BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:	)
	)
Rocking BS Ranch, Inc.,	)
	)
Dkt. No. CWA 09-04	)
	)

COMPLAINANT'S RESPONSE BRIEF IN OPPOSITION TO RESPONDENT'S NOTICE OF APPEAL

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INTRODUCTION

The Complainant, the Associate Director of the Water Enforcement Branch of the Compliance Assurance and Enforcement Division of the United States Environmental Protection Agency Region 6 ("EPA"), by and through his attorney, files this Response Brief in Opposition to Respondent's Notice of Appeal ("Response Brief"), pursuant to 40 C.F.R. § 22.30 of 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 ("Consolidated Rules"), 40 C.F.R. Part 22 (July 23, 1999). Respondent's Notice of Appeal ("Notice") was filed with the Regional Hearing Clerk on August 25, 2009.

FACTUAL AND PROCEDURAL BACKGROUND

The subject administrative enforcement action was initiated and has been prosecuted in accordance with Section 309(g) of the Clean Water Act ("the Act" or "CWA"), 33 U.S.C. § 1319(g), and the Consolidated Rules of Practice, codified at 40 C.F.R. Part 22. The findings of fact and conclusions of law as set forth in the Complaint, the Amended Complaint, Motion for Default Order, and Initial Decision, are hereby adopted and incorporated by reference.

Respondent is a corporation which was incorporated under the laws of the State of Oklahoma. As such, it is a "person" as defined at Section 502(2) of the CWA, 33 U.S.C. § 1362(5) and 40 C.F.R. § 122.2

At all relevant times, Respondent owned or operated a swine facility located about three miles south and eight miles east of Wetumka, Hughes County, Oklahoma, and was therefore an "owner or operator" within the meaning of 40 C.F.R. § 122.2.

At all relevant times, the facility was a "point source" of a "discharge" of "pollutants" to the receiving waters of Middle Creek, which are "waters of the United States" within the meaning of Section 502 of the CWA, 33 U.S.C. § 1362, and 40 C.F.R. § 122.2.

Because Respondent owned of operated a facility that is a point source of discharges of pollutants to waters of the United States, Respondent and the facility were subject to the CWA and the National Pollution Discharge Elimination System ("NPDES") program.

Under Section 301 of the CWA, 33 U.S.C. § 1311, it is unlawful for any person to discharge any pollutant from a point source to waters of the United States, except with the authorization of, and in compliance with, an NPDES permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

On January 23, 2007, an inspector from the Agricultural Environmental Management Services Division of the Oklahoma Department of Agriculture, Food, and Forestry conducted a Concentrated Animal Feeding Operations (CAFO) inspection of Rocking BS Ranch. The inspector documented an unauthorized discharge that occurred on January 23, 2007, that originated from the west lagoon, entered an unnamed tributary to Middle Creek and then to Middle Creek. (Initial Decision, Attachment A, page 8.)

Complainant filed the original Administrative Complaint ("Complaint") against Respondent on September 24, 2007. A certified mail return receipt (green card) which was filed with the Regional Hearing Clerk shows that the Complaint was signed for at the address indicated in the Certificate of Service on October 2, 2007. Respondent did not file an Answer to the Complaint. (Initial Decision, Attachment A, pages 5 and 6.)

Complainant filed an Amended Complaint ("Amended Complaint") on December 5, 2007, against Respondent. A certified mail return receipt (green card) which was

filed with the Regional Hearing Clerk shows that the Complaint was signed for at the address indicated in the Certificate of Service on December 11, 2007. Respondent did not file an Answer to the Complaint. (Initial Decision, Attachment A, pages 6 and 7.)

On April 9, 2008, Complainant filed a Status Report stating that the parties were in settlement discussions. Respondent had not submitted an Answer and thus Complainant intended to file a Motion for Default. (Status Report dated April 9, 2008, Attachment B.)

On June 20, 2008, Complainant filed a Status Report stating that the parties were engaged in settlement discussions and that Respondent was supposed to submit three years of tax returns by May 2008 so that Complainant could determine if Respondent had an inability to pay the penalty. However, Complainant had not received the tax returns or an Answer and thus Complainant intended to file a Motion for Default. (Status Report dated June 20, 2008, Attachment C.)

On October 16, 2008, Complainant filed a Status Report stating that the parties were engaged in settlement discussions and that Respondent was supposed to submit three years of tax returns by July 2008 so that Complainant could determine if Respondent had an inability to pay the penalty. However, Complainant had not received the tax returns or an Answer and thus Complainant intended to file a Motion for Default. (Status Report dated October 16, 2008, Attachment D.)

On January 15, 2009, the Presiding Officer ordered Complainant to report on the status on or before February 12, 2009.

On February 10, 2009, Complainant filed its Motion for Default. (Motion for Default, Attachment E.) Respondent was properly served with the Motion but failed to respond to it. (Initial Decision, Attachment A at page 7.)

On July 27, 2009, the Presiding Officer issued its Initial Decision and Default Order finding that at the relevant times, Respondent's facility was a point source of pollutants with its discharge from the lagoon to waters of the United States; Respondent, as the owner or operator of the facility, and the facility were subject to the CWA and the NPDES program. Respondent violated Section 301 of the CWA since it discharged pollutants to waters of the United States without a permit. Complainant had proposed a $16,800 penalty, but the Presiding Officer reduced the penalty to $11,000 on the basis that it was a single violation on a single day. (Initial Decision, Attachment A.)

Complainant received Respondent's Notice of on the Presiding Officer's Initial Decision which was filed on August 25, 2009. In its purported Notice of Appeal, Respondent (1) claims that the discharge from the lagoon never left the property and 2) they have no money to pay the penalty. Complainant makes the following statements in objection to the granting of the relief sought in Respondent's appeal.

ARGUMENT

I. RESPONDENT FAILED TO FOLLOW PROCEDURAL MEASURES

A. Failure to File an Answer

Respondent failed to follow the procedural measures set forth in 40 C.F.R. §§ 22.15 and 22.16(b). No good cause exists for Respondent's failure to file an answer to the Complaint and Amended Complaint and failure to respond to the Motion for Default Order. Respondent's notice purports to file an answer and request a hearing nearly two years after both the original and the Amended Complaints were filed. In accordance with 40 C.F.R. § 22.15, Respondent must file an answer to the complaint within 30 days after service of the complaint. In accordance with 40 C.F.R. § 22.16(b), Respondent was required to file any response to the Motion for

Default within 15 days of service. Respondent had two opportunities to file an answer and one opportunity to file a response, but failed to do so. (Initial Decision, Attachment A, pages 6 and 7.) Respondent's failure to answer the complaints constitutes an admission of all facts alleged in the Complaint and a wavier of Respondent's right to a hearing on such factual allegations in accordance with 40 C.F.R. § 22.17(a). Respondent's failure to respond to the Motion for Default is deemed to be a waiver of any objection to the granting of the Motion for Default pursuant to 40 C.F.R. §22.16(b). The consequences of failure to file and answer and respond to a Motion will be addressed later in this brief.

The Board has addressed untimely filings and has stated that "filing requirements ... are not merely procedural niceties. Rather, they serve an important role in helping to bring repose and certainty to the administrative enforcement process. Furthermore, they ensure that the Board's resources are reserved for those cases involving both important issues and serious and attentive litigants." (emphasis omitted) *In re Tri-County Builders Supply*, Docket No. CWA-9-2000-0008 (EAB, Order Denying Motion for Reconsideration, May 24, 2004, at 3). When the Complainant files a default order due to a procedural violation, the tribunal will determine whether the defaulting party provided any valid excuse for this procedural violation.[1] In this case, Respondent failed to provide any valid excuse for not filing an answer to the Complaint. Therefore, because Respondent did not timely file an answer to the Complaint, the Initial Decision should be upheld and become a final order by operation of law.[2]

B. Failure to Perfect an Appeal

Respondent failed to follow the procedural measures set forth in 40 C.F.R. § 22.30(a). 40

1 *See* In re Pyramid Chemical Co., 11 E.A.D. 657 (EAB 2004)
2 Id.

C.F.R. § 22.30(a) requires that if a party wishes to appeal an initial decision, within 30 days after the initial decision is served, the party should file a notice of appeal and an accompanying appellate brief. Moreover, one copy of any document filed with the Clerk of the Board shall also be served on the Regional Hearing Clerk. Appellant shall simultaneously serve one copy of the notice and brief upon all other parties and non-party participants. In this case, Respondent did not file an appellate brief with the notice of appeal. The only document which was mailed to Complainant was a letter and two maps. 40 C.F.R. § 22.30(a) requires that a brief contain a table of contents and authorities (with page references), a statement of the issues presented for review, a statement of the nature of the case and the facts relevant to the issues presented for review (appropriate references to the record), argument on the issues presented, a short conclusion stating the precise relief sought, alternative findings of fact, and alternative conclusions regarding issues of law or discretion. There was nothing in the documents sent to the Complainant which resembled what is required for a brief. Furthermore, failed to file a copy of its Notice of Appeal with both the Clerk of the Board and the Regional Hearing Clerk. Complainant was the only person who received Respondent's notice. It was not until Complainant asked both the Clerk of the Board and the Regional Hearing Clerk when the notice was filed that both clerks were aware that Respondent submitted such a notice. Complainant then emailed a PDF version of Respondent's notice to the Clerk of the Board on August 25, 2009, and the Clerk determined that August 25, 2009, was the filing date of the notice.

Furthermore, to overturn a Default Order on Appeal, the defaulting party has the burden of demonstrating in its brief that there is a "strong probability" that the Board would produce a different outcome.[3] Respondent has failed to meet this burden of showing that there was a strong

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3 Id.

probability that the Board would have overturned the Default Order with its Notice of Appeal. (No brief was attached to which Respondent should have argued its appeal.) Therefore, based on Respondent's failure to follow procedural measures, the Initial Decision should be upheld.

II. THE FACTS AS TO LIABILITY ARE UNDISPUTED AND RESPONDENT HAS WAIVED ITS RIGHT TO CONTEST ALL FACTS ALLEGED IN THE COMPLAINT AND AMENDED COMPLAINT AND THE PENALTY ASSESSED IN THE INITIAL DECISION

Complainant asserts that the Presiding Officer's Initial Decision as to both liability and penalty should be upheld.

Section 22.15(a) of 40 C.F.R. provides:

> Where respondent: Contests any material fact upon which the complaint is based; contends that the proposed penalty, compliance or corrective action order, or Permit Action, as the case may be, is inappropriate; or contends that it is entitled to judgment as a matter of law, it shall file an original and one copy of a written answer to the complaint with the Regional Hearing Clerk and shall serve copies of the answer on all other parties. Any such answer to the complaint must be filed with the Regional Hearing Clerk within 30 days after service of the complaint.

Pursuant to 40 C.F.R. § 22.15(d), "[f]ailure of respondent to admit, deny, or explain any material factual allegation contained in the complaint constitutes an admission of the allegation." Further, 40 C.F.R. § 22.15(c) provides that "[a] hearing upon the issues raised by the complaint and answer may be held if requested by respondent in its answer." Section 22.15(c) also gives the Presiding Officer the discretion to hold a hearing if issues appropriate for adjudication are raised in the answer. Respondent never filed an answer to the Complaint or the Amended Complaint. (Initial Decision, Attachment A, ¶¶ 7 and 14.) Respondent's failure to file an answer to the Complaint or to the Amended Complaint constitutes admission of all material factual allegations in the Complaint and Amended Complaint. Moreover, no hearing was proper since

Respondent did not file an answer and did not raise any issues appropriate for adjudication in an answer.

Respondent was clearly made aware of its obligation to file an answer and request a hearing, and the procedures for doing so, in order to preserve the right to a hearing or to pursue other relief. A copy of the requirements for filing an answer as set forth at 40 C.F.R. § 22.15 accompanied the Complaint and Amended Complaint. (Complaint, Attachment F, ¶ 15); (Amended Complaint, Attachment G, ¶ 16) Further, Paragraph 17 of the Complaint and paragraph 18 of the Amended Complaint clearly and expressly set forth that "Respondent must send the Answer to this Complaint, including any request for hearing, and all other pleadings to:

> Regional Hearing Clerk (6RC-D)
> U.S. EPA Region 6
> 1445 Ross Avenue, Suite 1200
> Dallas, TX 75202-2733"

and requested Complainant to send a copy of its answer to Ms. Ellen Chang Vaughan, the EPA attorney assigned to this case, and provided her mail code and mailing address. Paragraph 16 of the Complaint and paragraph 17 of the Amended Complaint also stated:

> If Respondent does not file an answer to this complaint within thirty (30) days after service of this complaint, a default order may be issued against Respondent pursuant to 40 C.F.R. § 22.17. A Default Order, if issued, would constitute a finding of liability, and could make the full amount of the penalty proposed in this Complaint due and payable by the Respondent without further proceedings sixty (60) days after a final order issued upon default.

The cover letter to the Complaint and the Amended Complaint invited Respondent to confer informally with the EPA concerning the alleged violations and the amount of the proposed penalty whether or not Respondent requested a hearing. The cover letter cautioned that "[a] request for an informal conference does not extend the thirty (30) days by which you must request or waive a hearing on the proposed penalty assessment; the two procedures can be

pursued simultaneously." [4]

Complainant also filed three status reports stating that because an Answer had not been filed, Complainant intended on filing a Motion for Default. Furthermore as stated in the status reports, Complainant had requested tax returns from the Respondent to determine if Respondent qualified for an inability to pay because Respondent claimed economic hardships.

In light of Respondent's failure to file an answer to the Complaint and Amended Complaint, and in accordance with the requirement to diligently prosecute a matter,[5] Complainant filed the Motion for Default Order. Section 22.17(a) of 40 C.F.R. provides:

> 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.

Respondent's failure to file a timely answer to the Complaint and Amended Complaint constitutes an admission of all facts alleged therein and a waiver of Respondent's right to contest such factual allegations. Further, Respondent did not file, or otherwise submit, a response to the Motion for Default Order. (Initial Decision, Attachment A, ¶19) Respondent's attempt to now answer the Complaint and request a hearing to contest all material allegations contained in the Complaint in its notice is untimely and improper under the Consolidated Rules. Therefore, the Initial Decision should be upheld.

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4 The referenced information emphasizing Respondent's right to file an answer and request a hearing was reiterated in the Amended Complaint.

5 *See* In the Matter of Colonial Heritage Corporation, RCRA NO. VI-801-H (RJO Malone, Order And Reasons Dismissing Complaint, Feb. 18, 2000, at 3-4) ("In any event, under the Administrative Procedure Act (APA), 5 U.S.C. § 555(b), federal agencies, including EPA, are required to proceed with reasonable dispatch during all administrative actions."); In the Matter of Village of Noble, SDWA Docket No. C9101 (RJO Malone, Order And Reasons Dismissing Complaint With Prejudice, July 13, 1999, at 3) ("In accordance with the Administrative Procedure Act (APA), 5 U.S.C. § 555(b), federal agencies are required to proceed with reasonable dispatch during all administrative proceedings.").

III. RESPONDENT'S NOTICE ATTEMPTS TO INTRODUCE NEW FACTS AND THEREFORE IS UNFAIR TO COMPLAINANT

Respondent's purported notice of appeal attempts to introduce new facts to the case which is unfair and a denial of due process to the Complainant. Respondent had three opportunities to present its facts and any evidence to support its position, but failed to do so. By introducing its facts this late into the process, Respondent has denied Complainant an opportunity to cross-examine the person presenting the facts. Furthermore, the person presenting the facts was not under oath, so we are uncertain of the veracity. Therefore, no new testimony should be admitted and as a result, the Initial Decision should be upheld.

IV. THE PENALTY ASSESSED IN THE INITIAL DECISION IS FAIR, APPROPRIATE, AND CONSISTENT WITH THE RECORD AND THE ACT

Section 22.17(a) of 40 C.F.R. provides, in pertinent part:

> The 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.

Complainant had assessed a penalty of $16,800, in the Complaint and had proposed as such in the Motion for Default. However, the Presiding Officer reduced the penalty to $11,000. Pursuant to 40 C.F.R. § 22.30(f), the Board may not assess a civil penalty in an amount that is higher than the amount proposed in the complaint or in the motion for default (whichever amount is smaller. As such, Complainant agrees that the $11,000 penalty is fair, appropriate and consistent with the CWA.

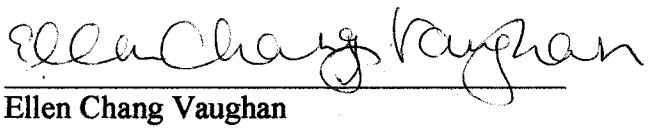
V. PARTIES WHO ARE PRO SE ARE STILL BOUND BY THE CONSOLIDATED RULES OF PRACTICE

Respondent who proceeded *pro se* is still bound by the Consolidated Rules. Even though *pro se* parties may be held to a more lenient standard than attorneys, they are still not excused from compliance with the Consolidated Rules.[6] "'The fact that [respondent], who apparently is not a lawyer, chooses to represent himself ***does not excuse respondent from the responsibility of complying with the applicable rules of procedure'" (quoting In re House Analysis & Assocs. & Fred Powell, 4 E.A.D. 501, 505 (EAB 1993).[7]

CONCLUSION

WHEREFORE, for the reasons set forth above, Complainant respectfully requests that the relief sought in the purported Notice to Appeal be denied and the Initial Decision be upheld.

Respectfully submitted,



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6 In re Jiffy Builders, Inc., 8 E.A.D. 315 (EAB 1999).
7 In re Rybond, 6 E.A.D. 614, 627 (EAB 1996).

CERTIFICATE OF SERVICE

I certify that the original of the foregoing Complainant's Response Brief in Opposition to Respondent's Notice to Appeal was hand-delivered to and filed with the Regional Hearing Clerk, U.S. EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202-2733, and true and correct copies were sent on this the 9th day of September, 2009, to the addressees listed below in the manner indicated:

VIA HAND DELIVERY:

Regional Judicial Officer (6RC-D)
U.S. Environmental Protection Agency
1445 Ross Avenue
Dallas, TX 75202

VIA U.S. MAIL, Certified Mail, Return Receipt Requested:

Mr. Bert Bishop
Rocking BS Ranch
8644 E. 127 Road
Wetumka, OK 74833

VIA Federal Express Mail

Eurika Durr
Clerk of the Board
Environmental Appeals
U.S. Environmental Protection Agency
Colorado Building
1341 G Street, N.W.
Suite 600
Washington, D.C. 20005

Ellen Chang Vaughan