UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
PARRY FARMS, LLC,	)	
	)	**Docket No. CWA-08-2010-0002**
	)	
Respondent.	)	

DECISION AND ORDER ON DEFAULT

I. Background

The Complaint initiating this proceeding was filed by the United States Environmental Protection Agency, Region 8, Office of Enforcement, Compliance and Environmental Justice ("Complainant" or "EPA"), on December 14, 2009. The Complaint alleges that Respondent violated Sections 301 and 402 of the Clean Water Act, 33 U.S.C. §§ 1311 and 1342 ("the Act"), and their implementing regulations, by violating certain terms of the State of Utah Storm Water General Permit for Construction Activities. The Complaint charges Respondent with three counts of violation and proposes that a penalty of $28,000 be assessed against Respondent for these violations.

Respondent, through counsel, filed an Answer to the Complaint on January 6, 2010, denying the violations and requesting a hearing. Thereafter, the parties engaged in Alternative Dispute Resolution to attempt to resolve this matter, but did not reach a settlement. Therefore, a Prehearing Order dated June 17, 2010 set due dates for each party to file a prehearing exchange. Complainant was directed to file its initial prehearing exchange on July 16, 2010, and Respondent was directed to file a prehearing exchange on July 30, 2010. Complainant requested an extension of time to file prehearing exchanges, which was granted by Order dated July 1, 2010, setting new due dates of July 30 for Complainant's prehearing exchange and August 16, 2010 for Respondent's prehearing exchange. Complainant timely file a Prehearing Exchange.

Respondent's counsel filed a Notice of Withdrawal of Counsel on July 12, 2010, providing Respondent's mailing address. Respondent did not file a prehearing exchange. Consequently on August 24, 2010, an Order to Show Cause was issued, ordering Respondent to show cause on or before September 8, 2010 why it failed to submit a prehearing exchange and why a default order should not be entered against it. As noted in the Order to Show Cause, on August 20, 2010, as a courtesy, a staff attorney of the undersigned contacted Respondent at a phone number provided by former counsel for Respondent, and reminded Jim Pack, the individual who answered the phone, of Respondent's obligation to file a prehearing exchange. During the phone call, Mr. Pack stated that he would notify Mr. Mike Sorenson of the call.

To date, Respondent has not responded to the Order to Show Cause and has not filed a prehearing exchange.

II. Applicable Procedural Rules and Standards Regarding Default

The Rules of Practice provide at 40 C.F.R. § 22.17(a) and(c) as follows:

> A party may be found to be in default . . . upon failure to comply with the information exchange requirements of § 22.19(a) or an order of the Presiding Officer. . . . Default by respondent constitutes, for the 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.
> * * * *
> 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 . . . . 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..

A default judgment is appropriate where the party against whom the judgment is sought has engaged in willful violations of court rules, contumacious conduct, or intentional delays. *Forsythe v. Hales*, 255 F. 3d 487. 490 (8th Cir. 2001) (quoting *Fingerhut Corp. v. Ackra Direct Mktg. Corp.*, 86 F.3d 852, 856 (8th Cir. 1996). Default judgment "is not an appropriate sanction for a marginal failure to comply with the time requirements [and] . . . should be distinguished from dismissals or other sanctions imposed for willful violations of court rules, contumacious conduct, or intentional delays." *Time Equipment Rental & Sales, Inc. v. Harre*, 983 F. 2d 128, 130 (8th Cir. 1993)(12 day delay in filing answer did not warrant entry of default). Moreover, Administrative Law Judges have broad discretion in ruling upon motions for default. Issuance of such an order is not a matter of right, even where a party is technically in default. *See, Lewis v. Lynn*, 236 F. 3d 766 (5th Cir. 2001). This broad discretion is informed by the type and the extent of any violations and by the degree of actual prejudice to the Complainant." *Lyon County Landfill*, EPA Docket No. 5-CAA-96-011, 1997 EPA ALJ LEXIS 193 * 14 (ALJ, Sept. 11, 1997).

The Environmental Appeals Board (EAB) has stated that "where a respondent fails to adhere to a procedural requirement, [the EAB] has traditionally applied a 'totality of circumstances' test to determine whether a default order should be . . . entered . . . ." *JHNY, Inc.* CAA Appeal No. 04-09 (Final Order, September 30, 2005), slip op. at 16-17. The EAB considers several factors under this test: the alleged procedural omission, considering whether a procedural requirement was indeed violated, whether a particular procedural violation is proper

grounds for a default order, and whether there was a valid excuse or justification for not complying with the procedural requirement. *Id.*, slip op. at 17. The EAB states that it is not necessary to find repeated failures to timely submit prehearing exchange information in order to issue a default order. *Id.*, slip op. at 24. The EAB upheld a default order upon respondent's tardiness in filing, and failure to attach proposed exhibits to, the initial prehearing exchange statement, where respondent alleged that the documents were provided to complainant in settlement discussions. *Id.*

III. Finding of Default

Respondent has failed to file a prehearing exchange despite having been granted an extension of time to do so, and having been reminded by telephone and by the Order to Show Cause. In addition, it has failed to comply with the Order to Show Cause. Respondent has willfully violated the Prehearing Order and Order to Show Cause, and thus has intentionally delayed this proceeding. Respondent is therefore in default, and under the Rules is deemed to have admitted all of the facts alleged in the Complaint and to have waived its right to contest them.

Accordingly, based upon the Complaint and the documents of record, I make the following Findings of Fact and Conclusions of Law.

IV. Findings of Fact and Conclusions of Law

1. Respondent Parry Farms, LLC, is and was at all times a Utah limited liability company with a registered office address of 1257 Margaret View Circle, Riverton, Utah, 84065. Respondent is and at all relevant times was a "person" within the meaning of Section 502(5) of the Act.

2. At all times relevant to this action, Respondent engaged in construction activities at the Parry Farms development in Bluffdale, Utah ("the Site"). The Site is a residential housing development with single-family lots.

3. On May 6, 2005, Respondent submitted a Notice of Intent to the State of Utah requesting authorization to discharge storm water at the Site pursuant to the Storm Water General Permit for Construction Activities, Permit UTR100000 ("Permit"). Coverage for the Site under the Permit, UTS 104357, was obtained on May 6, 2005. Part III of the Permit requires development of a Storm Water Pollution Prevention Plan (SWPPP) to control and reduce pollutants in storm water discharges from construction activities. The SWPPP must be completed prior to the Notice of Intent. Part III.D of the Permit sets forth requirements for the SWPPP, including the selection of controls and measures, known as Best Management Practices (BMPs), to prevent or reduce water pollution. Part III.B.1 of the Permit requires the signed SWPPP to be retained onsite at the facility unless the site is inactive, or, if no adequate onsite location exists to store the SWPPP, an onsite posting of the location of the plan and contact phone number. Part III.D.4 of the Permit

requires that qualified personnel inspect certain areas of the site at least once every 14 calendar days and within 24 hours of the end of a storm that is 0.5 inches of precipitation or greater. Part III.D.4.c of the Permit requires that inspection reports be made as specified, and retained as part of the SWPPP for at least three years from the date the site is finally stabilized.

4. Respondent commenced construction activities at the Site during the Spring of 2005, and such construction activities resulted in the disturbance of at least five acres of land.

5. On May 25, 2006, an inspector from the Utah Division of Water Quality ("DWQ") inspected the Site and observed, among other things, that:

a) a copy of the signed SWPPP for the Site was not available onsite;

b) BMPs to protect the storm water inlets were either missing or inadequate;

c) Sediment was built up in the streets;

d) There was no designated concrete washout area;

e) Site inspections had not been performed;

f) Inspection reports had not been prepared; and

g) Inspection reports were not retained as part of the SWPPP.

6. On June 27, 2006, an inspector from the DWQ inspected the Site and observed, among other things, that:

a) a copy of the signed SWPPP for the Site was not available onsite;

b) BMPs to protect the storm water inlets were either missing or inadequate;

c) Sediment was built up in the streets;

d) Site inspections had not been performed;

e) Inspection reports had not been prepared; and

f) Inspection reports were not retained as part of the SWPPP.

7. On May 14, 2008 and June 12, 2008, pursuant to Section 308 of the Act, EPA issued a Request for Information to Respondent, requiring Respondent to submit, among other things,

copies of all storm water self-inspections conducted at the Site, or, if such report was not available, the dates of such self inspections. EPA received a response to the Request from James Pack on behalf of Respondent, dated July 18, 2008, stating that certain information, including the self-inspection reports, would be forwarded to EPA. To date, EPA has not received copies of any self-inspection reports or the dates on which any such self-inspections were conducted at the Site.

8. At all times relevant to this action, water entering storm drains at the Site flowed through the Site's storm water infrastructure into a detention pond and ultimately into the Jordan River.

9. The Jordan River is a "water of the United States" and therefore a "navigable water" within the meaning of Section 502(7) of the Act.

10. Runoff and drainage from the Site is "storm water" as defined in 40 C.F.R. § 122.26(b)(13), and storm water contains "pollutants" as defined in § 502(6) of the Act.

11. The Site, as well as the storm drains and other conveyances referenced in the Complaint, constitute "point source[s]" within the meaning of § 502(14) of the Act.

12. Storm water discharge from the Site is a "discharge of a pollutant" as defined in § 502(12) of the Act and 40 C.F.R. § 122.2.

V. Discussion, Conclusions as to Liability, and Penalty

Count 1 alleges that on May 25 and June 27, 2006, Respondent did not retain the signed SWPPP at the Site as required by Part III.B.1 of the Permit, and that such failures constitute violations of the Permit. The Findings of Fact above establish that Respondent failed to comply with Part III.B.1 of the Permit as alleged in the Complaint.

Count 2 alleges that on May 25 and June 27, 2006, Respondent failed to properly select, operate and maintain BMPs as required by Parts III and III.D. of the Permit, and that such failures constitute violations of the Permit. The Findings of Fact above establish that Respondent failed to comply with Parts III and III.D of the Permit as alleged in the Complaint.

Count 3 alleges that from July 1, 2005 through December 31, 2006, Respondent failed to conduct Site inspections, prepare inspection reports, and retain inspection reports as part of the SWPPP as required by Parts III.D.4 and III.D.4.c of the Permit. The Findings of Fact above establish that Respondent failed to comply with Parts III.D.4 and III.D.4.c of the Permit as alleged in the Complaint.

Section 301(a) of the Act provides that the discharge of any pollutant by any person into waters of the United States shall be unlawful except as in compliance with a permit issued

pursuant to the Act. Section 309(g)(1) of the Act provides that whenever EPA finds that any person has violated Section 301(a) of the Act, or has violated any permit condition in a permit issued under Section 402 of the Act, a penalty may be assessed. Respondent is therefore subject to a penalty for the violations alleged in Counts 1, 2 and 3 of the Complaint. Furthermore, documents and other materials submitted with Complainant's Prehearing Exchange support the Findings of Fact. It is concluded that the case file does not show good cause why a default order should not be issued.

Given the provision in the Rules that "The relief proposed in the complaint . . . 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(c)), the next question is whether the penalty proposed in the Complaint is clearly inconsistent with the record or with the Act. Complainant calculated the proposed penalty taking into account the statutory factors in Section 309(g)(3) of the Clean Water Act, namely, "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." The Act provides that the amount of a class II civil administrative penalty "may not exceed $10,000 per day for each day during which the violation continues," except that the maximum amount shall not exceed $125,000. 33 U.S.C. § 1319 (g)(2)(B). The rules for Adjustment of Civil Monetary Penalties for Inflation, 40 C.F.R. Part 19, provide that penalties under Section 309(g)(2)(B) of the Act which are effective after March 15, 2004 are increased to $11,000 per day, and that the maximum penalty shall not exceed $157,500. 40 C.F.R. § 19.4.

The Complaint (at 6) contains a narrative explanation of the nature, circumstances, extent and gravity of the violations considered by Complainant in assessing the proposed penalty. Complainant's Prehearing Exchange includes photographs of the Site and documentary evidence relevant to the violations at the Site. The Complaint states that this is the first enforcement action EPA has issued to the Respondent as to storm water regulations. The Complaint also discusses the culpability of Respondent, and the economic benefit to Respondent by failing to meet all of the requirements of the storm water program, including the cost savings from failure to implement and maintain BMPs and failure to conduct and document Site inspections to ensure continuing implementation of BMPs. Complaint at 6-7. The proposed penalty was not reduced based upon any inability to pay or for any other matters as justice may require. Complaint at 7.

The proposed penalty is well within the statutory limit for three one-day penalties, that is, $33,000. To date, Respondent has not submitted any documents in support of any reduction of the penalty.

It is concluded that the proposed penalty of $28,000 is consistent with the record of this case and with the statutory penalty factors of the Clean Water Act.

ORDER

1. For failing to comply with the Prehearing Order and Order to Show Cause, as concluded above, Respondent is hereby found in **DEFAULT.** Respondent is liable for violating the Clean Water Act as alleged in the Complaint.

2. Respondent Parry Farms, LLC is hereby assessed a civil administrative penalty in the amount of $ **28,000.**

3. Respondent shall pay the full amount of this civil penalty within thirty (30) days after this Initial Decision becomes a final order under 40 C.F.R. § 22.27(c), as provided below. Payment shall be made by submitting a certified or cashier's check in the amount of $ 28,000, payable to "Treasurer, United States of America," and mailed to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000

4. A transmittal letter identifying the subject case and EPA docket number 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 entry of this Order, interest on the penalty may be assessed. *See,* 31 U.S.C. § 3717; 40 C.F.R. § 13.11.

6. This Decision and Order resolves all outstanding issues and claims in this proceeding, and therefore, as provided in 40 C.F.R. § 22.17(c), constitutes an Initial Decision.

7. Pursuant to 40 C.F.R. § 22.27(c), this Initial Decision shall become a final order forty-five (45) days after its service upon the parties and without further proceedings unless (1) Respondent moves to set aside this Decision and Order on Default; (2) an appeal to the Environmental Appeals Board is taken within thirty (30) days after this Initial Decision is served upon the parties; or (3) the Environmental Appeals Board elects, upon its own initiative, to review this Initial Decision, pursuant to 40 C.F.R. § 22.30(b).[1]

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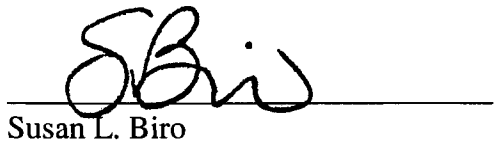
[1] For good cause, this Tribunal may set aside a default. 22 C.F.R. § 22.17(c). If Respondent has such *good cause*, it is encouraged to file a motion setting forth such cause as expeditiously as possible, as any such motion does not delay the time for filing an appeal.



Susan L. Biro
Chief Administrative Law Judge

Date: September 22, 2010
Washington, D.C.

In the Matter of Parry Farms, LLC, Respondent
Docket No. CWA-08-2010-0002

CERTIFICATE OF SERVICE

I certify that the foregoing **Decision And Order On Default**, dated September 22, 2010, was sent this day in the following manner to the addressees listed below:

Maria Whiting-Beale
Staff Assistant

Dated: September 22, 2010

Original And One Copy By Pouch Mail To:

Tina Artemis
Regional Hearing Clerk
U.S. EPA
1595 Wynkoop Street
Denver, CO 80202-1129

Copy By Pouch Mail To:

Wendy Silver, Esquire
Enforcement Attorney (8ENF-L)
U.S. EPA
1595 Wynkoop Street
Denver, CO 80202-1129

Copy By Regular Mail And Certfied Mail Return Receipt To:

Michael Sorenson
Parry Farms, LLC
8855 Jeremy Point
Park City, UT 84098