UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Frank Acierno,	)	**Docket No. CWA-03-2005-0376**
Christiana Town Center, LLC and	)	
CTC Phase II, LLC	)	
	)	
Respondents	)	

ORDER DENYING COMPLAINANT'S MOTION FOR DEFAULT ORDER

I. Introduction

This proceeding under Section 309(g) of the Clean Water Act ("CWA" or "the Act"), 33 U.S.C. § 1319(g), was commenced on September 29, 2005, by the issuance of a complaint by the Director of the Water Protection Division, U.S. Environmental Protection Agency, Region 3 ("Complainant"), charging Respondents, Frank Acierno and Christiana Town Center, LLC ("Christiana"), with violations of Section 301 of the Act, 33 U.S.C. § 1311.[1] Specifically, the complaint alleges that Respondents failed to comply with the National Pollutant Discharge Elimination System ("NPDES") General Permit requirements for storm water discharges at the Christiana Town Center ("the Site") located in White Clay Creek Hundred, New Castle County, Delaware, by failing to comply with an applicable Sediment and Stormwater Plan, and thus with the permit, and/or operating without such a plan.

Respondents, through counsel, filed an Answer on October 27, 2005, which denied the alleged violations, and requested a hearing. The Answer contained twenty-six affirmative defenses. The Answer also included a Motion to Suppress and Dismiss Allegations Arising From Unlawful Search and a Motion to Dismiss Acierno Completely and Christiana Partially. These motions were denied and Complainant's Motion for Leave to Amend Complaint, filed on January 30, 2006, was granted by an Order dated June 30, 2006 ("June Order").

The referenced Motion for Leave to File an Amended Complaint sought to add a third party as a Respondent, CTC Phase II, LLC ("CTC"), and was based on evidence in Respondents' Answer, and accompanying the Motions to Suppress and to Dismiss, that CTC is or was an owner and operator of a portion of the Site when the alleged violations took place.

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[1] The procedural rules applicable to this proceeding are the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Consolidated Rules of Practice" or "Consolidated Rule"), found at 40 C.F.R. Part 22.

The Amended Complaint alleges violations in three counts. Count I alleges that Respondents failed to stabilize the Site and implement the requirements of the approved April 2002 Sediment and Stormwater Management Plan ("April 2002 Plan") in violation of Section 301 of the Act, 33 U.S.C. § 1311, and as required by the NPDES General Permit issued by the State of Delaware. Count II alleges that, if the New Castle County Department of Land Use ("NCCDLU") did not approve the January 2003 Plan, since February 7, 2003, until the present, then Respondents have engaged in Land Disturbing Activities [at the Site] without an approved Sediment and Stormwater Management Plan. It is alleged that Respondents thus violated Section 301 of the Act, 33 U.S.C. § 1311, and the NPDES General Permit by failing to obtain an approved January 2003 Sediment and Stormwater Plan ("January 2003 Plan"). Alternatively, if on or about January 2003, NCCDLU approved the January 2003 Plan, then Respondents have failed to stabilize the Site, maintain the forebay,[2] and implement other requirements of the Plan, as required by Section 301 of the Act, 33 U.S.C. § 1311, and the NPDES General Permit. Thus, Respondents violated Section 301 of the Act, 33 U.S.C. § 1311, and the NPDES General Permit in the foregoing respects. Complainant alleges that the approval of the April 2002 Plan was revoked when the NCCDLU issued a New Castle County Code of Official Notice of Post-Deprivation Show Cause Decision on December 20, 2002 ("December 2002 Show Cause Decision"). Respondents submitted a revised January 2003 Plan, which according to NCCDLU was never approved. In the alternative, Complainant alleges that, if on or about January 2003, NCCDLU approved the January 2003 Plan, then Respondents violated Section 301 of the Act, 33 U.S.C. § 1311, by failing to stabilize the Site, maintain the forebay, and implement other requirements of the January 2003 Plan. Count III alleges that Respondent CTC failed to apply for an NPDES General Permit for the portion of the Site it owns and thus violated Section 301 of the Act, 33 U.S.C. § 1311, by discharging stormwater without such a permit. The penalty sought in the initial complainant, $157,500, was unchanged.

The June Order noted that Respondents had received a copy of the Amended Complaint with Complainant's Motion and directed that Respondents file an Answer thereto within 20 days of the service of the Order. The Order was served on its date, June 30, 2006.

On August 17, 2006, Complainant filed a Motion for a Default Order ("Motion for Default") and Memorandum of Law in Support thereof ("Memorandum"), alleging that Respondent CTC did not file a timely Answer as required by the June Order. The Motion was filed pursuant to Consolidated Rule 22.17(a) which provides, inter alia, that a party may be found in default after motion upon failure to file a timely answer to the complaint.[3] On August 23, 2006, Respondents filed a Response in Opposition to Complainant's Motion for Default Order ("Response"), accompanied by an Amended Answer. The Response made it clear that the

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[2] A forebay may be broadly defined as the discharging end of a pond or millrace (Webster's Third New International Dictionary (2002)).

[3] Rule 22.17 is entitled "Default" and provides 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; upon failure to comply with the information exchange requirements of § 22.19(a) or an order of the Presiding Officer; 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."

Amended Answer was filed on behalf of the two original Respondents as well as CTC (id. at ¶ 13). Complainant did not file a reply to this Response as permitted by Consolidated Rule 22.16(b).

II. Arguments of the Parties

A. Complainant's Argument in Support of Motion for Default

As noted supra, Complainant filed its Motion for Default pursuant to 40 C.F.R. § 22.17(a), alleging that CTC failed to file a timely Answer to the Amended Complaint (Motion for Default at 1). Complainant points outs that, in accordance with the June Order, CTC had twenty (20) days after service of the Order in which to file an Answer. The Order was served on its date, June 30, 2006, making the deadline for filing an Answer July 20, 2006 (id. at 3). Complainant asserts that as of August 17, 2006, no Answer from CTC has been filed, and that, therefore, CTC is in default (id. at 4). Complainant recites that CTC's default constitutes an admission of the factual allegations in the Amended Complainant, and a waiver of its right to contest such allegations. Complainant notes that its Motion for Default is limited to CTC's liability and says that it will later seek an assessment of a penalty against CTC.

Complainant cites cases where a respondent has been found in default for failure to file an answer and the complaint makes a prima facie case that the violations alleged occurred, arguing that [under such circumstances] Agency Presiding Officers have not hesitated to enter a default order and find the respondent liable (Memorandum at 3, citing *Tektoniks Corp.*, Docket No. TSCA-10-2003-0089, 2004 EPA RJO LEXIS 190 (RJO March 25, 2004); *Corporacion para el Desarrollo Economico y Futuro de la Isla Nena*, Docket No. CWA-II-97-61, 1998 EPA ALJ LEXIS 78, at *20-22 (ALJ, February 3, 1998); *Melotz Trucking, Inc.*, Docket No. CWA-08-2005-0033, 2006 EPA RJO LEXIS 238 (RJO June 9, 2006)).

Complainant points out that § 301(a) of the Act , 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant from a point source by any person to waters of the United States except in compliance with, inter alia, a NPDES permit issued pursuant to § 402, 33 U.S.C.§ 1342 (Memorandum at 4, 5). Additionally, Complainant notes that Sections 301(a) and 402(p) of the Act, 33 U.S.C. §§ 1311(a) and 1342(p), and the regulations, 40 C.F.R. §§ 122.1 and 122.26, provide that facilities or sites with stormwater discharges associated with industrial activity are "point sources" subject to NPDES permitting requirements under § 402(a), 33 U.S.C. § 1342(a), and must comply with those permitting requirements (Memorandum at 5; Amended Complaint at ¶ 25). Complainant notes that the Delaware Department of Natural Resources and Environmental Control ("DNREC") issues permits for the discharge of pollutants to waters of the United States in the State of Delaware and that, after November 17, 1998, the State of Delaware required those engaged in construction activity, such as CTC, to seek coverage under an NPDES general permit issued by the State. The NPDES general permit imposed requirements to be undertaken pursuant to an approved Sediment and Stormwater Management Plan to reduce the discharge of contaminated stormwater from the Site. The Sediment and Stormwater Plan approval authority for the Site is New Castle County (Amended Complaint at ¶ 40).

Referring to ¶ 128 of the Answer to the Initial Complaint filed by Respondents Acierno and Christiana, Complainant alleges CTC is the current owner of part of the property comprising the Site, including the undeveloped portion, and that it has been the owner since December 12, 2002. As the owner, CTC is responsible for acts and omissions that have occurred on that portion of the Site (Memorandum at 5, 6; Amended Complaint at ¶ 16). It is alleged that at all times relevant to the Amended Complaint, Respondents have conducted construction activity at the Site and that stormwater discharges flow, and at all times relevant to the Amended Complaint, have flowed from the Site's ditches, channels, swales and pipes [point sources] to Eagle Run, a tributary of the Christiana River (Amended Compliant at ¶ 37). Eagle Run is alleged to be "waters of the United States" (Amended Complaint at ¶ 24). CTC did not follow those requirements under an approved Sediment and Stormwater Management Plan to reduce discharges of contaminated stormwater from the Site (id.). Complainant further alleges that even after the April 2002 Plan was revoked and the January 2003 Plan remained unapproved, CTC still conducted construction at the Site without an approved Plan and discharged without an NPDES permit (id.).

1. CTC discharged stormwater from a point source into waters of the United States subject to NPDES permitting requirements

Pursuant to Section 301(a) of the Act, 33 U.S.C. § 1311, discharges of a pollutant from a point source by any person to waters of the United States are prohibited except in compliance with, inter alia, an NPDES permit issued under Section 402 of the Act, 33 U.S.C. § 1342 (Memorandum at 5; Amended Complaint at ¶ 20). Facilities or sites with stormwater discharges associated with industrial activity are point sources subject to NPDES permitting requirements pursuant to Sections 301(a) and 402(p) of the Act, 33 U.S.C. §§ 1311(a) and 1342(p), and 40 C.F.R. §§ 122.1 and 122.26 (id.; Amended Complaint at ¶ 25).

2. CTC and the stormwater discharges from the Site were subject to an NPDES Permit

Complainant alleges that CTC is a "person" within the meaning of Section 502(5) of the Act, 33 U.S.C. 1362(5), alleging that it is a limited liability company [under Delaware law] (Memorandum at 5; Amended Complaint at ¶ 8, ¶ 23). According to Acierno and Christiana's Answer, CTC is the owner of part of the Site, which includes the undeveloped portion since December 12, 2002.[4] Therefore, Complainant says that CTC is responsible for the acts and omissions that have occurred on its portion of the Site, alleging that stormwater discharges flow, and at all times relevant to the Amended Complaint, have flowed from the Site's ditches, channels, swales, and pipes [point sources] to Eagle Run, which is a water of the United States (id. at 6; Amended Compliant at ¶ 24, ¶ 37).

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[4] Answer at ¶ 128; Amended Complaint at ¶ 15. Respondents state that "[o]n or about December 12, 2002, the undeveloped portion of the Site constituting approximately 25 acres of land was conveyed by Christiana to CTC Phase II, LLC in a Deed recorded in the Office of the Recorder of Deeds in and for New Castle County at Instrument No. 2002-12-160120414." Answer at ¶ 128.

3. The State of Delaware requires an NPDES general permit for CTC's Site

The Delaware DNREC issues NPDES permits for discharges to waters of the United States in the State of Delaware pursuant to Section 402 of the Act, 33 U.S.C. 1342, and the provisions of 7 Delaware Code Chapter 60 and the regulations promulgated thereunder (Memorandum at 6; Amended Compliant at ¶ 26). On or about September 15, 1998, DNREC issued Delaware Regulations Governing Storm Water Discharges Associated with Industrial Activity (General Permit Storm Water Regulations) (Amended Complaint at ¶ 27). The General Permit Regulations provided that the Regulations themselves served as the NPDES General Permit for storm water discharges in Delaware and that the provisions of the Regulations were the terms and conditions of the NPDES General Permit for industrial activity, including Land Disturbing Activity.[5] Complainant alleges that movement of dirt and gravel by a backhoe on a construction site is a "Land Disturbing Activity" under the NPDES General Permit and that at all times relevant to the Amended Complaint, Respondents have conducted construction activities at the Site (Amended Complaint at ¶ 29, ¶ 36).

4. After November 17, 1998, the NPDES general permit covered stormwater discharges from the Site

On or about November 17, 1998, Respondent Acierno submitted a Notice of Intent pursuant to Sections 402(a) and 402(p) of the Act, 33 U.S.C. §§ 1342(a) and (p), and Sections 9.1.01.3 and 9.1.02.3 of the NPDES General Permit, and obtained NPDES Permit coverage for the discharge of stormwater associated with construction activity from the Site into Eagle Run (Memorandum at 7; Amended Complaint at ¶ 35, ¶ 38). Section 9.1.02.5 of the NPDES General Permit required permittees to obtain approval for and implement a Sediment and Stormwater Management Plan ("Plan") in accordance with 7 Del, C, Chapter 40 and the Delaware Sediment and Stormwater Regulations (7 Del. Adm. Code 5101) ("Stormwater Regulations") from the date of initiation of Land Disturbing Activities to the date of permanent stabilization (Amended Complaint at ¶ 31). Section 10.2.1 of the Stormwater Regulations states that all Plans shall include details of temporary and permanent stabilization measures including the requirement that, following soil disturbance or re-disturbance, permanent or temporary stabilization shall be completed within 14 calendar days as to the surface of all perimeter controls, topsoil stockpiles, and all disturbed or graded areas of the project site (Amended Complaint at ¶ 32). Complainant notes that the NPDES General Permit expired on September 14, 2003, yet its terms and conditions continued in effect for the stormwater discharges for valid Notices of Intent submitted during the term of the NPDES General Permit (id. at 7-8; Amended Complaint at ¶ 76, ¶ 77).

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[5] Amended Complaint at ¶ 28. Section 9.1.01.0 (13) of the NPDES General Permit defines "Land Disturbing Activities" as:

> a land change or construction activity for residential, commercial, silvicultural, industrial and institutional land use which may result in soil erosion from water or wind, or movement of sediments or pollutants into State waters or onto lands in the State, or which may result in accelerated stormwater runoff, including, but not limited to clearing, grading, excavating, transporting, and filling of land (Amended Complaint at ¶ 29).

5. The NPDES General Permit imposed requirements for Respondent CTC to follow under a Sediment and Stormwater Management Plan

Under Section 9.1.02.5 of the NPDES General Permit, permittees must obtain approval from New Castle County and implement a Sediment and Stormwater Management Plan, sometimes referred to as an Erosion and Sediment Plan or an E&S Plan, pursuant to 7 Delaware Code Chapter 40 and the Delaware Sediment and Stormwater Regulations found at 7 Delaware Administrative Code 5101 (Memorandum at 8; Amended Complaint at ¶ 31, ¶ 39 and ¶ 40). Complainant alleges that on or about September 12, 2001, Respondent Acierno submitted for approval to the NCCDLU a Sediment and Stormwater Plan (E&S Plan for the Site) and that the Plan submitted on September 12, 2001, was last revised and approved by NCCDLU on or about September 24, 2001 ("September 2001 Plan") (Amended Complaint at ¶¶ 39 - 41). It is further alleged that on March 18, 2002, the NCCDLU issued a New Castle County Code Official Notice of Rule to Show Cause Decision ("March 2002 Show Cause Decision") and that this Decision revoked the approval of the September 2001 Plan (Amended Complaint at ¶ 42, ¶ 45). On or about April 3, 2002, Respondents Acierno and Christiana submitted application No. 2000-1453 to NCCDLU for approval of its April 2002 Plan (id.; Amended Complaint at ¶ 46). NCCDLU approved the Plan on April 24, 2002 (id.; Amended Compliant at ¶ 49). NCCDLU revoked the April 2002 Plan on December 20, 2002 (Amended Complaint at ¶ 50, ¶ 51). Respondents submitted a revised Plan on January 10, 2003 ("January Plan"), which covered the entire Site, including the undeveloped portion (id. at 8-9; Amended Complaint at ¶¶ 52 - 54). In a court filing,[6] Respondents allege that the January 2003 Plan was approved by NCCDLU (id. at 9; Amended Compliant at ¶ 60). Complainant concludes that, if the January 2003 Plan was approved, then Respondents had to comply with it.

6. CTC did not comply with the Two Sediment and Stormwater Management Plans

On January 30, 2003, NCCDLU issued a Notice of Rule to Show Cause Decision ("January 2003 Show Cause Decision"), finding 27 violations at the Site including failing to install a forebay in the stormwater management basin, stabilize disturbed areas, install stabilized construction entrances, install a silt fence, and install sediment traps in accordance with the April 2002 Plan (Memorandum at 9; Amended Compliant, ¶ 55, ¶ 56). Complainant further alleges that Respondents' contractor established violations after performing Delaware Certified Construction Reviewers ("CCR") inspections of the Site.[7] Twenty-two CCR Reports[8] submitted to NCCDLU found that conditions at the Site were in noncompliance or unsatisfactory (id. at 10;

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[6] *Christiana Town Center, LLC v . New Castle County,* Complaint in Certiorari, C.A. No: 03A-07-08-RSG, Delaware Superior Court for New Castle County, ¶ 7.

[7] Id. at 9 and 10. CCRs, which are required for projects of more than 50 acres, independently inspect and assess construction sites for compliance with approved sediment and stormwater plans (Memorandum at 9-10; Amended Complaint at ¶ 62, ¶ 63).

[8] The CCR Reports, were dated from March 4, 2003 to August 6, 2003; September 7, 2003; and September 25, 2003 (id. at 10; Amended Complaint at ¶ 63, ¶ 65).

Amended Complaint at ¶ 65). Additionally, Complainant avers that CTC failed to file CCR Reports with NCCDLU for the months of May 2004 through September 2004 even though construction activity continued at the Site (id.; Amended Compliant at ¶¶ 66 - 75). Complainant goes on further to assert that during an inspection on May 4, 2004, EPA inspectors found bare soil covering portions of the Site, that the Site had not been stabilized, and that the sediment/stormwater management basin did not contain a forebay (id. at 10-11; Amended Complaint at ¶¶ 67 - 72).

7. Complainant alleges in the alternative that after the April 2002 Plan was revoked and while the January 2003 Plan remained unapproved, CTC conducted construction activities at the Site without an approved Plan

Complainant, in the alternative, alleges Respondent CTC was in violation of the prohibition of construction without an approved Plan because not only was the April 2002 Plan revoked, but according to NCCDLU, it did not approve the January 2003 Plan submitted by Respondents (Memorandum at 11; Amended Complaint at ¶ 51, ¶ 59). Thus, Respondent CTC is in violation of the NPDES General Permit for conducting construction activities without an approved plan.

8. CTC discharged without NPDES permit coverage

Complainant alleges that Respondent CTC never submitted a Notice of Intent to the State of Delaware to obtain NPDES permit coverage for stormwater discharges from the portion of the Site it owns and, therefore, is in violation [of the Act] and the NPDES General Permit by discharging from the Site without NPDES coverage (Memorandum at 11; Amended Complaint at ¶ 61). Complainant further argues that CTC is liable for failing to stabilize the Site and implement other requirements of the April 2002 Plan (id.). After revocation of the April 2002 Plan, Complainant contends that Respondent CTC either failed to comply with the January 2003 Plan or alternatively, engaged in land disturbing activities without an approved Sediment and Stormwater Plan, thereby violating Section 301 of the Act, 33 U.S.C. § 1311, and the NPDES General Permit (id. at 11 - 12).

B. Respondent CTC's Response in Opposition to Complainant's Motion for Default Order

On August 23, 2006, Respondent CTC, through it attorney, filed a Response in Opposition to Complainant's Motion for Default ("Response"). The Response was accompanied by an Amended Answer. CTC points out that the Motion for Default is based upon the June Order, which indicated that Respondents should file an Answer to the as yet unfilled Amended Complaint within 20 days thereafter (Response at ¶ 2). CTC emphasizes that the June Order only Granted a Motion for Leave to File an Amended Complaint and did not Order the Amended Complaint to be deemed filed and served. CTC asserts that Complaint has yet to file the Amended Complaint and argues that, accordingly, there is no Amended Complaint pending upon which a default order may be based (Response at ¶ 2, ¶ 3). Quoting Consolidated Rule 22.14(c) (40 C.F.R. Part 22), which provides that a "[r]espondent shall have 20 additional days from the

date of service of the amended complaint to file its answer," CTC argues that service of the Amended Complaint has yet to be affected and that consequently, it is legally impossible for CTC to be in default (Response at ¶ 5).

Moreover, CTC says that, even if the lack of a pending Amended Complaint may be overlooked and authority exists to ignore the Consolidated Rules of Practice in this respect, the Motion for Default should be denied because it is contrary to the interests of justice and well-settled case law favoring determination of matters on their merits (Response at ¶ 6). In this regard, CTC says that it is settled in this matter that CTC is owned by Respondent Frank Acierno and that CTC is the owner of land adjacent to those of Christiana Town Center, LLC.[9] CTC goes on to recite that because Respondent Acierno is the owner of CTC and Respondents Acierno and Christiana have timely filed an Answer and Requests for Hearing, and have vigorously defended themselves against the allegations in the Complaint, it is abundantly clear that CTC would take a similar position (id. at ¶ 7, ¶ 9). CTC points out that Acierno and Christiana have sought to have this entire matter dismissed and says that indeed, it cannot be legitimately gainsaid that CTC would do anything other than adopt the exact same position and posture [as the other Respondents]. According to CTC, its Amended Answer to the Amended Complaint could be accomplished by little more than the addition of its name to the original Answer (id.).

CTC cites what it says is a settled rule of Federal jurisprudence that matters should be decided on their merits rather than by default (id. at ¶ 10, citing *Hitz v. Woma Corp.* 732 F. 2d 1178, 1181 (3d. Cir. 1984)). CTC asserts that Complainant has not alleged that it suffered any prejudice as a result of any delay in filing its Answer and Request for Hearing and, noting that nothing has happened since issuance of the June Order, argues that Complainant has stated no justifiable basis for the exercise of discretion in favor of granting a default order. Moreover, CTC emphasizes that it is clear that this matter is far from over and that Acierno and Christiana will continue to vigorously defend against the allegations brought by Complainant (id. at ¶ 12). Under these circumstances, CTC contends that it matters little whether there are two Respondents or three and that no judicial economy or efficiency would be achieved through entry of a default order. Lastly, CTC points out that it has filed an Answer and argues that the Motion should be denied as moot (id. at ¶ 13).

III. Discussion

Although CTC emphasizes that the June Order did not provide that the Amended Complaint shall be deemed "filed and served," it has not questioned the ALJ's authority to issue an order so providing. Therefore, the requirement that the Amended Complaint be filed and served may be considered implicit in the Order and CTC held to have failed to comply with the prescribed filing time at its peril. Compare, *City of Orlando*, Docket No. CWA-04-501-99,

[9] Response at ¶ 7. It should be noted that both the Initial and Amended Complaints alleged that Respondent, Frank E. Acierno, is the owner of Christiana Town Center, LLC and that Respondents have admitted this allegation (Answer at ¶ 4; Amended Answer at ¶ 6). As noted in the June Order, Mr. Acierno's personal liability for the violations alleged in the Complaint is not dependent on whether the evidence is sufficient to "pierce the corporate veil", but rather is dependent on his involvement with and control over operations at the Site (id. at 15).

Order Granting Motion to Amend Complaint, 1999 EPA ALJ LEXIS 63 (August 24,1999) (proposed amended complaint not filed with motion to amend).

It is immediately apparent that Consolidated Rule 22.17(a), upon which Complainant's Motion for Default is based, is in no sense mandatory as it provides in pertinent part that "[a] party may be found in default: after motion, upon failure to file a timely answer to the complaint . . . ." (supra note 2 (emphasis added)). That the word "may" in the quoted portion of the Consolidated Rule is to be given its normal meaning, i.e., that a finding of default is a matter within the ALJ's discretion, is reinforced by the language of paragraph (c) of the Rule providing in pertinent part "(c) *Default order*. When the Presiding Officer finds that a default has occurred, he shall issue a default order against the defaulting party . . . unless the record shows good cause why a default order should not be issued." (40 C.F.R. § 22.17(c) (emphasis added)).

It is, of course, well settled that the law favors resolution of cases on their merits and that default is a harsh and disfavored remedy reserved for the most egregious cases (see, e.g., *Agronics, Inc.*, Docket No. CWA 6-1631-99, Order Denying Complainant's Motion for Default and Assessment of a Civil Penalty and Respondent's Motion to Dismiss, 2003 EPA RJO LEXIS 11 (May 7, 2003), and cases cited, in particular *Ackra Direct Marketing Corp. v. Fingerhut Corp.,* 86 F. 3d 852, 858 (8th Cir.1996) (default judgment is not appropriate where record evidence fails to demonstrate willful violations, contumacious conduct or intentional delay); *Environmental Control Systems, Inc,* Docket No. I. F. & R.-III-432-C, Order Denying Complainant's Motion for Default Order and Rendering Sua Sponte Partial Accelerated Decision as to Liability, 1993 EPA LEXIS ALJ 465 (July 13, 1993) (mere fact that a party may be in default does not entitle the opposing party to a default judgment or order as a matter of right); and *Gard Products, Inc*., Docket No. FIFRA-98-005, Order Denying Complainant's Motion for Default, 1999 EPA ALJ LEXIS 30 (June 2, 1999) (a default order is harsh sanction reserved for the most egregious cases).

Here, CTC has cured its default by filing an Answer to the Amended Complaint and it should be emphasized that Complainant has neither alleged nor shown any prejudice from the late filing. As noted supra, Complainant has taken some care to demonstrate that the Amended Complaint sets forth a prima facie case of the alleged violations of the Clean Water Act. Respondents have, however, alleged, inter alia, that in April of 2002, Christiana submitted, and NCCDLU approved, two revised Erosion and Sediment Control Plans, which according to Respondents, have never been revoked (Amended Answer at ¶ ¶ 46 - 51). Among other things, Respondents allege that the December 2002 Show Cause Decision, which Complainant alleges revoked the prior approval of the April E&S Plan or Plans, expressly committed to approving an additional Plan which was subsequently submitted in reliance on NCCDLU's promise that it was approved (id. at ¶ 51, ¶ 52). Moreover, Respondents allege that on January 17, 2003, NCCDLU committed in writing that Christiana had a valid and approved E&S Plan subject to further progress in implementing the Plan and bringing the Site into further compliance with the approved E&S Plan (id. at ¶ 55). This illuminates at least in part the basis for the parties' divergence of views as to whether the additional E&S Plan submitted on or about January 10, 2003, was approved by NCCDLU and is a matter appropriate for resolution at a hearing. Additionally, it is clear that there are factual issues concerning the status of construction or land disturbing activities at the Site, including whether permanent stabilization has been effected and

the 27 violations allegedly found by the January 2003 Show Cause Decision (Amended Complaint at ¶ 31, ¶ 56).

As Respondents point out, CTC is owned by Respondent Frank Acierno and issuance of a default order against CTC would not resolve this matter. Accordingly, the law favoring resolution of cases on their merits, Complainant's Motion for Default Order will be denied.

ORDER

1. Complainant's Motion for Default Order is denied.

2. Rulings on Complainant's Motion to Strike Certain Portions of Respondents' Answers and Certain Affirmative Defenses and a Prehearing Order will be forthcoming.

Dated this ___13th______day of December, 2006.

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Spencer T. Nissen
Administrative Law Judge