UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10

IN THE MATTER OF	)	
	)	**Docket No. CWA-10-2004-0139**
STANLEY PIENIAZEK	)	**Proceeding under Sections**
Fairbanks, Alaska	)	**301 and 404 of the Clean Water Act,**
	)	**33 U.S.C. §§ 1311 and 1344**
Respondent.	)	
	)	

DEFAULT ORDER /INITIAL DECISION

On August 10, 2004, the United States Environmental Protection Agency, Region 10 ("EPA", "Agency", or "Complainant") filed a motion pursuant to Section 22.17(a) of the Consolidated Rules of Practice, 40 C.F.R. § 22.17(a)[1], to find **STANLEY PIENIAZEK** ("the Respondent") in default for failing to file a timely answer to an Administrative Complaint and Notice of Opportunity for Hearing ("Complaint"), issued under section 309(g)(2)(B) of the Clean Water Act ("CWA", or "the Act"), as amended, 33 U.S.C. § 1319(g)(2)(B), alleging violations of sections 301(a), and 404 of the CWA as amended, 33 U.S.C. §§ 1311(a) and 1344, and regulations promulgated pursuant thereto. For the alleged violations, the Complainant is requesting the assessment of an administrative penalty, pursuant to Section 309(g)(2)(B) of the Act, 33 U.S.C. § 309(g)(2)(B), in the amount of **Ten Thousand ($10,000.00) dollars.**

This proceeding is governed by EPA's ***Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation or Suspension of Permits***, 40 C.F.R. Part 22, Fed. Reg./Vol. 64, N. 141/July 23, 1999 ("Consolidated Rules of Practice," "Consolidated Rules", or "the Rules"). Section 22.17(a) of the Consolidated Rules, 40 C.F.R. § 22.17(a), authorizes a finding of *default* upon failure of the Respondent to timely answer a Complaint. Section 22.15(a) of the Consolidated Rules, 40 C.F.R. § 22.15(a), requires that an answer to the Complaint be filed with the Regional Hearing Clerk within thirty (30) days after service. The Rules further provide that *default* by Respondent constitutes, for purposes of the pending proceeding, an admission of all facts alleged in the Complaint and a waiver of Respondent's right to a hearing on such factual allegations[2]. Section 22.17(c) of the Consolidated Rules, 40 C.F.R. § 22.17(c), provides that

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[1] "Complainant's Motion for Default Order", dated August 10, 2004, Attached. All references to Exhibits herein, i.e. id,, are to Exhibits included in, and attached to the subject Complainant's Motion for Default Order,

[2] Section 22.17(a) of the Consolidated Rules, 40 C.F.R. § 22.17(a)

when the Presiding Officer finds that default has occurred, a *default order* shall be issued against the defaulting party, unless the record shows good cause why a *default order* should not be issued. Section 22.17(c) of the Consolidated Rules, 40 C.F.R. § 22.17(c), provides that the relief proposed in the Complaint, or the motion for default, shall be ordered unless the record clearly demonstrates that the requested relief is inconsistent with the record of these proceedings, or the Act. This order shall constitute an *Initial Decision* in this matter, under Section 22.27 of the Consolidated Rules of Practice, 40 C.F.R. § 22.27.

For the reasons set forth below, the Respondent is found in *default* for failing to answer the Complaint, and assessed a civil penalty in the amount of **Ten Thousand dollars ($10,000.00).**

I. FINDINGS OF FACT

1. On April 15, 2003, the United States Environmental Protection Agency, Region 10, issued a Compliance Order ("Order) against Stanley Pieniazek ("the Respondent"), alleging the unlawful discharge of dredged or fill material into waters of the United States without authorization by a U.S. Army Corps of Engineers ("Corps") permit, as required by Section 404 of the Act, U.S.C. § 1344, in violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a).

2. Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant into waters of the United States by any person, except as authorized by a permit issued pursuant to Section 402 or 404 of the Act, 33 U.S.C. § 1342 or 1344. Each discharge of pollutants from a point source that is not authorized by such a permit constitutes a violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a).

3. Respondent owns, possesses, and/or controls property in the Fairbanks North Star Borough, Alaska, known as Lot 13 of the Ballaine Lake Subdivision, Section 31, Township 1 North, Range 1 West, Fairbanks Meridian. Lot 13 is hereinafter referred to as the "Site".

4. The Site is comprised in its entirety of open water and wetlands meeting the three criteria for jurisdictional wetlands in the 1987 "Federal Manual for Identifying and Delineating Jurisdictional Wetlands".

5. The Site's open water and wetlands complex are hydrologically connected and adjacent to an unnamed creek which is tributary to Noyes Slough.

6. Noyes Clough is a navigable-in-fact water body and contributes its flow through the Chena, Tanana, and Yukon Rivers to the Bering Sea. The Bering Sea is subject to the ebb and flow of the tide.

7. The Site's open water and wetlands are "waters of the United States" within the meaning of 33 C.F.R. § 328(a) and 40 C.F.R. § 232.2 and therefore are "navigable waters" within the meaning of Section 502(7) of the Act, 33 U.S.C. 1362(7).

8. Beginning in the summer of 1999 and continuing at least through September 2002, Respondent, at various times and at various locations within the Site, directed the operations of dump trucks and other earthmoving equipment to discharge gravel, dirt, sand, sod, and other materials into jurisdictional open waters and wetlands at the Site.

9. As of the date of the May 10, 2004, "Complaint", the gravel, dirt, sand sod, and other materials referenced in the preceding paragraph remain in place.

10. The gravel, dirt, sand, sod and other materials referenced in Paragraph 8 above constitute "fill material" and/or "dredged material" within the meaning of 40 C.F.R. § 232.2 and "pollutant[s]" withing the meaning of Section 502(6) of the Act, 33 U.S.C. § 1362(6), and 40 C.F.R. § 232.2.

11. Each piece of earthmoving equipment referenced in Paragraph 8 above is a '"point source" within the meaning of Sections 502(14) of the Act, 33 U.S.C. § 1362(14).

12. By causing such dredged or fill material to enter waters of the United States, Respondent has engaged in the "discharge of pollutants" from a point source within the meaning of Sections 301(a) and 502(12) of the Act, 33 U.S.C. §§ 1311(a) and 1362(12).

13. Respondent's discharge of pollutants was not authorized by any permit issued pursuant to Section 402 or 404 of the Act, 33 U.S.C. § 1342 or 1344.

14. Respondent's discharge of pollutants into waters of the United States without a permit under the Act is in violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a).

15. Each day the dredged or fill material remains in place without the required permit constitutes an additional day of violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a).

16. On April 16, 2003, Respondent was issued an Administrative Compliance Order ("Order") issued pursuant to Sections 308 and 309(a) of the Act, 33 U.S.C. §§ 1318 and 1319(a), requiring Respondent to perform certain work and to provide certain information related to restoration of the Site.

17. On August 11, 2003, EPA visited the Site and determined that Respondent had not taken any action towards restoring the wetlands as directed in the April 16, 2003, Order.

18. As of the date of the subject Complaint Respondent had not responded to the April 2003 Order and is therefore in violation of that Order.

19. On May 11, 2004, Complainant filed a Complaint, with the Regional Hearing Clerk, proposing assessment of a $10,000.00 civil penalty for Respondent's violation of the Act. The Complaint was served on Respondent on May 26, 2004.

20. The Complaint notified Respondent that " [t]o avoid a default order being entered, pursuant to 40 C.F.R. § 22.17, Respondent must file a written Answer to the Complaint with the Regional Hearing Clerk within thirty (30) days after service of the Complaint." This time period expired on June 25, 2004.

21. On August 10, 2004, the Complainant filed a Motion for Default Order to find the Respondent in default for failing to file a timely answer to the Complaint. As of the date of that Motion, the Respondent has yet to file an Answer to the Complaint.

II. DEFAULT BY RESPONDENT

As stated above, under Section 22.15(a) of the Consolidated Rules, 40 C.F.R. § 22.15(a), the Respondent is required to file an answer to the Complaint, within 30 days after service of the Complaint. Further, section 22.17(a) of the Consolidated Rules, 40 C.F.R. § 22.17(a), provides that after motion, a party may be found to be in default for failure to file a timely answer to the Complaint.

In the instant case, the Complaint was filed with the Regional Hearing Clerk on May 11, 2004. The Complaint was served on the Respondent on May 26, 2004. Respondent's Answer to the Complaint was due to be filed with the Regional Hearing Clerk ". . . within 30 days after service of the Complaint" - by June 25, 2004. Notwithstanding, to date, nearly eight months later, the Respondent has yet to file an answer to the Complaint.

On August 10, 2004, the Complainant filed a Motion for Default Order with the Regional Hearing Clerk. As of the date of that Motion, the Respondent had still not filed an answer to the Complaint. Pursuant to Section 22.17(a) of the Consolidated Rules, 40 C.F.R. § 22.17(a), and based on the entire Administrative Record of these proceedings, I find the Respondent, **Stanley Pieniazek,** in default, for failing to file a timely answer to the Complaint. I hereby grant the Complainant's August 10, 2004, Motion for Default.

III. DETERMINATION OF LIABILITY

For a default order to be entered against the Respondent, the Presiding Officer must conclude that Complainant has established a ***prima facie*** case of liability against the Respondent. To establish a ***prima facie*** case of liability, Complainant must present evidence sufficient to establish a given fact . . . which if not rebutted or contradicted, will remain sufficient . . . to

sustain judgment in favor of the issue which it supports, but which may be contradicted by other evidence." **Black's Law Dictionary** 1190 (6th ed. 1990).

The facts alleged in the Complaint, and published in part above, as Findings of Fact in this matter, establish jurisdiction over the Respondent and that the Respondent violated the sections 301(a) and 404 of the CWA, 33 U.S.C. §§ 1311(a) and 1344.

DISCUSSION

In order to establish a prima facie case against the Respondent for violating Section 301(a) and 404 of the CWA, 33 U.S.C. §§ 1311(a) and 404, by discharging pollutants (dredge and fill materials) into waters of the United States without a Corps of Engineers permit or other authorization, the Complainant must show that: (1) a person, (2) discharged, (3) a pollutant, (4) into waters of the United States, (5) from a point source, (6) without a permit or other authorization. See In re Phoenix Construction Services, Inc., CWA Appeal No. 02-07, slip op. At 6 (EAB April 15, 2004). Complainant alleges that:

1. Respondent is an individual and therefore a "person" within the meaning of Sections 301(a) and 502(5) of the Act, 33 U.S.C. §§ 1311(a) and 1362(5). See Complainant's Ex. 1 at ¶ 2.2 Respondent owns, possesses, and/or controls the Site. Id. at ¶ 2.3; see also Ex. 5;

2. Respondent directed trucks and other earthmoving equipment to discharge gravel, dirt, sand, sod, and other materials at the Site. Ex. 1 at, ¶ 3.1. "Discharge" is defined as "any addition of any pollutant to navigable waters from any point source: 3 U.S.C. § 1362912);

3. The earthmoving equipment used to discharge the fill or dredged material at the Site is a "point source: within the meaning of Section 502(14) of the Act, 33 U.S.C. § 1362(14). Ex. 1 at ¶ 3.4; Concerned Area Residents for the Environment v. Southview Farm, 34 F. 3d 114, 118 (2d Cir. 1994)(tractors constitute "point sources"); Avoyelles Sportsmen's League v. Marsh, 715 F. 2d 897, 922 (5th Cir. 1983) (bulldozers and backhoes constitute "point sources"); Avoyelles Sportsmen's League v. Alexander, 473 F. Supp. 525, 532 (W.D. La. 1979);

4. The gravel, dirt sand, sod, and other materials Respondent discharged at the Site constitute "fill material" and/or "dredged material" within the meaning of 40 C.F.R. § 232.2 and "pollutant[s]" within the meaning of Section 502(6) of the Act, 33 U.S.C. § 1362(6), and 40 C.F.R. § 232.2 Ex. 1 at ¶ 3.3; United States v. Pozsgai, 999 F. 2d. 719, 724 (3d Cir. 1993) ("pollutants" include fill material dredged spoil, rock , and sand), cert denied, 510 U.S. 1110 (1994); Rybachek v. United States, 904 F. 2d. 1276, 1285 (9th Cir. 1990) (dirt is a pollutant);

5. The Site is comprised of open water and wetlands that meet the three criteria for jurisdictional wetlands in the 1987 "Federal Manual for Identifying and Delineating Jurisdictional Wetlands." Id. at ¶ 2.4. The Site's open water and wetlands complex are hydrologically connected and adjacent to an unnamed creek that is a tributary of Noyes Slough, which is a navigable-in-fact water body. Id. at ¶ 2.6-2-7; 33 C.F.R. § 328.3(a); 40 C.F.R. § 230.3(s) (defining "water of the United States" to include tributaries of navigable-in-fact water-bodies and wetlands adjacent to such tributaries), and are "waters of the United States" within the meaning of Section 502(7) of the Act, 33 U.S.C. § 1362(7);

6. Respondent has not applied for or obtained a Section 404 permit from the Corps authorizing the discharges, as required by Section 301 of the Act, 33 U.S.C. ¶ 1311. Ex. 1 at ¶ 3.6; see generally Ex. 4.

Since the Respondent did not file an Answer to the Complaint, it has presented no evidence to contravene the above facts alleged by the Complainant. The Findings of Fact, set forth above, along with the allegations set forth in the Complaint, which are incorporated herein by reference, are hereby found to establish a prima facie case against the Respondent for violating Section 301(a) of the Act, 33 U.S.C. § 1311(a), by discharging pollutants, from a point source, into waters of the United States, without a permit.

Section 22.17 of the Consolidated Rules, 40 C.F.R. § 22.17, provides that . . . "[d]efault by respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the Complaint and a wavier of Respondent's right to contest such factual allegations." The Respondent was found in default, in **Paragraph II above**, for failing to file a timely answer to the Complaint. All the facts alleged in the Complaint and set forth herein are hereby admitted, and the Respondent has waived its rights to contest such factual allegations.

Based on the entire Administrative Record, of these proceedings and the facts herein admitted, I find the Respondent liable for violating Sections 301(a) and 404 of the Act, 33 U.S.C. §§1311(a) and 1344, as alleged in the Complaint.

IV ASSESSMENT OF ADMINISTRATIVE PENALTY

Under the section 22.27(b) of the Consolidated Rules of Practice, 40 C.F.R. § 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 Act. The Presiding Officer shall consider any civil penalty guidelines issued under the Act. If the Respondent has defaulted, the Presiding Officer shall not assess a penalty greater than that proposed by Complainant in the Complaint . . . , or motion for default, whichever is less."

The Court has made it clear that notwithstanding a Respondent's default, the Presiding Officer must consider the statutory criteria and other factors in determining an appropriate

penalty. Katzson Brothers Inc. v. U.S. EPA 839 F.2d 1396 (10th Cir. 1988). Moreover, the Environmental Appeals Board has held that the Board is under no obligation to blindly assess the penalty proposed in the Complaint. Rybond, Inc. RCRA (3008) Appeal No. 95-3, 6 E.A.D. 614 (EAB, November 8, 1996).

The Agency has not issued any civil penalty policy guidelines under the Clean Water Act. But Section 309(g)(3) of the Act, 33 U.S.C. §1319(g)(3), sets forth the following statutory criteria for assessing civil penalties, under the Act:

> "In determining the amount of any penalty assessed under [the Act] the Administrator . . ., 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 violation, and such other matters as justice may require."

In determining the appropriate penalty in this matter I relied on the statutory factors set forth above, as applied by the Complainant in it Memorandum in Support of it Motion for Default Order. In addition, this tribunal was guided by the Agency's general enforcement policy for assessing civil penalties set forth in GM-21 and GM-22[3].

DISCUSSION.

1. **Seriousness of Violations.**

In determining the seriousness of the violations the courts have considered the number, degree and duration of the violations, as well as the actual and potential harm to human health and the environment. In the instant case, the seriousness of the violations was determined by evaluating the nature, circumstances, extent and gravity of the violations, in accordance with Section 309(g)(3) of the Act, 33 U.S.C. §1319(g)(3). Friends of the Earth, Inc. v. Laidlaw Envtl. Serv. (TOC), Inc., 956 F. Supp. 588, 602 (D.S.C. 1997) The Complainant noted that the Respondent's discharge of dredged or fill material has buried and threatens to destroy 0.13 acres of wetland and open water areas. The Site's wetlands provide numerous water quality and aquatic ecosystems benefits, and Respondent's failure to act promptly, to remove the illegal discharge of dredge and fill material, has decreased the probability of a successful restoration. Id. at ¶ 4.3.

2. **History of Such Violations**.

In determining the "history of violations ", courts consider the duration of Respondent's

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[3] (1) GM-21, Policy on Civil Penalties ("the Penalty Policy"), and (2) GM-22, A Frame work for Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties (the "Penalty Framework"), both dated February 16, 1984.

current violations, whether Respondent has committed similar violations in the past, and the duration and nature of all violations, including whether the violations are perpetual or sporadic. In the instant case, Complainant determined that, based on the evidence currently available to it, Respondent has no prior history of similar violations.

3. **Degree of Culpability.**

In determining the appropriate civil penalty courts also consider whether the Respondents took any action to increase or decrease the number of violations, or made any effort to mitigate the impact of their actions on the environment. The Complainant determined that the Respondent had little or no degree of culpability for the initial 1999 filling activity. However, the record establishes the Respondent has continued to violate the Act after being informed of the Section 404 program on multiple occasions by the Corps and EPA. Id. at 4.6; see also generally Ex. 4. Additionally, Respondent was unresponsive to the April 2003 Order and has demonstrated a pattern of refusing service and communication from regulatory agencies. Ex. 1 at 4.6; see also generally Ex. 4. Standing alone, Respondent's degree of culpability, as evidenced by repeated, unpermitted discharges and non-responsiveness to EPA and the Corps, warrants a substantial civil penalty. See In re Dr. Marshall C. Sasser, 3 E.A.D. 703, 708 (CJO 1991) (noting that wilful disregard of the Section 404 permitting process and refusal to comply with restoration orders are ground supporting assessment of maximum penalty); in re Urban Drainage and Flood Control District, et al., 1998 EPA, ALJ Lexis 42, at *74(Initial Decision, June 24, 1998)(noting that the respondent's degree of cooperation with EPA in rectifying the violations is a factor to consider in determining an appropriate penalty); In re Veldhuis, 2002 EPA ALJ Lexis 39, at *309(Initial Decision, June 24, 2002).

4. **Economic Benefit Resulting from Violations.**

The courts have said that penalties are not limited to the economic benefit derived from noncompliance, such as a penalty that would make the violator no worst off than complying in a timely manner. The main purpose of the penalty is to deter the violator and others from committing future violations. the Complainant argues that Respondent has enjoyed an economic benefit from its Section 404 violations. Respondent's violations allowed him to avoid the costs and delays associated with obtaining the necessary Section 404 permit from the Corps. In addition, by illegally converting the Site's wetland and open water to dry land, Respondent increased the value of the site. See Complainant's Motion for Default, Ex. 1 at ¶ 4.7.

5. **Ability to Pay**.

Complainant believes that Respondent has the ability to pay a civil penalty o $10,000. Id. at 4.4. According to Borough records, Respondent's two parcels of property in the Ballaine Lake Subdivision have a current assessed value of $16,977. Ex. 5. To date, Respondent has neither claimed an inability to pay a penalty nor provided tax returns or other financial information which would shed light on his financial condition. Respondent's failure to provide specific

evidence substantiating a claim of its inability to pay results in waiver of that claim. In re Spitzer Great Lakes Ltd, 9 E.A.D. 302, 321 (EAB 200).

6. **Other Factors as Justice may Require.**

In considering other factors as justice may require, Complainant argues that the assessment of a penalty in this case will deter future violations by Respondent and neighboring property owners. Moreover, the penalty will encourage property owners to apply for a Section 404 permit prior to discharging into Waters of the United States.

Although the Complainant did not specifically place a dollar value on each statutory factor, considering that under Section 309(g)(2)(B) of the Act, 33 U.S.C. § 1319(g)(2)(B), the Respondent is subject to a civil penalty of $10,000/day, for each day that a violation continues, up to $125,000, and the Respondent's numerous days of violation, the $10,000 penalty proposed by the Complainant is found to be reasonable considering the risk of harm to the environment from the Respondent's discharges remaining in place for an extended period of time.

V. CONCLUSIONS OF LAW

1. Respondent, **Stanley Pieniazek**, is an individual and therefore a "person" within the meaning of Sections 301(a) and 502(5) of the Act 33 U.S. §§ 1311(a) and 1362(5).

2. Respondent owns, possesses, and/or controls property in the Fairbanks North star Borough, Alaska known as Lot 13 of the Ballaine Lake Subdivision, Section 31, Township 1 North, Range 1 West, Fairbanks Meridian. Lot 13 is approximately 0.19 acres in size and is hereinafter referred to as the "Site."

3. Beginning in the summer of 1999 and continuing to the present day, Respondent has, at various times and at various locations within the Site, directed the operation of certain earthmoving equipment which was used to discharge gravel, dirt, sand sod, and other materials into approximately 0.13 acres of jurisdictional open water and wetlands at the Site.

4. The gravel, dirt, sand sod, and other materials referenced in Paragraph 3 above constitute "fill material" and/or "dredged material" within the meaning of 40 C.F.R. § 232.2 and "pollutant[s]" within the meaning of Section 502(6) of the Act, 33 U.S.C. § 1362(6) and 40 C.F.R. § 232.2.

5. Each piece of earthmoving equipment referenced in Paragraph 3 above is a "point source" within the meaning of Section 502(14) of the Act, 33 U.S.C. § 1362(14).

6. The open water and wetlands referenced above in paragraph 3 are hydrologically connected and adjacent to a unnamed creek which is a tributary of Noyes Slough. Noyes

Slough is a navigable-in-fact water body and contributes its flow through the Chena, Tanana, and Yukon Rivers to the Bering Sea. The Bering Sea is subject to the ebb and flow of the tide.

7. The Site's open water and wetlands are "waters of the United States" within the meaning of 33 C.F.R. § 328.3(a) and 40 C.F.R. § 232.2 and therefore are "navigable waters" within the meaning of CWA Section 502(7), 33 U.S.C. 1362(7).

8. Respondent's discharge of pollutants was without a permit issued pursuant to Section 402 or 404 of the Act, 33 U.S.C. § 1342 or 1344, or any other authorization.

9. Respondent violated Sections 301(a) and 404 of the Act, 33 U.S.C. §§ 1311(a) and 1344, by discharging dredge and fill materials ("pollutants"), using earthmoving equipment ("from a point source"), into tributaries to the Bering Sea ("waters of the United States"), without a permit issued pursuant to Section 402 or 404 of the Act, 33 U.S.C. § 1342 or 1344, or any other authorization.

10. On May 11, 2004, the Complainant filed a Complaint under Section 309(g)(B)(2) of the CWA, 33 U.S.C. § 1319(g)(B)(2), with the Regional Hearing Clerk, alleging Respondent violated Section 301(a) and 404 of the CWA, 33 U.S.C. §§ 1311(a) and 1344, by discharging dredge and fill materials into waters of the United States without a permit.

11. Pursuant to section 22.15(a) of the Consolidated Rules, 40 C.F.R. § 22.15(a), the Respondent was required to file an answer to the May 11, 2004, Complaint with the Regional Hearing Clerk, within 30 days after service of the Complaint - by June 25, 2004.

11. Notwithstanding, the Respondent failed to meet the June 25, 2004, deadline and the record indicates that, as of the date of this decision, the Respondent has yet to file an answer to the Complaint.

12. On August 10, 2004, the Complainant filed a motion pursuant to Section 22.17(a) of the Consolidated Rules of Practice, 40 C.F.R. § 22.17(a), to find the Respondent in default for failing to file a timely answer to the Complaint.

13. Pursuant to section 22.17(c) of the Consolidated Rules of Practice, 40 C.F.R. § 22.17(c), the Respondent is found in default for failing to file a timely answer to the Complaint (See **Paragraph II** above).

14. Pursuant to Section 22.17(a) of the Consolidated Rules of Practice, 40 C.F.R. § 22.17(a), "[d]efault by Respondent constitutes, for the 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". The Respondent is deemed to have admitted all of the factual allegations in the Complaint.

15. In accordance with Section 309(g)(2)(B) of the Act, 33 U.S.C. § 309(g)(2)(B), Complainant requested that a civil penalty, in the amount of **Ten Thousand dollars ($10,000.00)** be assessed against the Respondent for its violations of the CWA and regulations promulgated pursuant thereto.

16. Pursuant to section 22.17(c) of the Consolidated Rules of Practice "The relief proposed in the Complaint . . . shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act".

17. Considering the statutory factors set forth in Section 309(g)(3) of the Act, 33 U.S.C. § 309(g)(3), and the entire Administrative Record, the Respondent, **Stanley Pieniazek**, is assessed a civil penalty, in the amount of **Ten Thousand dollars ($10,000.00)**, for violations of Sections 301(a) and 502(12) of the CWA, 33 U.S.C. §§ 1311(a) and 1362(12), and the regulations promulgated pursuant thereto.

DEFAULT ORDER

In accordance with Section 22.17 of the Consolidated Rules, 40 C.F.R. § 22.17, and based on the entire administrative record, I hereby grant the Complainant's Motion for Default Order and assess an administrative penalty, in the amount of **Ten Thousand dollars ($10,000.00)** against the Respondent, **Stanley Pieniazek,** for violations of the **CWA**, and regulations promulgated pursuant thereto.

No later than 30 days after the date that this Default Order becomes final, Respondent shall submit a cashier's check or certified check, payable to the order of "Treasurer, United States of America," in the amount of **Ten Thousand dollars ($10,000.00)** to the following address:

Mellon Client Services Center
EPA Region 10
500 Ross Street
P.O. Box 360903
Pittsburgh, Pennsylvania 15251-6903

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 an EPA at the following two addresses:

Regional Hearing Clerk
U.S. Environmental Protection Agency
Region 10
1200 Sixth Avenue, Mail Stop ORC-158
Seattle, Washington 98101

Aquatic Resources Unit
U.S. Environmental Protection Agency
Region 10
1200 Sixth Avenue, Mail Stop ECO-083
Seattle, Washington 98101
Attn: Steve Roy

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

Should the 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. Should such a failure to pay occur, Respondent may be subject to a civil action to collect the assessed penalty under the Clean Water Act. In any collection action the validity, amount, an appropriateness of the penalty shall not be subject to review.

Should Respondent fail to pay any portion of the penalty in full by its due date, Respondent shall also be responsible for payment of the following amounts:

1. Interest. Pursuant to Section 309(g)(9) of the CWA, 33 U.S.C. § 1319(g)(9), any unpaid portion of the assessed penalty shall bear interest at the rate established by the Secretary of the Treasury pursuant to 31U.S.C. §3717(a)(1) from the effective date of this Default Order provided; however, that no interest shall be payable on any portion of the assessed penalty that is paid within thirty days of the effective date of this Default Order.

2. Attorneys Fees, Collection Costs, Nonpayment Penalty. Pursuant to Section 309(g)(9) of the Act, 33 U.S.C. § 1319(g)(9), should Respondent fail to pay on a timely basis the amount of the penalty assessed by this Default Order, Respondent shall pay (in addition to any assessed penalty and interest) attorneys fees, costs for collection proceedings, and a quarterly nonpayment penalty for each quarter during which such failure to pay persists. Such nonpayment penalty shall be in an amount equal to twenty percent (20%) of the aggregate amount of Respondent's penalties and nonpayment penalties which are unpaid as of the beginning of such quarter.

This Default Order constitutes an Initial Decision, in accordance with Section 22.27(a) of the Consolidated Rules, 40 C.F.R. § 22.27(a). This Initial Decision shall become a Final Order 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 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.[4]

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 RIGHTS TO JUDICIAL REVIEW.**

SO ORDERED This 25th Day of February, 2005.

Alfred C. Smith

Alfred C. Smith
Presiding Officer

[4] Section 22.30 of the Consolidated Rules, 40 C.F.R. § 22.30.