UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR
Decision Published At Website - http://www.epa.gov/aljhomep/orders.htm

IN THE MATTER OF	)	
	)	
JACK GOLDEN,	)	**DOCKET NO. CWA 10-99-0188**
	)	
RESPONDENT	)	

DEFAULT ORDER AND INITIAL DECISION

Federal Water Pollution Control Act ("Clean Water Act"): Pursuant to 40 C.F.R. § 22.17(a), Respondent, Jack Golden, is found to be in default because of his failure to timely comply with the Administrative Law Judge's Prehearing Order without good cause, and such default by Respondent constitutes an admission of all facts alleged in the Complaint and a waiver of Respondent's right to contest such factual allegations. Respondent violated Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), for unlawfully discharging pollutants into the waters of the United States. The $40,000 civil administrative penalty proposed in the Complaint is assessed against Respondent.

Issued: October 6, 2000

Barbara A. Gunning
Administrative Law Judge

Appearances:

For Respondent: Karl W. Ferrier, Esq.
1405 Bay Avenue
P.O. Box 1159
Ocean Park, WA 98640

For Complainant: Deborah E. Hilsman, Esq.
Assistant Regional Counsel
Office of the Regional Counsel
U.S. EPA, Region 10
1200 Sixth Avenue
Seattle, WA 98101

INTRODUCTION

This civil administrative penalty proceeding arises under Section 309(g) of the Federal Water Pollution Control Act, 33 U.S.C. § 1319(g), commonly referred to as the Clean Water Act. 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 (the "Rules of Practice"), 40 C.F.R. §§ 21.1-22.32.[1/]

The United States Environmental Protection Agency ("Complainant" or the "EPA") initiated this proceeding by filing with the Regional Hearing Clerk a Complaint against Jack Golden, Respondent ("Respondent"), on October 28, 1999. The Complaint charges Respondent with violating Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), for unlawfully discharging dredged and/or fill material into waters of the United States. Complainant seeks the imposition of a civil administrative penalty in the amount of $40,000 against Respondent.

As discussed below, Respondent is found to be in default pursuant to Section 22.17(a) of the Rules of Practice, 40 C.F.R. §22.17(a), because Respondent failed to timely comply with the Administrative Law Judge's Prehearing Order issued on June 7, 2000, without good cause. Such default by Respondent constitutes an admission of all facts alleged in the Complaint and a waiver of Respondent's right to contest such factual allegations. 40 C.F.R. §22.17(a). The factual allegations contained in the Complaint, deemed to be admitted, establish that Respondent violated Section 301(a) of the Clean Water Act as charged in the Complaint. Further, as the civil administrative penalty in the amount of $40,000 proposed in the Complaint is not clearly inconsistent with the record of proceeding or the Clean Water Act, Respondent is assessed the proposed penalty of $40,000.

[1/] The Rules of Practice were revised effective August 23, 1999.

FINDINGS OF FACT

1. The EPA initiated this matter against Respondent by issuing a Complaint and Notice of Opportunity For Hearing pursuant to Section 309(g)(1) of the Clean Water Act. In the Complaint, the EPA charges that Respondent violated the Clean Water Act by unlawfully discharging pollutants into the waters of the United States. Specifically, the Complaint charges that Respondent violated Section 301(a) of the Clean Water Act beginning on or before January 5, 1998, by conducting mechanized landclearing in wetlands and discharging dredged and fill material to wetlands on Respondent's property located on Oysterville Road, Oysterville, Washington, without the authorization of a permit issued under Section 402 or 404 of the Clean Water Act, 33 U.S.C. §§ 1342, 1344. The EPA proposes a civil administrative penalty of $40,000 for this alleged violation.

2. The Complaint was filed with the Regional Hearing Clerk on October 28, 1999, and a copy was sent to the Respondent by certified mail. The Complaint advised Respondent that the Rules of Practice, 40 C.F.R. Part 22, govern these proceedings, and a copy of the Rules was sent to Respondent along with the Complaint.

3. Respondent, through counsel, filed an Answer to the Complaint with the Regional Hearing Clerk on November 22, 1999. In his Answer, Respondent requests a hearing and denies that he violated the Clean Water Act in the manner alleged in the Complaint.[2/]

4. On November 23, 1999, the case was forwarded to the Chief Administrative Law Judge who advised the parties of the availability of participating in the process of Alternative Dispute Resolution ("ADR") to facilitate settlement. Both Respondent and Complainant agreed to participate in ADR and an ADR neutral was assigned to this matter in an Order issued on January 24, 2000. The parties were unable to resolve this matter during ADR and, consequently, the case was assigned on June 1, 2000, to the undersigned Administrative Law Judge for resolution through the civil administrative hearing process.

5. On June 7, 2000, the undersigned entered a Prehearing Order setting forth a schedule for the parties to submit their prehearing exchange information. Complainant was directed to file

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[2/] Hereinafter, all references to the service of documents on Respondent refers to service on his attorney of record.

its prehearing exchange by August 4, 2000, and Respondent was directed to file his prehearing exchange by September 4, 2000.[3/] The parties were advised that failure to comply with the Order could result in the entry of a default judgement against the defaulting party. The June 7, 2000, Order was sent to Respondent by certified mail, return receipt requested.

6. On August 4, 2000, Complainant filed its prehearing exchange as directed. Complainant's prehearing exchange was sent to Respondent by first class mail. Respondent did not file his prehearing exchange by the date specified in the Prehearing Order. On September 19, 2000, the undersigned issued an Order to Show Cause directing Respondent to show cause, if any, on or before October 3, 2000, why he failed to meet the September 4, 2000, filing deadline and why a default order should not be entered for failing to meet this deadline.

7. In response to the Order to Show Cause, Respondent's attorney submitted his own affidavit on October 3, 2000. In this affidavit, Respondent's counsel states that Respondent has been unable to aid in his defense because serious illnesses of Respondent's wife cause Respondent to be away from home for long periods at a time. Counsel asserts that the parties still seek the settlement of this matter but that finalization has been delayed by the fact that any person who commented on the proposed penalty must be given notice and that the EPA must approve the final settlement. In this affidavit, counsel also states that if a default order is not entered and a hearing is held, Respondent would elect to only conduct cross-examination of Complainant's witnesses.

8. Respondent's stated reasons for failing to comply with the Administrative Law Judge's Prehearing Order dated June 7, 2000, do not constitute good cause why a default order should not be issued.

9. Respondent is Jack Golden, an individual who owns, possesses, and controls property located at Section 4, Township 12 North, Range 11 West, W. M., Oysterville, Pacific County, Washington ("Site").

10. Respondent is a "person" as defined at Section 502(5) of the Clean Water Act, 33 U.S.C. § 1362(5).

[3/] The June 7, 2000, Prehearing Order directed Respondent to file a statement of election to only conduct cross-examination of Complainant's witnesses as its manner of defense if it chose to forgo the presentation of direct and/or rebuttal evidence.

11. The Site contains palustrine[4/] forested wetland habitat which is part of a mosaic wetlands/uplands system adjacent to Willapa Bay.

12. On or before January 5, 1998, Respondent began mechanized landclearing and logging of the wetlands in the mixed wetlands/ uplands portion of the Site. This activity involved the excavation and redeposition of vegetation and topsoil throughout a large area that extends north/south along the entire western portion of the Site. Respondent also excavated and redeposited vegetation and topsoil along a one-half mile section of mixed wetlands/uplands along the eastern portion of the Site. The materials discharged by Respondent to the wetland areas of the Site remained in place as of the time of the filing of the Complaint.

13. Aerial photographs were taken of the Site both before and after Respondent had undertaken the activities described above. The property was also inspected by the EPA and the Army Corps of Engineers. The photographs and the inspections reveal that approximately 15 acres of wetland areas were affected by Respondent's activities.

14. At all times relevant to the Complaint, the wetland portions of the Site were "navigable waters" and "waters of the United States" within the meaning of Section 502(7) of the Clean Water Act.

15. The soil and vegetation discharged to the wetlands located on the Site are "pollutants" within the meaning of Section

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[4/] Palustrine wetlands are defined as:

> All nontidal wetlands dominated by trees, shrubs, persistent emergents, and emergent mosses or lichens, and all such wetlands that occur in tidal areas where salinity due to ocean-derived salts is below 0.5 part per thousand. Also includes wetlands lacking such vegetation, but with all of the following four characteristics: (1) area less than 8 ha (20 acres); (2) active wave-formed or bedrock shoreline features lacking; (3) water depth in the deepest part of the basin less than 2 meters at low water; and (4) salinity due to ocean-derived salts less than 0.5 ppt.

Wetlands Division, Office of Wetlands, United States Environmental Protection Agency, Oceans And Watersheds, Natural Wetlands and Urban Stormwater: Potential Impacts and Management (1993).

502(6) of the Clean Water Act and "fill material" within the meaning of 40 C.F.R. § 232.2.

16. The discharge of dredged and fill material described above was accomplished by the use of an excavator and other heavy equipment. The excavator and the heavy equipment are a "point source" within the meaning of Section 502(14) of the Clean Water Act.

17. By causing the discharge of dredged and fill material to enter the waters of the United States, Respondent has engaged in the "discharge of pollutants" from a point source within the meaning of Sections 301 and 502(12) of the Clean Water Act.

18. Respondent's discharge of pollutants was not authorized by any permit issued pursuant to Section 402 or 404 of the Clean Water Act.

19. The nature, circumstances, extent, and gravity of Respondent's violation of Section 301(a) of the Clean Water Act were significant as Respondent's activities affected a significant amount of high quality wetlands by severely impairing its hydrological and ecological functions.

20. Respondent was aware that a permit under Section 404 of the Clean Water Act was required to authorize his activities as he received a previous Notice of Violation in 1995 from the Corps of Engineers for landclearing and placement of dredged/fill material in wetlands on the Site without authorization of a permit. Therefore, Respondent's degree of culpability with respect to the instant violation is high.

21. Respondent, as well as other persons, may be deterred from future violations of the Clean Water Act by the assessment of a penalty in this case.

DISCUSSION

The issue before me is whether a default order should be entered against Respondent with the assessment of a civil administrative penalty in the amount of $40,000. This proceeding arises under the authority of Section 309(g) of the Clean Water Act. The federal regulations governing such proceedings are found at the Rules of Practice, 40 C.F.R. Part 22. Section 22.17(a) of the Rules of Practice, 40 C.F.R. § 22.17(a), concerning default states, in pertinent part:

> A party may be found to be in default: after motion, upon failure to file a timely answer to the complaint; upon failure to comply with the information exchange requirements of § 22.19(a) or an order of the Presiding Officer [5/]; or upon failure to appear at a conference or hearing. Default by respondent constitutes, for 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.

40 C.F.R. § 22.17(a).

Section 22.17(c) of the Rules of Practice concerning default orders states, in pertinent part:

> 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. If the order resolves all outstanding issues and claims in the proceeding, it shall constitute the initial decision under these Consolidated Rules of Practice. The relief proposed in the complaint or in the motion for default shall be ordered unless the

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5/ The term "Presiding Officer" means the Administrative Law Judge designated by the Chief Administrative Law Judge to serve as the Presiding Officer. 40 C.F.R. § 22.3(a).

> requested relief is clearly inconsistent with the record of the proceeding or the Act. For good cause shown, the Presiding Officer may set aside a default order.

40 C.F.R. § 22.17(c).

A party's failure to comply with an order of the Administrative Law Judge subjects the defaulting party to a default order under Section 22.17(a) of the Rules of Practice, 40 C.F.R. § 22.17(a). Although the Administrative Law Judge is accorded some discretion in making the default determination under Section 22.19 of the Rules of Practice, such discretion is usually reserved for minor violative conduct or when the record shows "good cause" why a default order should not be issued.[6/]

The file in this proceeding reflects that this matter was initiated by the filing of a Complaint against Respondent on October 28, 1999. The parties were directed to file their prehearing exchange information by the Administrative Law Judge's Prehearing Order entered on June 7, 2000. The Prehearing Order advised both parties that their failure to comply with the Prehearing Order could result in the entry of a default judgment against the defaulting party. The EPA timely filed its prehearing exchange but no prehearing exchange information was filed by Respondent. The Administrative Law Judge then issued an Order to Show Cause directing Respondent to show cause why he failed to submit his prehearing exchange information and why a default order should not be entered for this failure.

In response to the Order to Show Cause, Respondent's counsel submitted his own affidavit on October 3, 2000. In this affidavit, counsel for Respondent states that Respondent has attempted to cooperate since the beginning of this matter. Respondent's

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[6/] The language of Section 22.17(a) of the Rules of Practice concerning the entry of a default order is discretionary in nature, providing that " a party may be found in default . . . upon failure to comply with the information exchange requirements of § 22.19(a) or an order of the Presiding Officer." The application of the regulation should be made as a general rule in order to effectuate its intent. Thus, when the facts support a finding that there has been a failure to comply with an Administrative Law Judge's order without good cause, a default order generally should follow. Discretion may be exercised in instances of minor nonperformance, and lesser sanctions as appropriate, are available to the Administrative Law Judge for violative conduct that does not reach the level of default. It is also noted that the entry of a default order avoids indefinitely prolonged litigation.

attorney asserts, however, that serious illnesses of Respondent's wife cause him to be away from home for long periods of time and as a result, Respondent is unable to aid in his defense.

These assertions put forth by counsel are somewhat vague and do not contain sufficient facts to support a finding of good cause. Counsel's affidavit does not specify how Respondent's alleged absences resulted in Respondent's absolute failure to timely respond to the Prehearing Order. The Prehearing Order provided Respondent with three months' notice of the filing deadline. While the facts alleged indicate that Respondent may have faced obstacles in his preparation for this case and may well have presented a valid basis for an extension of time, such allegations do not provide sufficient cause for Respondent's complete failure to respond to the Prehearing Order. Respondent is represented by counsel in this matter, and once counsel was aware of Respondent's alleged inability to aid in his defense, it was incumbent upon counsel to have moved for an extension of time to file the prehearing exchange information. I also note that Respondent's prehearing exchange, consisting of a single sentence in counsel's affidavit filed in response to the Order to Show Cause, did not require significant preparation and could easily have been submitted at an earlier date.

Counsel's additional assertions that there had been significant delay in finalizing this matter because of the required notice that must be provided to persons who commented on the proposed penalty and the need for EPA approval of the final settlement are immaterial to Respondent's failure to respond to the Prehearing Order. The Prehearing Order specifically notified the parties that the pursuit of settlement negotiations would not constitute good cause for failure to comply with the filing deadlines set forth in the order.

In view of the foregoing, I find that the record does not establish good cause for Respondent's failure to timely comply with the Administrative Law Judge's June 7, 2000, Prehearing Order or why a default order should not be issued, nor is it established that discretion should be exercised in favor of Respondent. Thus, Respondent is found to be in default for its failure to timely comply with the Administrative Law Judge's June 7, 2000, Prehearing Order.

As cited above, Section 22.17(a) of the Rules of Practice, 40 C.F.R. § 22.17(a), further 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 waiver of respondent's right to contest such factual allegations." This

regulatory provision, couched in mandatory language, requires, upon Respondent's default, that I accept as true all facts alleged in the Complaint. Thus, in the instant proceeding, I must accept as true all facts alleged in the instant Complaint. 40 C.F.R. § 22.17(a). The facts alleged in the instant Complaint establish, by a preponderance of the evidence, Respondent's violation of Section 301(a) of the Clean Water Act as charged in the Complaint.

PENALTY DETERMINATION

The assessment of a civil administrative penalty for violations of Section 301(a) of the Clean Water Act is governed by Section 309(g) of the Clean Water Act. Section 309(g) of the Clean Water Act authorizes the imposition of two categories of civil administrative penalties: Class I and Class II. Section 309(g)(2)(A) concerning Class I penalties states:

> The amount of a class I civil penalty under paragraph (1) may not exceed $10,000 per violation, except that the maximum amount of any class I civil penalty under this subparagraph shall not exceed $25,000.

33 U.S.C. § 1319(g)(2)(A).

Section 309(g)(2)(B) concerning Class II penalties states:

> The amount of a class II civil penalty under paragraph (1) may not exceed $10,000 per day for each day during which the violation continues; except that the maximum amount of any class II civil penalty under this subparagraph shall not exceed $125,000.

33 U.S.C. § 1319(g)(2)(B).

Section 309(g)(3) of the Clean Water Act sets forth various factors that the EPA and the Administrative Law Judge must consider in determining the amount of any penalty for violations of Section 301 of the Clean Water Act. Section 309(g)(3) of the Clean Water Act, in pertinent part, provides:

> In determining the amount of any penalty assessed under this subsection, the Administrator or the Secretary, as the case may be, 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.

33 U.S.C. § 1319(g)(3).

In the instant case, Complainant proposes that Respondent be assessed a Class II penalty in the amount of $40,000 for his violation of Section 301(a) of the Clean Water Act.[7/] In determining the proposed penalty amount, the EPA considered the statutory penalty factors set forth in Section 309(g)(3) of the Clean Water Act, cited above. Specifically, the EPA found and alleged in the Complaint that the nature, circumstances, extent, and gravity of Respondent's violation were significant as Respondent's activities affected a significant amount of high quality wetlands by severely impairing its hydrological and ecological functions. The EPA determined that Respondent's degree of culpability was high as he was aware that a permit under Section 404 of the Clean Water Act was required to authorize his activities. The Complaint alleges that Respondent had previously

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[7/] The Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996, requires the EPA to periodically adjust penalties to account for inflation 40 C.F.R. Part 19 (61 Fed. Reg. 69360, Dec. 31, 1996). The EPA has issued a Civil Monetary Penalty Inflation Adjustment Rules which declares that the maximum civil penalty for violations of the Clean Water Act that occurred on or after January 31, 1997, and assessed under Section 309(g)(2)(B), is $11,000 per violation and that the total penalty cannot exceed $137,500. *Id.*

received a Notice of Violation in 1995 from the Corps of Engineers for landclearing and placement of dredged/fill material in wetlands on the Site without authorization of a permit. Further, the EPA determined that Respondent, as well as other persons, may be deterred from future violations of the Clean Water Act by the assessment of a penalty in this case. As discussed above, all facts alleged in the Complaint are deemed to be admitted by Respondent upon default.

In a default proceeding "[t]he relief proposed in the complaint or the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act." In the instant matter, Complainant's proposed penalty is authorized and it is consistent with the civil administrative penalty factors set forth in Section 309(g) of the Clean Water Act and with the record of proceeding. Thus, pursuant to Section 22.17(c) of the Rules of Practice, the proposed penalty of $40,000 is assessed against Respondent.

CONCLUSIONS OF LAW

1. Respondent is found to be in default because he failed to timely comply with the Administrative Law Judge's June 7, 2000, Prehearing Order and the record does not show good cause why a default order should not be issued. 40 C.F.R. § 22.17(a).

2. The default by Respondent constitutes, for purposes of the above-cited matter only, an admission of all facts alleged in the Complaint and a waiver of his right to contest such factual allegations. 40 C.F.R. § 22.17(a).

3. Respondent's "discharge of pollutants" from a "point source" into the navigable waters of the United States within the meaning of Sections 301 and 502(12) of the Clean Water Act without authorization of a permit issued pursuant to Section 402 or 404 of the Clean Water Act is a violation of Section 301(a) of the Clean Water Act. 33 U.S.C. §§ 1311, 1342, 1344, 1362(12).

4. The civil administrative penalty of $40,000 proposed in the Complaint for Respondent's violation of Section 301(a) of the Clean Water Act is not clearly inconsistent with the record of proceeding or the Clean Water Act. 33 U.S.C. §§ 1319(g)(2)(B), (g)(3); 40 C.F.R. § 22.17(c).

ORDER

1. Respondent is found to be in default for his failure to timely comply with the June 7, 2000, Prehearing Order and, accordingly, is found to have violated Section 301(a) of the Clean Water Act as charged in the Complaint.

2. Respondent, Jack Golden, is assessed a civil administrative penalty of $40,000.

3. Payment of the full amount of this civil penalty shall be made within thirty (30) days of the service date of the final order by submitting a cashier's check or certified check in the amount of $40,000, payable to the "Treasurer, United States of America," and mailed to:

Attn: Regional Hearing Clerk
U.S. Environmental Protection Agency
Region 10
P.O. Box 360903M
Pittsburgh, PA 15251

4. A transmittal letter identifying the subject case and EPA docket number (CWA-10-99-0188), as well as Respondent's name and address, must accompany the check.

5. If Respondent fails to pay the penalty within the prescribed statutory period after the entry of the Order, interest on the civil penalty may be assessed. 31 U.S.C. § 3717; 40 C.F.R. § 13.11.

This Default Order constitutes an Initial Decision as provided in Section 22.17(c) of the Rules of Practice, 40 C.F.R. § 22.17(c). Pursuant to Sections 22.27(c) and 22.30 of the Rules of Practice,

40 C.F.R. §§ 22.27(c) and 22.30, this Initial Decision shall become the Final Order of the Agency, unless an appeal is filed with the Environmental Appeals Board within thirty (30) days after the service of this Order, or the Environmental Appeals Board elects, *sua sponte*, to review this decision.

Original signed by undersigned

Barbara A. Gunning
Administrative Law Judge

Dated: 10-6-00
Washington, DC