UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6
DALLAS, TEXAS

IN THE MATTER OF:	)	
	)	
Diamond 3S, LLC	)	Docket No. CWA-06-2018-1831
	)	
Respondent	)	
	)	

INITIAL DECISION AND DEFAULT ORDER

This proceeding was initiated by the Director of the Compliance Assurance and Enforcement Division, Region 6, United States Environmental Protection Agency (hereinafter, "Complainant" or "EPA") in order to assess an administrative penalty in the amount of $64,500 against Diamond 3S, LLC ("Respondent") for violations of the Clean Water Act ("CWA"). The proceeding is governed by the procedures set forth in the revised Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination and Suspension of Permits set forth at 40 Code of Federal Regulations ("CFR") part 22, including the Supplemental Rules for Administrative Proceedings not Governed by the Administrative Procedures Act (collectively, the "Rules of Practice").

Section 22.17(a) of the CFR provides that a "party may be found to be in default: after motion, upon failure to file a timely answer to the complaint…" 40 CFR § 22.17(a). EPA filed an Administrative Complaint ("Complaint") against Respondent on September 28, 2018. I granted Respondent's unopposed Motion for extension of time to answer the Complaint until April 1, 2019. Complainant had four informal settlement discussions with Respondent over a ten-month period and left numerous voicemails/sent many e-mails requesting more information and responses/decisions regarding the settlement discussions, to which Respondent never replied. To date, Respondent has not filed its Answer or requested a hearing. On January 9, 2020, Complainant filed a Motion for Default ("Motion"), to which Respondent has not, to date, countered with a response. Therefore, based on the Rules of Practice, the record in this proceeding, and the reasons set forth below, Complainant's Motion is hereby GRANTED, this

shall constitute my Initial Decision pursuant to 40 CFR § 22.17(c), and I will assess the full amount of the $64,500 penalty Complainant sought against Respondent.

I. BACKGROUND AND PROCEDURAL HISTORY

On March 16, 20, 2018, as well as April 12, 26, 2018, EPA inspections observed oil field wastes and produced water generated from oil production activities discharging from Respondent's facility into "waters of the United States," as defined by 40 C.F.R. § 122.2, specifically, a tributary of the Daniel's Run Creek. Consequently, on September 28, 2018, Complainant issued a Complaint against Respondent assessing civil penalties in the amount of $64,500. Service was properly made in accordance with 40 C.F.R. § 22.6, on October 9, 2019. Complainant had four informal settlement discussions with Respondent over a ten-month period and left numerous voicemails/sent many e-mails requesting more information and responses/decisions regarding the settlement discussions, to which Respondent never replied. To date, Respondent has not filed its Answer or requested a hearing, nor taken any sustained efforts to formally settle the matter and is presently not in communication with Complainant.

On September 5, 2019, Complainant served upon Respondent a Notice of Intent to file the Motion, to which Respondent did not reply. EPA therefore filed the present Motion on January 9, 2020, seeking a default order against Respondent finding it liable for the alleged Complaint violations, as well as the full assessment of the proposed $64,500 penalty. Complainant properly served the Motion upon Respondent pursuant to 40 C.F.R. § 22.5(b).

To date, Respondent has failed to file its Answer, a response motion, or communicate with Complainant to resolve the matter. As noted prior, Section 22.17(a) of the Rules of Practice provides that a "party may be found to be in default: after motion, upon failure to file a timely answer to the complaint..." 40 CFR § 22.17(a). Default by Respondent entails "an admission of all facts alleged...and a waiver of respondent's right to contest such factual allegations," thereby leaving Respondent potentially liable for the entire proposed penalty if such default decision is rendered. 40 C.F.R. § 22.17(a).

II. FINDINGS OF FACT

Pursuant to 40 C.F.R. §§ 22.17(c) and 22.27(a), and based on the entire record, I make the following findings of fact:

1. Respondent is a limited liability company and partnership doing business in the state of Oklahoma and as such is a "person" as that term is defined at 33 U.S.C. § 1362(5) and 40 C.F.R. § 122.2.
2. At all relevant times, Respondent owned or operated an oil field disposal and production facility known as the Kennedy Lease, located in Pawhuska, Osage County, Oklahoma, and was therefore an "owner or operator" within the meaning of 40 C.F.R. § 122.2
3. At all relevant times, the facility acted as a "point source" of a "discharge" of "pollutants," specifically oil field brine, to the tributary of Daniel's Run Creek, a "water of the United States," as all such terms are defined at 40 C.F.R. § 122.2.
4. Because Respondent owned or operated a facility that acted as a point source of a discharge of pollutants to waters of the United States, Respondent and its facility were subject to the CWA and National Pollutant Discharge Elimination System ("NPDES") program.
5. Under 33 U.S.C. § 1322, it is unlawful for any person to discharge any pollutant from a point source to waters of the United States, except with the authorization of, and in compliance with, an NPDES permit issued pursuant to 33 U.S.C. § 1342. Respondent's discharges noted herein were non-permitted discharges under the NPDES program.
6. On June 26, 2018, EPA notified the public of the Complaint filing and allowed for a 30-day comment period, as required by 33 U.S.C. § 1319(g)(4)(A). The comment period expired without public comment.
7. Complainant filed the Complaint on September 18, 2018, seeking a penalty in the amount of $64,500 for Respondent's failure to comply with the CWA.
8. Answers are required within 30 days after service of the Complaint. 40 C.F.R. § 22.15(a).
9. 40 C.F.R. § 22.15(d) clearly provides that if an Answer fails to admit, deny, or explain any material allegation of fact in the Complaint, it is deemed an admission of such allegation. Respondent also waives its right to a hearing on such factual allegations if such a request is not made in the Answer. *Id.*

10. Beyond an extension request that was granted prior and has since expired, Respondent did not file an Answer, request a hearing, or take any actions indicating it intends to settle or contest this matter. Rather, communications from Respondent have ceased after numerous attempts to contact Respondent.
11. Respondent must file any response to said Motion within 15 days after service. 40 C.F.R. § 22.16(b). Respondent cannot object to the granting of the Motion if it fails to respond within the designated time period. *Id.*
12. Proper service was made upon Respondent and, to date, Respondent has not filed a response.

II. CONCLUSIONS OF LAW

Pursuant to 40 CFR §§ 22.17(c) and 22.27(a), and based on the entire record, I make the following conclusions of law:

13. Respondent is a person and owner or operator of the facility that was a point source of a discharge of pollutants into waters of the United States, all within the meaning of 33 U.S.C. § 1362 and 40 C.F.R. § 122.2, and the NPDES program.
14. Respondent never obtained a permit to discharge such pollutants into waters of the United States and therefore violated the CWA and its accompanying regulations.
15. As set forth herein, Respondent was properly served the Complaint and Motion. 40 C.F.R. §§ 22.5(b) and 22.6.
16. Respondent's failure to timely file an Answer or response motion in this matter is deemed an admission of the factual allegations set forth in the Complaint and is grounds to enter this default order against Respondent assessing the full amount of the civil penalty sought and a waiver by Respondent of its right to object to the issuance of this order.
17. EPA has afforded Respondent ample time and opportunity to remedy this matter, as well as made numerous attempts to contact Respondent to resolve the matter.
18. Respondent has failed to make any efforts to work with EPA to settle this matter, pay the penalty, or contest the matter or file an Answer.
19. Section 22.17(a) of the C.F.R. provides that a "party may be found to be in default: after motion, upon failure to file a timely answer to the complaint…" Default by Respondent

entails "an admission of all facts alleged…and a waiver of respondent's right to contest such factual allegations," thereby leaving Respondent liable for the entire proposed penalty.

20. As discussed above, Respondent failed to comply with the Complaint, never filed an Answer or response motion in this matter, nor provided good cause as to why I should not issue this Initial Decision and Default Order against Respondent.

21. The requested civil penalty of $64,500 is not inconsistent with the CWA and the record in this proceeding.

III. PENALTY DISCUSSION

Pursuant to 40 CFR § 22.27(b), the "Presiding Officer shall determine the amount of the recommended civil penalty based on the evidence in the record and in accordance with any penalty criteria set forth in the [CWA]. The Presiding Officer shall consider any civil penalty guidelines issued under the [CWA]." This determination may include (1) the nature, circumstances, extent, and gravity of the violation or violations, (2) the violator's ability to pay, (3) history of violations, (4) degree of culpability, (5) economic benefit, and (6) other matters as justice may require. 42 U.S.C. § 1319(g)(3). In this case, the relief requested is a civil penalty in the amount of $64,500. Considering the above factors, the findings of facts and conclusions of law set forth above, and the entire record in this case, I make the following determinations regarding the proposed penalty.

1. The Nature, Circumstances, Extent, and Gravity of the Violation or Violations

The nature, circumstances, extent, and gravity of the violation or violations will depend on the facts and circumstances in each specific case. In this case, the oil field brine, or produced water, had high concentrations of calcium and sodium salts. Typically, this brine is disposed of via underground injection wells, but here, an EPA inspector observed a failed flow line at the facility near an injection well. There were clear indicators that the discharges had been occurring for some time, including, among other things, dead vegetation along the flow path to the point of entry into the tributary of Daniel's Run Creek.

This type of pollutant can also have significant impact on aquatic life when the total dissolved solids ("TDS") in the surface water bodies exceeds a certain limit. In this case, the

TDS levels exceeded the recommended and researched EPA concentrations that negatively affect aquatic life in both acute and chronic exposure.

These actions, as well as impacts and potential impacts, are a clear violation of the CWA and the TDS measurements undermine the statutory purpose of the CWA.

2. Violator's Ability to Pay

In order to promote fair and equitable treatment of the regulated community, EPA will consider the violator's ability to pay, its history of violations, and degree of culpability when deciding whether or not to adjust the penalty. Pursuant to 33 U.S.C. § 1319(g)(3), EPA must consider Respondent's financial capability, size of business, and ability to pay a penalty. The burden is on Respondent to prove its inability to pay. EPA requested documentation to support Respondent's argument that it could not afford the penalty, but was not provided the requested documentation, save for three tax returns, which are insufficient to prove an inability to pay.

EPA, however, ran a preliminary analysis based on those tax returns. The analysis showed that there was a 90% probability that Respondent could afford the full penalty amount assessed after meeting its Pollution Control Expenditures of $26,323. ABEL estimates also provided that there was a 70% chance Respondent could afford a penalty of $235,430 after meeting its Pollution Control Expenditures of $26,323, although this estimate was based only on cash flow Respondent is anticipated to generate over the next five years. Typically, EPA utilizes the 70% threshold model to determining Respondent's ability to pay. Based on the above, EPA chose to not use this factor in reducing the penalty amount.

3. History of Violations

33 U.S.C. § 1319(g)(3) requires EPA to look at the Respondent's violation history. In this matter, EPA issued an Order for Compliance to Respondent on April 11, 2018, as well as an Administrative Complaint on June 18, 2018, and Administrative Order on September 22, 2017, each alleging violations of the CWA. This violation history does not warrant a reduction in the penalty component.

4. Degree of Culpability

Pursuant to 33 U.S.C. § 1319(g)(3), EPA must consider the Respondent's degree of culpability, such as how quickly the violation was corrected, Respondent's good faith efforts to resolve the matter and work with EPA, and other relevant considerations. Respondent has made no substantial good faith efforts to remedy the matter at issue. In fact, EPA's last observation of

the facility and discharge noted that not only was the area not cleaned up, but the discharge was still occuring. Further, Respondent never provided EPA with all the documents it requested, nor took any substantial steps towards working with EPA to resolve the matter.

5. Economic Benefit

33 U.S.C. § 1319(g)(3) requires EPA to consider economic benefit of noncompliance. This factor ensures the violator did not gain an economic advantage due to noncompliance and computing such benefit incorporates capital investments, one-time, non-depreciable expenditures, and annually recurring costs. EPA determined Respondent gained an economic advantage by not spending money to achieve compliance, not putting to use non-depreciable expenditures, and not spending funds annually to achieve and maintain compliance.

Because of these factors, EPA calculated the total economic benefit at $1,120, which factored into the penalty calculation.

6. Other Matters as Justice May Require

33 U.S.C. § 1319(g)(3) provides that EPA must consider all matters that justice requires, which includes if the area at issue is environmentally sensitive (e.g., endangered species present, environmental justice location, etc.). The discharge was occuring in a sensitive area as the land is owned by a tribal nation.

Pursuant to 40 CFR § 22.17(c), the "relief proposed in the complaint…shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the [CWA]." Complainant proposed to assess a total civil penalty of $64,500 for the violations set forth herein. After carefully considering the statutory factors and the entire record in this case, I find the civil penalty proposed is consistent with the record in this matter and the CWA.

IV. DEFAULT ORDER

Pursuant to 40 CFR § 22.17, Complainant's Motion is granted. Therefore, Respondent is hereby **ORDERED** to comply with all the terms herein, including as follows:

1. Respondent is assessed a civil penalty in the amount of $64,500.
    a. Payment of the full amount of the civil penalty assessed shall be made within thirty (30) days after this default order becomes final under 40 CFR § 22.27(c) by

submitting a certified check or cashier's check payable to Treasurer, United States of America, and mailed to:

Regional Hearing Clerk
EPA – Region 6
P.O. Box 360582M
Pittsburgh, PA 15251

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

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

Lorena S. Vaughn
Regional Hearing Clerk (6RC)
U.S. Environmental Protection Agency
Region 6
1201 Elm Street, Suite 500
Dallas, TX 75270-1201

2. This Default Order constitutes an Initial Decision, as provided in 40 CFR § 22.17(c). This Initial Decision shall become a final order 45 days after its service upon the parties and without further proceedings unless (1) a party appeals the initial decision to the Environmental Appeals Board if done so within thirty (30) days from the date of service provided in the certificate of service accompanying this order, (2) a party moves to set aside the Default Order, or (3) the Environmental Appeals Board elects, *sua sponte*, to review the initial decision on its own initiative. 40 CFR §§ 22.27(c), 22.30(a).

SO ORDERED, this 12th day of March, 2021.

Rucki, Thomas

Digitally signed by Rucki, Thomas
DN: cn=Rucki, Thomas, email=Rucki.Thomas@epa.gov
Date: 2021.03.12 11:15:42 -06'00'

THOMAS RUCKI
REGIONAL JUDICIAL OFFICER

CERTIFICATE OF SERVICE

I hereby certify that on this 12 day of March, 2021, I served true and correct copies of the foregoing Initial Decision and Default Order on the following in the manner indicated below:

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Ryan Summers
Diamond 3S, LLC
20102 West Coyote Trail
Sand Springs, OK 74063

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

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

COPY HAND/E-MAIL DELIVERED

Rusty Herbert
Enforcement Counsel (6RC-EW)
U.S. EPA - Region 6
10625 Fallstone Road
Houston, Texas 77099

Branch Chief
Water Enforcement Branch (6RC-EW)
Office of Regional Counsel
U.S. EPA - Region 6
1201 Elm Street
Dallas, Texas 75270-1201

Lorena S. Vaughn
Regional Hearing Clerk