UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
DONATO TRINKLE (MR.),	)	**DOCKET NO. CWA-3-2000-0020**
	)	
	)	
RESPONDENT	)	

ORDER

This proceeding under 309(g) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(g)(2)(a), was commenced on July 21, 2000, by the filing of a complaint by the Director of the Environmental Services Division, U. S. Environmental Protection Agency, Region 3 ("Complainant"), charging Respondent, Donato Trinkle, ("Respondent" or "Trinkle") with a violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a) by discharging pollutants into waters of the United States without a permit. Specifically, the complaint alleges that Trinkle is the sole proprietor of a business in Mahoning Township, Carbon County, Pennsylvania, known as "Dan Trinkle's Auto Mall", and that commencing in or about April 1999 and continuing through the date of the complaint, Trinkle or someone on his behalf operated equipment which discharged "fill material" into a channel measuring 70' by 8' on the property which channel constitutes "waters of the United States" as defined in CWA § 502(7), 33 U.S.C. § 1362(7) and 40 C.F.R. §§ 232.2 and 122.2.

It is alleged that the equipment from which the fill material was discharged constitutes a "point source" as defined in Section 502(14) of the Act and that the "fill area" is presently used as a parking lot. The regulation, 40 C.F.R. § 232.2, defines "fill material" as meaning any ‘pollutant’ which replaces portions of ‘waters of the United States’ with dry land or which changes the bottom elevation of a water body for any purpose. Section 301(a) of the Act prohibits the discharge of pollutants to waters of the United States except in compliance, inter alia, with a permit issued by the Secretary of the Army under Section 404 of the Act. The term "pollutant" is broadly defined in CWA § 502(6) as including, among other things, "dredged spoil, solid waste,...rock, sand, cellar dirt,...." The complaint alleges that at no time during the described discharge did Trinkle have a permit. For this alleged violation, it was proposed to assess Trinkle a civil penalty of $30,000.00.

By a letter, dated July 25, 2000, signed by James A. Scherer, General Manager, Dan Trinkle’s Auto Mall answered the complaint and requested a hearing. Respondent denied the allegations of paragraph 2 of the complaint to the effect that he owned property in Mahoning Township, Pennsylvania, which contained "wetlands" constituting "waters of the United States", denied the allegations of paragraph 3 to the effect that commencing in or about April 1999, Respondent or persons acting on his behalf operated equipment which discharged "fill material" into a channel on the property, and denied the allegations of paragraph 4 to the effect that

Respondent was the sole proprietor of a business known as "Dan Trinkle's Auto Mall", which is operated on the property and that the "fill area" was presently used as a parking lot.

Respondent neither admitted nor denied the allegations of paragraphs 5 through 9 of the complaint which alleged that the "channel" previously referred to constitutes "waters of the United States", defined the term "fill material" by reference to 40 C.F.R. § 232.2, alleged that the equipment which discharged fill material to waters of the United States constituted a "point source" as defined in the Act, alleged that CWA § 301(a) prohibited the discharge of pollutants from point sources to waters of the United States except in conformance with, inter alia, a permit issued by the Secretary of the Army, and alleged that at no time during the period of the discharge did Respondent have a permit. Respondent denied the allegations of paragraphs 10 and 11 of the complaint to the effect that by discharging fill material to waters of the United States without a permit, he violated CWA § 301(a) and was liable for a penalty not to exceed $11,000 for each day of violation.

By a letter-order, dated September 19, 2000, the ALJ directed that, in the absence of settlement, the parties exchange specified prehearing information on or before November 3, 2000. Complainant filed its Prehearing Exchange on November 2, 2000.

Respondent did not file a prehearing exchange. However, by an undated letter, a copy of which was received in the ALJ's office on October 31, 2000, Mr. Trinkle informed counsel for Complainant that

poor economic conditions, declining sales and the ongoing problems with your Agency have forced our company to cease operations. He stated that we feel we have cooperated fully in trying to cure the problems here on the property, but that these efforts have been futile. He noted that the possibility of a $30,000 fine continued to loom over our heads and that, while we were hoping for a speedy resolution of this matter, it is obvious that your Agency has no intention of allowing an expedient end to this [proceeding]. Additionally, Mr. Trinkle pointed out that since our situation started over a year ago, we have ceased any further work, stabilized the area, had an environmental report done, met with your Agency, and traveled to Philadelphia hoping to end this case, but that we receive daily more demands from your Agency which inhibit our efforts.

Mr. Trinkle complained that we have never received any estimate of how much the pending fine could, or would be reduced and that, while our company works for a conclusion [resolution of this matter], there are many individuals in our immediate area who continue to excavate, fill and dump with no apparent ramifications to them. The letter concluded with the assertion that we had hoped to avoid litigation between our company and your Agency, but that it was becoming more and more obvious that such was not the case and included an address in Northhampton, Pennsylvania, where future correspondence to Respondent was to be sent.

On November 14, 2000, Complainant filed a motion for a default order pursuant to Rule 22.17 of the Consolidated Rules of Practice

(40 C.F.R. Part 22), for Respondent's failure to file a prehearing exchange in accordance with the ALJ's order. Information Respondent was directed to supply, in addition to names of witnesses, summaries of expected testimony and copies of any documents or exhibits expected to be proffered at the hearing, was an explanation of the basis for the denial of the allegations in paragraphs 2, 3, and 4 of the complaint and, if Respondent was contending that assessment of the proposed penalty would jeopardize its ability to remain in business, financial statements, copies of income tax returns or other data to support such contention.

Mr. Trinkle has not responded to the motion.

DISCUSSION

Consolidated Rule 22.17(a) provides in pertinent part that "A party may be found to be in default:...upon failure to comply with the informational exchange requirements of § 22.19(a) or an order of the Presiding Officer;....." Additionally, Rule 22.17(a) provides that default by a respondent constitutes, for the purpose 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.

Here, while Trinkle has not complied with the order to exchange specified prehearing information, his undated letter addressed to Complainant's counsel, a copy of which was provided to the ALJ, was apparently intended as at least partial compliance with the order for a prehearing exchange. In addition to stating that he has closed his business, the letter states, among other

things, that he has ceased any further work, stabilized the area and had an environmental report prepared. The latter two items are relevant to possible mitigation of any penalty, while the fact that the business has been closed is relevant to Mr. Trinkle's "ability to pay", because Complainant relies almost entirely on the value of the property to support its contentions as to Respondent's ability to pay the penalty proposed. Moreover, the reference to "litigation" in the last paragraph of the letter indicates that Mr. Trinkle, who is not represented by counsel, may not be fully aware that unless he participates in this litigation and complies with the ALJ's orders to provide information, he will, in accordance with the rule on default, be deemed to have admitted the facts alleged in the complaint. It is, therefore, concluded that the harsh remedy of default will not be granted at this time and that Respondent will be given another opportunity to provide information relevant to a defense of the violation alleged in the complaint or to mitigation of the proposed penalty or both.

Complainant will be directed to provide a statement with reasons:

1. whether any of the exemptions in 40 C.F.R. § 232.3 from the permitting requirements of Section 404 apply to Respondent's activities on the property identified in the complaint; and
2. the affect, if any, of the decision in Solid Waste Agency Of Northern Cook County v. United

States Army Corps Of Engineers, 2001 U.S. LEXIS 640 (S. Ct, January 9, 2001) on EPA's jurisdiction in this matter.

ORDER

Respondent is directed to provide the following:

1. A statement of the reasons for the apparent belief that the "channel" referred to in the complaint is not a "wetland" and thus not "waters of the United States" within EPA and Corps of Engineers jurisdiction and that any discharges to the channel were not of "fill material" as defined in 40 C.F.R. § 232.2.
2. A description of the work performed in "stabilizing the area" as alleged in the undated letter to Complainant’s counsel.
3. A copy of the "environmental report" referred to in the mentioned letter.
4. The names of employees of Respondent or other individuals who have knowledge of the property identified in the complaint and of Respondent’s activities thereon.
5. A statement of Respondent’s ability to pay the proposed penalty together with any supporting data such as financial statements or copies of income tax returns.

Complainant is directed to provide a statement with reasons:

1. whether any of the exemptions in 40 C.F.R. § 232.3 from the permitting requirements of Section 404 and the "Tulloch Rule" apply to Respondent's activities on the property identified in the complaint; and
2. the affect, if any, of the cited Supreme Court decision on EPA's jurisdiction in this matter.

Responses to this order will be provided to the Regional Hearing Clerk, the opposing party and to the undersigned on or before March 16, 2001.

Dated this 22nd day of February 2001.

Original signed by undersigned

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Spencer T. Nissen
Administrative Law Judge