

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

2010 MAY 13 PM 2:05

IN THE MATTER OF:)
)
47th Street Townhouses, LLC,)
Jordahl Custom Homes, Inc.,)
and)
Master Construction Co., Inc.)
)
Respondents.)
_____)

Docket No. CWA-08-2009-0021
Proceeding under Section 301(a) and
402(p) of the Clean Water Act,
33 U.S.C. § 1311(a) and 1342(p)

FILED
EPA REGION VIII
HEARING CLERK

DEFAULT INITIAL DECISION AND ORDER

This proceeding arises under the authority of sections 301(a) and 402(p) of the Clean Water Act (“CWA”), 33 U.S.C. §§ 1311(a) and 1342(p). This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, and the Revocation or Suspension of Permits (“Consolidated Rules” or “Part 22”), 40 C.F.R. §§ 22.1-22.32.

I. BACKGROUND

On July 9, 2009, the United States Environmental Protection Agency, Region 8 (“EPA” or “Complainant”) filed a Penalty Complaint and Notice of Opportunity for Hearing (“Complaint”). The Complaint named three Respondents: 47th Street Townhouses, LLC, Jordahl Custom Homes, Inc., and Master Construction Co., Inc. (“Respondents”). The Complaint alleges storm water control violations under the CWA in connection with the construction of a 5.2 acre multi-family residential complex in Fargo, North Dakota. The Complaint also proposes that Respondents pay a \$25,000 penalty. EPA mailed a copy of the Complaint to each Respondent on July 9, 2009.

Pursuant to 40 C.F.R. § 22.15(a), a Respondent must file an Answer to the Complaint within 30 days of service of the Complaint.¹ Respondents 47th Street Townhouses, LLC and Jordahl Custom Homes, Inc. filed an Answer with the Regional Hearing Clerk on August 17, 2009.² Master Construction Co., Inc. did not file an Answer. On December 9, 2009, Complainant sent additional copies of the Complaint to Fred J. Schlanser, Jr., Registered Agent for Master Construction Co. Inc., and to Duane

¹ According to the domestic return receipt card indicating service for certified mail received by 47th Street Townhouses, LLC and Jordahl Custom Homes, Inc., Answers to the Complaint were due no later than August 14, 2009. A return receipt card was not returned for Master Construction Co., Inc. verifying service. However, the United States Postal Service website, which tracks certified mail, shows the Complaint, #7008-18300000-5157-1796, was delivered on July 13, 2009.

² Respondents 47th Street Townhouses, LLC and Jordahl Custom Homes, Inc. filed a joint Answer.

Baumgart, General Superintendent for Master Construction Co., Inc. Mr. Baumgart received his copy of the Complaint on December, 14, 2009 according to the return receipt card. Mr. Schlanser also received the Complaint based on a return receipt card returned to EPA on December 18, 2009 with his signature. The date received is not known because Mr. Schlanser signed but did not date the return receipt card. (See, Affidavit of Margaret J. Livingston, dated April 10, 2010).

The Complaint iterates Respondents' obligations with respect to responding to the Complaint, including filing an Answer. (See, Complaint, p. 8). Specifically, the Complaint states:

FAILURE TO FILE AN ANSWER AND REQUEST FOR HEARING WITHIN 30 DAYS MAY WAIVE A RESPONENT'S RIGHT TO DISAGREE WITH THE ALLEGATIONS AND/OR THE PROPOSED PENALTY. IT MAY ALSO RESULT IN A DEFAULT JUDGMENT AND ASSESSMENT OF THE FULL PENALTY PROPOSED IN THE COMPLAINT OR THE MAXIMUM PENALTY AUTHORIZED BY THE ACT." (emphasis in original document).

An Answer from Master Construction Co. Inc. has not been filed with the Regional Hearing Clerk to date.

On April 8, 2010, Complainant filed a Motion for Default on Liability ("Default Motion") and Memorandum in Support of Complainant's Motion for Default on Liability ("Memo in Support"). In its Default Motion, Complainant requests this court to find default against Master Construction Co., Inc. ("Master Construction") on liability only for Count 2 of the Complaint. Count 2 alleges that Master Construction discharged storm water into waters of the United States from the construction site related to a 5.2 acre multi-family residential complex, 47th Street Townhouses ("the Site"), in the Osgood Townsite Eight Addition, on Lot 5, Block 1, in Fargo North Dakota. The discharges were part of an industrial activity, as that term is defined in 402(p) of the CWA, 33 U.S.C. § 1342(p), and 40 C.F.R. § 122.26(b)(14)(x) that left the Site and entered the City of Fargo's municipal separate sewer system ("MS4") and the Red River of the North. The discharges occurred without a permit from April 28, 2008 to May 30, 2008. None of the Respondents have filed a reply to Complainant's Motion.³ A decision on the Motion for Default is, therefore, ripe and appropriate.

II. DEFAULT ORDER

This proceeding is governed by the Consolidated Rules of Practice, 40 C.F.R. Part 22 (Consolidated Rules). Section 22.17 of the Consolidated Rules provides in part:

³ Counsel for 47th Street Townhouses, LLC and Jordahl Custom Homes, Inc. in its April 28, 2010, Request for Extension, appeared to be requesting an extension for all the Respondents including Master Construction Co., Inc.. The Regional Hearing Clerk attempted to verify, through counsel, if the law firm is representing all the Respondents and did not receive a response.

(a) *Default.* A party may be found to be in default: after motion, upon failure to file a timely answer to the complaint . . . 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. . . .

(b) *Motion for default.* A motion for default may seek resolution of all or part of the proceeding. Where the motion requests the assessment of a penalty or the imposition of other relief against a defaulting party, the movant must specify the penalty or other relief sought and state the legal and factual grounds for the relief requested.

(c) *Default order.* When the Presiding Officer finds that a 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 requested relief is clearly inconsistent with the record of the proceeding or the Act.

40 C.F.R. § 22.17.

It is appropriate at this juncture for this court to rule on the Motion for Default.⁴

III. FINDINGS OF FACT

Pursuant to 40 C.F.R. §§ 22.17(c) and 22.27(a) of the Consolidated Rules, and based upon the record before me, I make the following findings of fact:

- 1) Master Construction is a North Dakota Corporation doing business in North Dakota.
- 2) From Approximately April 28, 2008 to May 30, 2008, Master Construction had day-to-day responsibility for construction on property (the Site) where a multi-family residential complex known as 47th Street Townhouses was being constructed.

⁴ Complainant also filed a Motion for Partial Accelerated Decision on Liability related to Respondents 47th Street Townhouses, LLC and Jordahl Custom Homes, Inc. on April 8, 2010. This court will not address the pending Motion for Partial Accelerated Decision. Upon this Order being issued, all Defendants will have either filed an Answer or been properly disposed of by default and the matter will be transferred to the Office of Administrative Law Judges. (See, September 20, 2007, Biro Memorandum on Referring New Cases Involving Multiple Respondents to OALJ).

- 3) The Site encompassed 5.2 acres where construction activities including clearing, grading and excavating occurred on or about April 28, 2008.
- 4) Storm water, snowmelt, surface drainage, and runoff water have left the Site and flowed into the City of Fargo's municipal separate storm water system.
- 5) On September 23, 2008, EPA representatives inspected the Site and observed excessive sediment in storm drains at the Site, missing or inadequate best management practices (e.g., a fallen silt fence, missing or misplaced or improperly trenched straw waddles, and drain protection bags in need of replacement and /or repair), sediment tracking on 47th Street South, and no storm water pollution prevention plan (SWPPP) on site.
- 6) As of September 23, 2008, neither Master Construction nor any other Respondent had sought or obtained authorization from the North Dakota Department of Health ("NDDH") to discharge storm water from the Site under NDDH's general permit (NDPDES Permit No. NDR10-0000) or any individual NDPDES permit storm water discharge permit.
- 7) Respondent has discharged storm water into waters of the United States from the Site to the Red River of the North via the City of Fargo's MS4 without authorization by any permit issued under the Act from April 28, 2008 through May 30, 2008.
- 8) On July 9, 2009, EPA filed a Penalty Complaint and Notice of Opportunity for Hearing.
- 9) On December 9, 2009, Complainant sent additional copies of the Complaint to Fred J. Schlanser, Jr., Registered Agent for Master Construction, and to Duane Baumgart, General Superintendent for Master Construction.
- 10) Mr. Baumgart received his copy of the Complaint on December, 14, 2009 according to the return receipt card.
- 11) Mr. Schlanser received the Complaint based on a return receipt card returned to EPA on December 18, 2009 with his signature.
- 12) On April 8, 2010, Complainant filed a Motion for Default on Liability.
- 13) No responses to the Motion for Default on Liability were filed.

IV. Conclusions of Law

Pursuant to 40 C.F.R. §§ 22.17(c) and 22.27(a) of the Consolidated Rules, and based upon the record before me, I make the following conclusions of law:

1. Respondent, Master Construction is a corporation and therefore a “person” with the meaning of section 502(5) of the Act, 33 U.S.C. § 1362(5) and 40 C.F.R. §122.2.
2. Storm water contains “pollutants” as defined by section 502(6) of the Act, 33 U.S.C. § 1362(6) and 40 C.F.R. §122.2.
3. The storm water discharged from the Site, is a “discharge of pollutants” as defined by section 502(12) of the Act, 33 U.S.C. § 1362(12) and 40 C.F.R. §122.2.
4. The storm water discharge from the Site is a “point source” as defined by section 502(14) of the Act, 33 U.S.C. § 1362(14) and 40 C.F.R. §122.2.
5. The Red River of the North is a “navigable water” as defined by section 502(7) of the Act, 33 U.S.C. § 1362(7) and a “water of the United States” as defined by 40 C.F.R. §122.2.
6. Pursuant to section 402(p)(2)(B), 33 U.S.C. § 1342(p)(2)(B), discharges composed entirely of storm water require a permit if the discharge is associated with industrial activity.
7. 40 C.F.R. § 122.26(b)(14)(x) defines “storm water associated with industrial activity” to include clearing, grading, and excavating at a site of five or more acres.
8. Master Construction discharged pollutants from a point source into navigable waters of the United States without a permit in violation of section 301(a), 33 U.S.C. § 1311(a).
9. Master Construction’s failure to have a permit for the discharge of storm water associated with industrial activity in accordance with the regulations at 40 C.F.R. § 122.26 from April 28, 2008, through and including May 30, 2008, constitutes a violation of section 402(p), 33 U.S.C. § 1342(p).
10. Pursuant to 40 C.F.R. § 22.5(b)(1), Complainant has demonstrated that it has complied with the service requirements.
11. 40 C.F.R. § 22.14 provides that an answer to a complaint must be filed within thirty (30) days after service of the complaint.
12. 40 C.F.R. § 22.17 provides that a party may be found to be in default, after motion, upon failure to file a timely answer to the complaint.
13. This default constitutes an admission, by Master Construction, of all facts alleged in the Amended Complaint and a waiver, by Master Construction,

of its rights to contest those factual allegations pursuant to 40 C.F.R. § 22.17(a).

DEFAULT ORDER

In accordance with 40 C.F.R. § 22.17(c), “the relief proposed in the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act.” Based on the record, the Findings of Fact set forth above, I hereby find that Master Construction is in default and liable as a matter of law under Count 2 of the Complaint from April 28, 2008 to and through May 30, 2008.

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

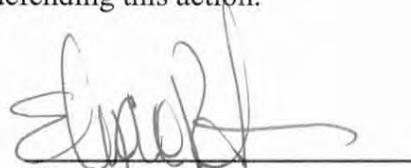
Within thirty (30) days after the Initial Decision is served, any party may appeal any adverse order or ruling of the Presiding Officer by filing an original and one copy of a notice of appeal and an accompanying appellate brief with the Environmental Appeals Board. 40 C.F.R. § 22.27(a). If a party intends to file a notice of appeal to the Environmental Appeals Board it should be sent to the following address:

U.S. Environmental Protection Agency
Clerk of the Board
Environmental Appeals Board (MC 1103B)
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-0001

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 RIGHT TO JUDICIAL REVIEW.

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

SO ORDERED This 13th Day of May, 2010.



Elyana R. Sutin
Presiding Officer

CERTIFICATE OF SERVICE

The undersigned certifies that the original of the attached **DEFAULT INTITIAL DECISION AND ORDER**, in the matter of **47th STREET TOWNHOMES, LLC., JORDAHL CUSTOM HOMES, INC. and MASTER CONSTRUCTION CO., INC.;** **DOCKET NO.: CWA-08-2009-0021** was filed with the Regional Hearing Clerk on May 13, 2010.

Further, the undersigned certifies that a true and correct copy of the documents was delivered to Margaret "Peggy" Livingston, Senior Enforcement Attorney, U. S. EPA – Region 8, 1595 Wynkoop Street, Denver, CO 80202-1129. True and correct copies of the aforementioned documents were placed in the United States mail certified/return receipt requested and e-mailed on May 3, 2010, to:

Attorney for Respondents 47th Street Townhomes, LLC., and Jordahl Custom Homes, Inc.:

James R. Bullis
Kyle G. Pender
Montgomery, Goff & Bullis, P.C.
P. O. Box 9199
Fargo, ND 58106-9199
KYLE@BULLISLAW.COM

U. S. Certified Return Receipt Mail to:

Fred J. Schlanswer, Jr.
Registered Agent for
Master Construction Co., Inc.
1572 45th Street NW
P. O. Box 788
Fargo, ND 58107-0788

May 3, 2010


Tina Artemis
Paralegal/Regional Hearing Clerk

