



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

IN THE MATTER OF:)
) U.S. EPA Docket No. CWA-09-2021-0049
) INITIAL DECISION AND ORDER ON
) MOTION FOR PARTIAL DEFAULT
FRANK ALO,) (LIABILITY)
)
Respondent.)
_____)

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) moved for a Partial Default Order on liability under § 22.17(b) of the Consolidated Rules. Pursuant to the Consolidated Rules, the record in this matter, the following findings of fact, and conclusions of law, a Partial Default Order as to liability is entered against Frank Alo (Respondent). The issue of an appropriate penalty is referred to the Complainant for further action.

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 that if a default has occurred, the Presiding Officer 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. Respondent has made no showing that good cause exists to defeat Complainant's Motion for Default Order.

FINDINGS OF FACT

1. Respondent is an individual and therefore a "person" within the meaning of section 502(5) of the CWA, 33 U.S.C. § 1362(5). *See* Complainant's Memorandum in Support of Motion for Default, Exhibit A, Complaint at ¶4.
2. Respondent owns the real Property at 54-028 Kukuna Road, Hauula, Hawaii identified by a State of Hawaii Tax Map Key ("TMK") 5-4-001-013. *Id.* at ¶5.
3. Respondent's real property adjoins four parcels of land owned by other persons and entities, including the State of Hawaii and the CCH. *Id.* at ¶6.
4. Respondent's real property, and portions of the four adjoining parcels of land referenced in

paragraph 6 of the Complaint, contains wetlands that are adjacent to and abut a perennial tributary to the Pacific Ocean. *Id.* at ¶7.

5. Based on inspections conducted by representatives of the Corps, Honolulu District on May 18, 2018, and by representatives of EPA Region 9 on July 22, 2020, and other information available to EPA, including Respondent's February 26, 2020 response to EPA's December 5, 2019 information request made pursuant to EPA's information gathering authorities at section 308 of the CWA, 33 U.S.C. § 1318, Respondent, or persons acting on behalf of Respondent, operated equipment on or around February 12, 2018, and possibly thereafter on dates best known to Respondent, which discharged approximately 200 truckloads of gravel, asphalt, clay, dirt and other fill material to waters of the United States located on Respondent's real property and also onto portions of the four other adjoining parcels of land referenced in paragraph 6 above, referred to together as "the Site." Respondent's activities at the Site include the discharge of fill material to approximately 0.77 acres of wetlands. *Id.* at ¶8.
6. The fill referenced in paragraph 8 of the Complaint, including gravel, asphalt, clay, dirt and other fill material, which Respondent discharged to "waters of the United States," constitutes a "pollutant" within the meaning of section 502(6) of the CWA, 33 U.S.C. § 1362(6), which includes, *inter alia*, "dredged spoil," "biological materials," "rock," and "sand." *See also* Exhibit A, Complaint at ¶9.
7. The equipment referenced in paragraph 5 above, which discharged fill material to "waters of the United States," constitutes a "point source" within the meaning of section 502(14) of the

CWA, 33 U.S.C. § 1362(14), which defines “point source” to include any discernible, confined and discrete conveyance... from which pollutants are or may be discharged.” *Id.* at ¶10.

8. On June 10, 2021, EPA issued an Administrative Order for Compliance, Docket No. CWA-309(a)-21-001 (“Order”), ordering Respondent to remove the unauthorized fill from the wetlands at the Site and restore the wetlands in accordance with EPA and Corps requirements. *Id.* at ¶12.
9. Respondent has not completed the work under the Order. *Id.* at ¶13.
10. Complainant initiated this proceeding by filing a Complaint, Notice of Proposed Penalty, and Notice of Opportunity to for a Hearing (Complaint) against Respondent on July 1, 2021. Complainant alleged Respondent violated Section 301(a) of the CWA, 33 U.S.C. §1311(a), by discharging materials into the waters of the United States without authorization under section 404 of the CWA. *See* Motion for Partial Default, Exhibit A.
11. Pursuant to 40 C.F.R. § 22.15(a), Respondent was required to file a written answer to the Complaint within thirty (30) days after service of the Complaint. The Complaint explicitly states on page 5, in the section entitled *Answer and Notice of Opportunity to Request a Hearing*:

23. To avoid being found in default, which constitutes an admission of all facts alleged in the Complaint and a waiver of the right to hearing, Respondent must file a written answer and request a hearing within thirty (30) days of service of this Complaint.

Complainant completed service of the Complaint on July 6, 2021. Therefore, Respondent’s

written answer had to be filed on or before August 9, 2021. *See* Motion for Partial Default, Exhibit A.

12. Respondent did not file an answer to the Complaint. *See* Motion for Partial Default, Exhibit C.
13. Complainant unsuccessfully tried to contact Respondent by mail, phone and by email. *See* Motion for Partial Default, Exhibit B.
14. Complainant filed a Motion for Partial Default (Liability) on February 3, 2022.
15. Complainant served the moving papers on Respondent on February 7, 2022. *See* Declaration of Scott McWhorter RE: Notice of Delivery of Complainant's Motion for Partial Default (Liability). Pursuant to 40 C.F.R. § 22.16(b), Respondent had fifteen days from the service of the Motion to file its opposition papers.
16. Respondent did not file a timely opposition to Complainant's Motion for Partial Default.

CONCLUSIONS OF LAW

1. Respondent, by discharging fill material to "waters of the United States" at the Site without authorization under section 404 of the CWA, 33 U.S.C. § 1344, violated section 301(a) of the CWA, 33 U.S.C. § 1311(a).
2. Jurisdiction is conferred by Section 309 of the CWA, 33 U.S.C. § 1319.
3. The Complaint in this action was properly served upon Respondent in accordance with 40 C.F.R. § 22.5(b) of the Consolidated Rules.
4. Respondent's failure to timely file an Answer to the Complaint, or otherwise respond to the Complaint, constitutes a default by Respondent pursuant to 40 C.F.R. § 22.17(a).

5. Respondent's default constitutes an admission of the allegations and a waiver of Respondent's right to a hearing on such factual allegations pursuant to 40 C.F.R. § 22.17(a) and 40 C.F.R. § 22.15(d).
6. Respondent's failure to file a timely answer to the Complaint is grounds for an entry of a default order as to liability against Respondent. 40 C.F.R. § 22.17.

ORDER

In accordance with 40 C.F.R. § 22.17(c), "the relief proposed in the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act." Based on the record and the Findings of Fact set forth above, I hereby find that Frank Alo is in default and is liable as a matter of law for the violations set forth in the Complaint in this matter. The issue of an appropriate penalty is referred to the Complainant for further action.

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 appeal with the Environmental Appeals Board. 40 C.F.R. §22.27(a). The Environmental Appeals Board's filing procedures can be found at:

[https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/General+Information/
Electronic+Submission?OpenDocument](https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/General+Information/Electronic+Submission?OpenDocument)

If 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, the respondent waives its right to judicial review. Each party shall bear its own costs in bringing or defending this action.

IT IS SO ORDERED:

**STEVEN
JAWGIEL** Digitally signed by
STEVEN JAWGIEL
Date: 2022.06.15
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Steven L. 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 Motion for Partial Default (Liability), 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
[REDACTED]

Complainant:

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

Digitally signed by Tu,
Ponly
Date: 2022.06.15
17:18:16 -07'00'

Ponly J. Tu
Regional Hearing Clerk
U.S. EPA, Region 9