



UNITED STATES  
 ENVIRONMENTAL PROTECTION AGENCY  
 REGION 6  
 DALLAS, TEXAS



	)	
IN THE MATTER OF:	)	
	)	
CHARLIE MORTILLERO d/b/a	)	
CHARLIE'S AUTO WRECKERS	)	CWA DOCKET NO. VI-99-1622
	)	
RESPONDENT	)	
	)	
	)	

**ORDER PARTIALLY GRANTING AND PARTIALLY DENYING COMPLAINANT'S MOTION FOR DEFAULT ORDER**

**I. BACKGROUND AND PROCEDURAL HISTORY**

On May 28, 1999, the Complainant filed an Administrative Complaint (Complaint) against the Respondent, alleging violations of the Clean Water Act (CWA). The Complaint sought a \$27,500 civil penalty. The Respondent did not file an answer. However, the Complainant did not show that the Respondent received a copy of the Complaint by filing proof of service, as required by 40 C.F.R. § 22.5(b)(1)(iii). Therefore, on February 14, 2000, the Presiding Officer issued an Order to Show Cause, requiring the Complainant to file proof of service of the Complaint by February 25, 2000, or show cause why the Complaint should not be dismissed without prejudice for failing to complete service. If the Complainant filed proof of service, it was also ordered to file a motion for a default order by

March 6, 2000, or show cause why the Complaint should not be dismissed for lack of prosecution.

On February 23, 2000, the Complainant filed a Motion for Default Order. On April 27, 2000, the Presiding Officer found that the Respondent was in default and thus admitted all facts alleged in the Complaint and waived its right to contest such factual allegations. However, the Presiding Officer also found that the Complainant failed to show that it pled a prima facie case in its Complaint, and failed to state the legal and factual grounds for the proposed penalty. Thus, the Presiding Officer concluded that good cause existed for not entering a default order. Therefore, the Complainant was ordered to file another motion for default by May 19, 2000. Order Denying Complainant's Motion for Default at 8 (April 27, 2000). On May 19, 2000, the Complainant filed another motion for default.

## **II. DISCUSSION**

### **A. LIABILITY**

The Complainant has alleged that the Respondent unlawfully discharged pollutants into waters of the United States, in violation of Section 301 of the CWA, 33 U.S.C. § 1311. Complaint ¶ 15. Section 301(a) of the CWA, 33 U.S.C. § 1311(a) prohibits, *inter alia*, the discharge of a pollutant by any person except in compliance with a National Pollutant Discharge Elimination System (NPDES) permit

(Section 402 of the CWA, 33 U.S.C. § 1342). The NPDES permit program requires permits for the discharge of pollutants from point sources into navigable waters.<sup>1</sup> See 40 C.F.R. § 122.1(b). The Complainant alleges that the Respondent discharged pollutants from a point source into waters of the United States without an NPDES Storm Water Permit. Complaint ¶¶ 7 - 15.

In 1987, Congress added Section 402(p) to the CWA to establish a comprehensive framework for addressing storm water discharges under the NPDES program. Section 402(p)(4) of the CWA, 33 U.S.C. § 1342(p)(4), clarified the requirements for EPA to issue NPDES permits for storm water discharges associated with industrial activity. On November 16, 1990, EPA promulgated regulations which defined the term "storm water discharge associated with industrial activity." 60 *Fed. Reg.* 50804, 50807 (September 29, 1995).<sup>2</sup> On September 29, 1995, EPA issued the Storm Water Multi-Sector General Permit for Industrial Activity (NPDES Storm Water Permit). 60 *Fed. Reg.* 50804. This general permit authorized storm water discharges associated with industrial activity to waters of the United States only in accordance with the conditions of the permit.

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<sup>1</sup>"Navigable waters" means "waters of the United States". 33 U.S.C. § 1362(7).

<sup>2</sup>These regulations have been modified several times.

With the foregoing in mind, the general elements of liability which must be proven in order for the Presiding Officer to enter a default order as to liability are as follows:

1. The Respondent is a "person", as that term is defined by Section 502(5) of the CWA, 33 U.S.C. § 1362(5);

2. The Respondent discharged "pollutants" as that term is defined by Section 502(6) of the CWA, 33 U.S.C. § 1362(6);

3. The pollutants were added to "navigable waters", as that term is defined by Section 502(7) of the CWA, 33 U.S.C. § 1362(7);

4. The pollutants were added to the navigable waters by a "point source", as that term is defined by Section 502(14) of the CWA, 33 U.S.C. § 1362(14);

5. The Respondent was required to obtain an NPDES Storm Water Permit prior to discharge of such pollutants. Section 402 of the CWA, 33 U.S.C. § 1342; and

6. The Respondent failed to obtain an NPDES Storm Water Permit prior to discharge of such pollutants, and thus violated Section 301 of the CWA, 33 U.S.C. § 1311.

The following is a summary of the facts set forth in the Complaint. The Respondent owns and operates a auto salvage yard in New Orleans, Louisiana. EPA issued a general permit for storm water discharges associated with industrial activity. Facilities subject

to storm water discharges associated with industrial activity are considered point sources. The Respondent's SIC code is 5015, and thus the Respondent is considered to be engaging in industrial activity. Therefore, the Respondent was required to obtain an NPDES Storm Water Permit prior to the discharge of any pollutants into waters of the United States. The Respondent discharged pollutants into Lake Pontchartrain, which meets the definition of a water of the United States. The Respondent failed to obtain an NPDES Storm Water Permit prior to discharging pollutants, and thus is in violation of the Clean Water Act.

However, the Complaint doesn't identify the pollutant which was discharged. It just makes the legal conclusion that a pollutant has been discharged. One has to infer from reading the Complaint that the pollutant(s) is contained in the storm water associated with industrial activity. The Complainant could have helped out in this matter by providing an analysis in its default motion of how a prima facie case was pled in the Complaint. That was the intent of the Presiding Officer when he pointed the Complainant to examples of the type of analysis needed to prove a prima facie case. Order Denying Complainant's Motion for Default Order at 8, fn 4.

Rather, the Complainant just realleged the various paragraphs of the Complaint. This does not constitute analysis. If the Presiding Officer just wanted the Complainant to reallege various

paragraphs of the Complaint, there would be no reason to require the Complainant to provide an analysis. The Presiding Officer could just review the Complaint in the Regional Hearing Clerk's file. The Complainant will be required to provide an such an analysis in the future. Absent this analysis, the Presiding Officer will not grant future motions for default (even if the same form Complaint that the Complainant has used for this case is used).

**B. ANALYSIS OF COMPLAINT**

Based on the foregoing, the Complainant has stated a cause of action. The Complainant alleged the following in the administrative complaint:

1. The Respondent is a an individual and thus a "person", as that term is defined by Section 502(5) of the CWA, 33 U.S.C. § 1362(5), and 40 C.F.R. § 122.2. Complaint ¶ 1.

2. The Respondent discharged "pollutants". Complaint ¶¶ 4, 12, and 15.

3. The pollutants were added to Lake Pontchartrain, which is "waters of the United States" within the meaning of Section 502 of the CWA, 33 U.S.C. § 1362 and 40 C.F.R. § 122.2. Complaint ¶ 4.

4. The pollutants were added to the waters of the United States by Respondent's facility, a "point source". Complaint ¶¶ 2, 3, 4, 12, and 15.

5. The Respondent was required to obtain an NPDES Storm Water Permit prior to discharge of such pollutants. Complaint ¶¶ 7 - 12;

6. The Respondent failed to obtain an NPDES Storm Water Permit prior to discharge of such pollutants. Complaint ¶¶ 13 - 15.

Therefore, the Respondent violated Section 301 of the CWA, 33 U.S.C. 1311, and a default order on liability will be entered against the Respondent.

However, as to the issue of penalty, the Complainant's motion falls short. Although it appears on the surface that the Complainant proved its penalty case, this is not the case. Instead of providing an affidavit setting forth the factual allegations supporting the proposed penalty, the Complainant set forth the alleged facts in its motion. The so called facts set forth in the motion are not evidence, but actually arguments of counsel. See *British Airways Board v. Boeing Company*, 585 F.2d 946, 952 (9<sup>th</sup> Cir. 1978) (legal memoranda not evidence); *cert denied*, 440 U.S. 981, 99 S.Ct. 1790 (1979). The Declaration of Thea Lomax (Attachment 3 to Motion for Default Order) only makes a conclusory allegation that the penalty was calculated in accordance with the statutory factors and penalty policy. As previously noted, this Declaration is insufficient to prove that the Complainant is entitled to a \$27,500 civil penalty. Order Denying Motion for Default Order at 7 (April 27, 2000).

Any facts in support of a proposed penalty need to be set forth in an affidavit or declaration.<sup>3</sup> Any documents relied upon should also be referenced in the affidavit and attached to the affidavit as an exhibit. Thus, the documents submitted by the Complainant are not sufficient to prove that the Complainant is entitled to a \$27,500 civil penalty. See 40 C.F.R. § 22.17(b) (movant must state the factual grounds for the penalty). Therefore, good cause exists for not granting a motion for default on the issue of penalties. See 40 C.F.R. § 22.17(c). Thus, the Complainant will have to resubmit a motion for default on penalties.

Based on the foregoing, I make the following findings of fact and conclusions of law:

1. Mr. Charles Mortillero (Respondent) is an individual doing business as Charlie's Auto Wreckers.

2. As an individual, the Respondent is a "person", as that term is defined by Section 502(5) of the CWA, 33 U.S.C. § 1362(5), and 40 C.F.R. § 122.2.

3. The Respondent owns and operates an auto salvage yard located at 9025 Old Gentilly Road, New Orleans, Orleans Parish, Louisiana.

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<sup>3</sup>28 U.S.C. § 1746 provides that an unsworn declaration under penalty of perjury may be used in place of an affidavit.



4. The Standard Industrial Classification (SIC) Code for the Respondent's facility is 5015.

5. The activity at the Respondent's facility is an "industrial activity", as defined by 40 C.F.R. § 122.26(b)(14).

6. The Respondent discharged storm water associated with industrial activity to Lake Pontchartrain.

7. The discharge of storm water associated with industrial activity contained "pollutants", as that term is defined by Section 502(6) of the CWA, 33 U.S.C. § 1362(6), and 40 C.F.R. § 122.2;

8. The Respondent's facility is a "point source", as that term is defined by Section 502(14) of the CWA, 33 U.S.C. § 1362(14), and 40 C.F.R. §§ 122.2 and 122.26(b)(14).

9. Lake Pontchartrain is a "navigable water", as that term is defined by Section 502(7) of the CWA, 33 U.S.C. § 1362(7).

10. Under Section 301 of the CWA, 33 U.S.C. § 1311, it is unlawful for any person to discharge any pollutant from a point source to navigable waters except with the authorization of, and in compliance with an NPDES permit issued pursuant to Section 402 of the Act, 33 U.S.C. § 1342.

11. The Respondent was required to obtain an NPDES Storm Water Permit prior to discharging pollutants into navigable waters.

12. The Respondent did not obtain an NPDES Storm Water Permit prior to discharging pollutants into navigable waters.

13. The Respondent's discharges were unpermitted and therefore not in compliance with Section 301 of the CWA, 33 U.S.C. § 1311.

14. Therefore, the Respondent violated Section 301 of the CWA, 33 U.S.C. § 1311.

Thus, the Presiding Officer enters an order of default as to liability against the Respondent. However, the Complainant's motion for default as to penalties is denied for the reasons set forth above. Therefore, it is hereby **ORDERED** that the Complainant shall file a motion for default order on penalties in accordance with this order by **August 25, 2000**.

Dated this 4<sup>th</sup> day of August, 2000.

/S/\_\_\_\_\_  
Evan L. Pearson  
Regional Judicial Officer

**CERTIFICATE OF SERVICE**

I hereby certify that on the 4<sup>th</sup> day of August, 2000, I served true and correct copies of the foregoing Order Granting in Part and Denying in Part Complainant's Motion for Default Order on the following in the manner indicated below:

**CERTIFIED MAIL - RETURN RECEIPT REQUESTED P 110 194 647**

Charles Mortillero  
Charlie's Auto Wreckers  
9025 Old Gentilly Road  
New Orleans, Louisiana 70127-4333

**INTEROFFICE MAIL**

Gary Smith  
Assistant Regional Counsel (6RC-EW)  
U.S. EPA - Region 6  
1445 Ross Avenue  
Dallas, Texas 75202-2733

Marvin Benton, Chief  
Water and RCRA Enforcement Branch (6RC-EW)  
U.S. EPA - Region 6  
1445 Ross Avenue  
Dallas, Texas 75202-2733

/S/ \_\_\_\_\_  
Evan L. Pearson  
Regional Judicial Officer