penalty Policies provide a number of factors for determining Respondent's degree of negligence in this matter (see GM-21 at 5, GM-22 at 17). Complainant is correct in stating liability under the CWA is strict and does not require negligence. Nonetheless, Complainant considered the Penalty Policies' negligence factors as an appropriate way to calculate the penalty amount in this matter based on Respondent's "degree of culpability" under section 309(g)(3) of the CWA. The factors are as follows:

a. Control

The Penalty Policies suggest considering "[h]ow much control the violator had over the events constituting the violation" when assessing the degree of negligence. *See* GM-22 at 18. The record shows Respondent had significant, if not total, control over the discharge of fill to the

wetlands at issue. Therefore, Complainant determined Respondent had a high degree of control over, and culpability for, the violation at issue in this matter. *See* McWhorter Decl. ¶22.

b. Foreseeability

The Penalty Policies suggest considering "[t]he foreseeability of the events constituting the violation" when assessing the degree of negligence involved in an action. *See* GM-22 at 18. Guidance set forth in *C.L. "Butch" Otter and Charles Robnett*, 2001 WL 580477, EPA Docket No. CWA-10-99-0202 (ALJ, April 9, 2001) is instructive when determining the foreseeability of violations of section 404 of the CWA. In *Butch Otter*, the respondents engaged in the unauthorized discharge of dredged and fill material in 1998 to wetlands located on their property in Idaho. Respondents engaged in similar unauthorized fill activity to other wetlands located on their property in 1992 and 1995, both of which resulted in Corps enforcement actions. The ALJ in *Butch Otter* found "a considerable degree of negligence" on the part of respondents based on their historical violations of section 404 of the CWA, which the ALJ found made respondents "well-aware" of the need for a 404 permit. In the instant case, Respondent was already the subject of an enforcement action by the Corps in 2011 for filling 0.06 acres of wetlands at the same Site without 404 permit authorization. *See* McWhorter Decl. (¶¶3, 24). On November 30, 2011, the Corps issued a Cease and Desist/Restoration Order to Respondent making clear that Respondent needed a permit to conduct filling activities. *Id.* On several occasions, the [Corps] informed Respondent of the necessity of obtaining a Section 404 permit before discharging pollutants into the waters of the United States and that unauthorized discharge constitutes a violation of federal law. McWhorter Decl. ¶24 (attaching the Corps' 2011 Cease and Desist/Restoration Order as Exhibit 1).

On December 2, 2011, Respondent ultimately agreed to remove the unauthorized fill as instructed by the Corps and EPA. *See* McWhorter Decl. ¶24.13 Based on the Corps' enforcement history, and Respondent's acknowledgment of the need for a CWA 404 permit from the Corps, the record establishes Respondent's violation of section 404 of the CWA was foreseeable.

c. Reasonable Precautions Taken

The Penalty Policies also suggest considering "[w]hether the violator took reasonable precautions against the events constituting the violation" when assessing the degree of negligence. *See* GM-22 at 18. Complainant is unaware of any precautions taken by Respondent to prevent the violation at issue. To the contrary, Complainant references recent aerial photos that indicate Respondent not only allowed the unauthorized fill to remain in place, but also installed additional structures on top of that same fill, including what appears to be a house. *See* McWhorter Decl. ¶22.

d. Respondent's Level of Sophistication

The Penalty Policies suggest considering "[t]he level of sophistication within the industry in dealing with compliance issues and/or the accessibility of appropriate control technology" when assessing negligence. *See* GM-22 at 18. As asserted by Complainant, Respondent's work experience in the trucking industry and in real estate, as well as prior interactions with the Corps associated with Respondent's 2011 wetland violations, factors into Respondent's level of sophistication, particularly in regard to Respondent's knowledge of the need for authorization under section 404 of the CWA. However, even though discharging fill material to waters of the United States was more than minimal, the discharge process was not highly sophisticated.

e. Knowledge of the Legal Requirement

The records establishes Respondent knew of the requirement under section 301(a) of the CWA, 33 U.S.C. § 1344, that prohibits the discharge of fill to waters of the United States without prior authorization under section 404 of the CWA, 33 U.S.C. § 1344. However, Complainant chose not to adjust the preliminary deterrence amount upward in its consideration of this factor because Complainant already considered this factor when it determined the preliminary deterrence amount should be adjusted upward for the foreseeability of the violation.

f. Adjustment to Preliminary Deterrence Amount for Negligence

The Penalty Policies suggest a range of adjustment of up or down 20% of the preliminary deterrence amount's gravity component to account for the degree of Respondent's willfulness or negligence. GM-22 at 18-19. Complainant adjusted the $81,000 gravity component upward by the full 20%, or $16,200, to reflect Respondent's degree of negligence, or "culpability." *See* McWhorter Decl. ¶22.

2. Level of Cooperation

The Penalty Policies suggest Respondent's degree of cooperation or noncooperation in remedying the violation is an appropriate factor to consider in adjusting the preliminary deterrence amount downward. See GM-21 at 5, GM-22 at 19. The areas where this factor is considered relevant include: (1) prompt reporting of noncompliance; and (2) prompt correction of environmental problems. GM-22 at 19-21.

a. Prompt Reporting of Noncompliance

Cooperation can be manifested by the violator promptly reporting its noncompliance. *See* GM-22 at 19. Complainant is unaware of any effort by Respondent to report the violations.

Instead, the Corps discovered the violations independently. *See* McWhorter Decl. ¶23. Therefore, Complainant did not reduce the preliminary deterrence amount under this factor.

b. Prompt Correction of Environmental Problems

The Penalty Policies also suggest a reduction of the gravity component of the preliminary deterrence amount if Respondent commits to correcting the violation promptly. Here, Respondent has been completely unresponsive to an administrative order for compliance that EPA issued to Respondent on June 10, 2021 (EPA Docket Number CWA-309(a)-21-001), which required corrective action. Complaint at ¶12; *see also* McWhorter Decl. ¶23. Therefore, Complainant did not reduce the preliminary deterrence amount under this factor.

3. History of Noncompliance

The Penalty Policies support adjusting the preliminary deterrence amount's gravity component upwards where a party has violated a similar environmental requirement before because the prior violation "is usually clear evidence that the party was not deterred by the previous enforcement response." *See* GM-21 at 5; GM-22 at 21. Here, Respondent has a relevant history of non-compliance with section 301(a) of the CWA, 33 U.S.C. § 1311(a), and the need for authorization of fill activity under section 404 of the CWA, 33 U.S.C. § 1344. *See* McWhorter Decl. ¶¶3, 24. When determining how large the adjustment to the preliminary deterrence amount should be, Complainant considered the following criteria in the Penalty Policies: (1) how similar the previous violation was; (2) how recent the previous violation was; (3) the number of previous violations; and (4) the violator's response to previous violation(s) in regard to correction of the previous problem. GM-22 at 21-22.

a. Similarity of Previous Violation

The Penalty Policies provide that a violation should generally be considered "similar" if the

previous enforcement response should have alerted the party to a particular type of compliance problem. *See* GM-22 at 21. Facts to consider include whether the same permit was violated; the same substance was involved; and the same statutory or regulatory provision was violated. *Id.* Respondent committed a similar violation in 2011 when Respondent filled 0.06 acres of wetlands located at the Site with approximately 210 cubic yards of fill without section 404 authorization in violation of section 301(a) of the CWA, 33 U.S.C. § 1311(a). McWhorter Decl. ¶24. The violation in 2011 involved a failure by Respondent to obtain the same 404 permit authorization from the Corps. *Id.* Furthermore, the fill in 2011 was comprised of construction debris just as the fill was in 2018. *Id*. Therefore, there is a similarity between Respondent's current and past violations.

b. Recency of Previous Violation

The exact date that Respondent committed the violation in 2011 is not known but likely occurred sometime in late 2011 based on the EPA and Corps inspections that occurred on November 7 and November 15, 2011. Respondent's most recent violation on February 12, 2018, likely came less than seven years later. Thus, Complainant considered Respondent's prior violation in 2011 as occurring recently in relation to Respondent's 2018 violation. *See* McWhorter Decl. ¶24.

c. Number of Previous Violations

Complainant is unaware of and did not consider any other previous similar violations other than that which occurred sometime in 2011. *See* McWhorter Decl. ¶24.

d. Response to Previous Violations

Although Respondent agreed in a letter dated December 2, 2011 to the Corps to comply with the Cease and Desist/Restoration Order, *Id.*, Complainant is not aware if Respondent complied with the Corps' November 30, 2011 Cease and Desist/Restoration Order.

e. Adjustment to Preliminary Deterrence Amount for History of Noncompliance

The Penalty Policies suggest a repeat violation that is "similar" to the first violation may result in an upward adjustment of the gravity component of the preliminary deterrence amount of up to 35%. GM-22 at 22. The record in the instant case shows Respondent committed a similar violation in 2011 at the same Site at issue. Although Respondent's December 2, 2011, letter to the Corps indicates Respondent intended to comply with the Corps' 2011 Restoration Order, the February 12, 2018, violation shows Respondent was not deterred by previous enforcement efforts. Therefore, Complainant adjusted the $81,000 gravity component of the preliminary deterrence amount upward by 5%, or $4,050. Complainant chose 5%, rather than a larger percentage because Complainant also considered Respondent's prior violation when assessing Respondent's degree of willfulness and/or negligence. *See* McWhorter Decl. ¶24.

4. Ability to Pay

Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3) requires Complainant to consider the violator's ability to pay the assessed penalty when determining the amount of an administrative penalty. *See also* GM-21 at 4 and GM-22 at 23-24 (requiring EPA to consider ability to pay as a penalty adjustment factor). Here, Respondent owns two parcels of real property in Hawaii, suggesting an ability to pay the proposed penalty. One parcel comprises part of the Site at 54-28 Kukuna Road in Hauula. This parcel is over a half-acre in size and has an assessed value of

approximately $88,300 according to CCH property records. The other parcel is approximately 0.16 acres in size and is located on the Island of Kauai at 2961 Hoolako Street, in Lihue. The Kauai parcel has an assessed value of $506,400 and a total market value of $698,900, according to Kauai County property records. *See* McWhorter Decl. ¶25 (attaching the CCH and Kauai County property records as Exhibits 9 and 10, (respectively). As Complainant asserts, the value of these real property parcels suggests Respondent has the ability to sell or borrow against these properties to pay the penalty proposed here. Therefore, Complainant met its initial burden of showing its proposed penalty is appropriate. Alternatively, Respondent has not put its ability to pay the proposed penalty at issue in these proceedings. Similarly, Respondent has failed to raise inability to pay the proposed penalty as a defense by failing to respond to the Complaint.

5. Other Unique Factors

Complainant did not identify any other factors.

CONCLUSION

Complainant proposed a penalty comprised of the quantified economic benefit totaling $14,715. Complainant also factored in the gravity component of the preliminary deterrence amount ($81,000), which it adjusted upward by $16,200 for Respondent's culpability (or degree of negligence), and by $4,050 for Respondent's history of noncompliance for a total gravity factor of $101,250. In sum, Complainant proposes a total proposed penalty of **$115,965**, which is the total of the $14,715 economic benefit amount added to the total adjusted gravity factor amount of $101,250.

ORDER

Pursuant to the Consolidated Rules of Practice, 40 C.F.R. §§ 22.17 and .27, Complainant's Motion For Partial Default For Penalties is **GRANTED** and Respondent is

ORDERED as follows:

1. Respondent, Frank Alo, is assessed a civil penalty in the amount of **$115,965.00** and ordered to pay the civil penalty as directed in this Order.

2. Respondent shall pay the civil penalty to the "United States Treasury" within thirty (30) days after this Default Order has become final. Payment by Respondent shall reference Respondent's name and address and the EPA Docket Number of this matter. Respondent may use any of the following means for purposes of paying the penalty:

a. All payments made by check and sent by regular U.S. Postal Service Mail shall be addressed and mailed to:

United States Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000
Contact: Customer Service (513-487-2091)

b. All payments made by check and sent by private commercial overnight delivery service shall be addressed and mailed to:

United States Environmental Protection Agency
Cincinnati Finance Center
Government Lockbox 979077
1005 Convention Plaza
Mail Station SL-MO-C2-GL
St. Louis, MO 63101
Contact: 314-425-1818

c. All payments made by check in any currency drawn on banks with no USA branches shall be addressed for delivery to:

United States Environmental Protection Agency
Cincinnati Finance Center
MS-NWD
26 W. M.L. King Drive
Cincinnati, OH 45268-0001

d. All payments made by electronic wire transfer shall be directed to:

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"

e. All electronic payments made through the Automated Clearinghouse (ACH), also known as Remittance Express (REX), shall be directed to:

U.S. Treasury REX/Cashlink ACH Receiver
ABA = 051036706
Account No.: 310006, Environmental Protection Agency
CTX Format Transaction Code 22- Checking

Physical location of U.S. Treasury facility:
5700 Rivertech Court
Riverdale, MD 20737
Contact: 866-234-5681

f. On-Line Payment Option: WWW.PA Y.GOV/paygov/

[Enter "sfo 1.1" in the search field. Open and complete the form.]

g. Additional payment guidance is available at:

https:/ /www2.epa.gov /financial/makepayment

3. At the time that payment is made, Respondent shall provide Complainant copies of any check or written notification confirming electronic fund transfer or online payment to:

Regional Hearing Clerk
Office of Regional Counsel (ORC-1)
U.S. Environmental Protection Agency, Region IX
R9HearingClerk@epa.gov

4. In the event that Respondent fails to pay the civil penalty as directed above, this matter may be referred to a United States Attorney's Office for further action.

5. 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.

6. This Default Order resolves all outstanding issues and claims in this proceeding and constitutes the Presiding Officer's Initial Decision, as provided in 40 C.F.R. §§ 22. l 7(c) and 22.27(a). This Initial Decision shall become a Final Order forty-five (45) days after it is served upon the Complainant and Respondent and without further proceedings, unless: (1) a party moves to reopen a hearing; (2) a party appeals this Initial Decision to the EPA Environmental Appeals Board within thirty (30) days of service of the Initial Decision, in accordance with 40 C.F .R. § 22.30; (3) a party moves to set aside the Default Order that constitutes this Initial Decision, or; 4) the Environmental Appeals Board elects to review the Initial Decision on its own initiative. See 40 C.F.R. § 22.27(c).

Under 40 C.F.R. § 22.30, any party may appeal this Order by filing an original and one copy of a notice of appeal and an accompanying appellate brief with the Environmental Appeals Board within thirty (30) days after this Initial Decision is served upon the parties.

IT IS SO ORDERED:

STEVEN JAWGIEL

Digitally signed by STEVEN JAWGIEL
Date: 2023.07.19 11:46:53 -07'00'

Steven Jawgiel
Regional Judicial Officer
USEPA, Region IX

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the date listed below, the Initial Decision and Order on Default Judgment, In the Matter of Frank Alo, Docket No. CWA-09-2021-0049 was served on the following parties via **electronic mail**:

Respondent:

Frank Alo
54-028 Kukuna Road
Hauula, Hawaii 96717
FrankfAlo@outlook.com

Complainant:

Rich Campbell
Assistant Regional Counsel
U.S. Environmental Protection Agency, Region 9
75 Hawthorne Street
San Francisco, CA 94105
Campbell.Rich@epa.gov

PONLY TU

Digitally signed by PONLY TU
Date: 2023.07.19 13:43:26 -07'00'

Ponly J. Tu Date
Regional Hearing Clerk
U.S. EPA, Region IX