

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

2010 APR -8 AM 8:56

FILED
EPA REGION VIII
HEARING CLERK

IN THE MATTER OF)

47th Street Townhomes, LLC,)

Jordahl Custom Homes, Inc.,)

and)

Master Construction Co., Inc.,)

Respondents.)

Docket No. CWA-08-2009-0021

**COMPLAINANT'S
MOTION FOR DEFAULT
ON LIABILITY**

EPA Region 8, the Complainant in this matter, requests a default judgment against Respondent Master Construction Co., Inc., on liability under Count 2 of the Complaint in this action for unpermitted discharges from April 28, 2008, to May 30, 2008. Please see the accompanying Memorandum in Support of Complainant's Motion for Default on Liability for more details in support of this motion.

Respectfully submitted,

Margaret J. (Peggy) Livingston

Margaret J. (Peggy) Livingston
Enforcement Attorney
Office of Enforcement, Compliance
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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

2010 APR -8 AM 9:00

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IN THE MATTER OF)

47th Street Townhomes, LLC,)
Jordahl Custom Homes, Inc.,)
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Docket No. CWA-08-2009-0021

**MEMORANDUM IN
SUPPORT OF COMPLAINANT'S
MOTION FOR DEFAULT
ON LIABILITY**

I. INTRODUCTION

This memorandum is filed in support of a motion for default filed by the United States Environmental Protection Agency (EPA). As set forth below, Respondent Master Construction Co., Inc. (Master Construction) has failed to answer the Penalty Complaint and Notice of Opportunity for a Hearing (the Complaint) that EPA filed on July 9, 2009.

For the reasons presented below, EPA requests a ruling that Master Construction is liable under Count 2 of the Complaint for violating §§ 301(a) and 402(p) of the Clean Water Act (CWA or Act), 33 U.S.C. §§ 1311(a) and 1342(p), from April 28, 2008, to May 30, 2008.

II. BACKGROUND

The Complaint named three respondents: 47th Street Townhomes, LLC, Jordahl Custom Homes, Inc., and Master Construction (collectively, the Respondents). The Complaint proposed that the Respondents pay an administrative civil penalty of \$25,000 for violating storm water control requirements under the CWA in connection with the construction of a 5.2-acre multi-

family residential complex known as the 47th Street Townhomes, and referenced here as the Site, in the Osgood Townsite Eighth Addition, on Lot 5, Block 1, in Fargo, North Dakota, at the 47th Street Townhomes site in Fargo, North Dakota.

III. STANDARD FOR FINDING DEFAULT

A respondent may be found in default upon failure to file a timely answer to an administrative complaint. A respondent's default constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of the respondent's right to contest such factual allegations. 40 C.F.R. § 22.17(a).

A motion for default may seek resolution of all or part of the proceeding. 40 C.F.R. § 22.17(b). In promulgating 40 C.F.R. § 22.17, EPA intended to allow parties to move for a determination of default, without necessarily requesting a ruling on a penalty amount. 64 Fed. Reg. 40138, 40155 (July 23, 1999).

When a Presiding Officer finds that a default has occurred, s/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. 40 C.F.R. § 22.17(c).

IV. ARGUMENT

A. Respondent Has Failed to File an Answer

According to 40 C.F.R. § 22.15(a), a respondent must file an answer to a complaint with the Regional Hearing Clerk within 30 days after service of the complaint.

EPA mailed a copy of the Complaint to each Respondent on July 9, 2009. Respondents 47th Street Townhomes, LLC and Jordahl Custom Homes, Inc. filed an answer, which was filed

with the Regional Hearing Clerk on August 17, 2009. However, EPA did not receive an answer from Master Construction.

On December 9, 2009, EPA mailed additional copies of the Complaint to Fred J. Schlanser, Jr., Registered Agent for Master Construction, and to Duane Baumgart, General Superintendent for Master Construction.

Mr. Baumgart received his copy of this mailing on December 14, 2009, according to the return receipt card that was returned to EPA. The precise date Mr. Schlanser received his copy is not known, because his signature on the return receipt card accompanying his copy of the Complaint was not dated.¹

Mr. Schlanser's return receipt card was received by EPA on December 18, 2009. (See the Affidavit of Margaret J. (Peggy) Livingston.) Both return receipt cards were filed with the Regional Hearing Clerk on January 22, 2010. Mr. Baumgart's card is number 7008 3230 0003 0730 0132. Mr. Schlanser's card is number 7008 3230 0003 0729 7500.

Assuming for the sake of argument that the date of service on Mr. Schlanser is the date that the return receipt card was filed with the Regional Hearing Clerk,² Master Construction was required to have filed an answer no later than February 22, 2010.

EPA has yet to receive an answer from Master Construction.

B. Prima Facie Case of Liability

A respondent's default constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of that respondent's right to contest

¹ The fact that the return receipt card was not dated should not preclude a default judgment. EPA Regional Judicial Officers have entered default judgments against respondents whose representatives signed, but did not date, return receipt cards accompanying copies of complaints. See, e.g., In the Matter of Lincoln Road RV Park, Inc., Docket No. SDWA-08-2008-0038 (RJO Elyana R. Sutin, July 30, 2009), and In the Matter of Shaded Acres Water Company, 1992 EPA RJO LEXIS 15 (July 20, 1992, RJO Regina M. Kossek).

² This is a conservative assumption, because the return receipt card for Mr. Schlanser arrived at EPA on December 18, 2009.

the complaint's factual allegations. 40 C.F.R. § 22.17(a); In the Matter of: Alvin Raber, Jr., and Water Enterprises Northwest, Inc., 2004 EPA RJO LEXIS 188 (July 22, 2004, RJO Alfred C. Smith).

Count 2 of the Complaint alleges that the Respondents discharged storm water into waters of the United States from their construction site to the Red River of the North via the City of Fargo's municipal separate storm sewer system (MS4) without authorization by any CWA permit from April 28, 2008, through November 4, 2008, in violation of §§ 301(a) and 402(p) of the Act, 33 U.S.C. §§ 1311(a) and 1342(p).

To prove a *prima facie* case that Master Construction is liable under Count 2 of the Complaint for violating § 301(a) of the Act, EPA must prove that Master Construction discharged pollutants from a point source without authorization under the Clean Water Act. Committee to Save the Mokelumne River v. East Bay Utility District, 13 F.3d 305, 308 (9th Cir. 1993), cert. denied 513 U.S. 873, 115 S.Ct. 198, 130 L.Ed.2d 130 (1994); In re: Larry Richner / Nancy Sheepbouwer & Richway Farms, 2002 EPA App. LEXIS 13 (EAB, July 22, 2002).

The Complaint alleges each of these elements. The facts alleged in the Complaint establish liability under § 301(a). By failing to answer the Complaint, Master Construction has admitted all factual allegations in the Complaint, including but not limited to the following, as of all times relevant to the Complaint:

1. Master Construction is a North Dakota business corporation. (Par. 3, Complaint.)
2. From approximately April 28, 2008, to May 30, 2008, Master Construction had day-to-day responsibility for construction on property (the Site) at which a multi-family residential complex known as the 47th Street Townhomes was being constructed. (Par. 5 and 8, Complaint.)³

³ EPA reserves the right to argue at later stages of this proceeding that Master Construction had day-to-day control of the Site after May 30, 2008.

3. 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. (Par. 12, Complaint.)
4. 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 wattles, and drain protection bags in need of replacement and/or repair), sediment tracking on 47th St. South, and no storm water pollution prevention plan (SWPPP) on-site. (Par. 28, Complaint.)
5. 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 storm water discharge permit. (Par. 24 and 27, Complaint.)
6. Respondents have 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 November 4, 2008. (Par. 37, Complaint.)

The admissions that storm water contains "pollutants" as defined by § 502(6) of the Act, 33 U.S.C. §1362(6), that the Respondents have discharged storm water from the Site, that storm water has flowed from the Site into the City of Fargo's MS4 and on to the Red River of the North, that the Red River of the North is a "navigable water" as defined by § 502(7) of the Act, 33 U.S.C. § 1562(7), and a "water of the United States" as defined by 40 C.F.R. § 122.2, and that the discharge is from a point source establish that pollutants have been discharged from the Site.

The admission that Master Construction is a corporation establishes that Master Construction is a "person" as defined in § 502(5) of the Act, 33 U.S.C. § 1362(5). The admission that Master Construction had day-to-day responsibility for construction at the Site from approximately April 28, 2008, to May 30, 2008, establishes that Master Construction discharged pollutants from the Site during this time period.

Master Construction therefore has admitted all elements of a violation of § 301(a) of the Act, 33 U.S.C. § 1311(a).

In addition, EPA alleged in Count 2 that the Respondents violated § 402(p) of the Act, 33 U.S.C. § 1342(p). Section 402(p) was added to the Clean Water Act in 1987, to clarify that the Act's permitting requirement applies to certain industrial and municipal storm water discharges. See In the Matter of Service Oil, Inc., 2007 EPA ALJ LEXIS 21, *18 (ALJ Biro, August 3, 2007).⁴

Section 402(p) of the Act provides that that certain “discharges composed entirely of stormwater” prior to October 1, 1994, were exempt from the permit requirement. However, the exemption does not apply to a “discharge associated with industrial activity.” CWA § 402(p)(2)(B); 33 U.S.C. § 1342(p)(2)(B). EPA has defined the term “storm water discharge associated with industrial activity” to include a discharge from clearing, grading, and excavating at a site of five or more acres. 40 C.F.R. § 122.26(b)(14)(x).

By failing to answer Paragraphs 6 and 7 of the Complaint, which allege that the Site encompasses 5.2 acres and that construction activities, including clearing, grading, and excavating, began at the Site on or around April 28, 2008, Master Construction also has admitted the facts necessary to prove a violation of § 402(p) of the CWA, 33 U.S.C. § 1342(p).

V. CONCLUSION

Master Construction has failed to answer EPA's Complaint. For the reasons set forth above, EPA requests that the Presiding Officer find Master Construction liable as a matter of law

⁴ This decision was affirmed by the EPA's Environmental Appeals Board (EAB). In re: Service Oil, Inc., 2008 EPA App. LEXIS 35 (EAB, July 23, 2008). The EAB's decision was overturned on unrelated grounds. See Service Oil, Inc. v. United States Environmental Protection Agency, 2009 WL 5064042, 2009 U.S. App. LEXIS 28384 (8th Cir. 2009).

under Count 2 of the Complaint for violating §§ 301(a) and 402(p) of the CWA, 33 U.S.C. §§ 1311(a) and 1342(p), from April 28, 2008 to May 30, 2008.

Respectfully submitted,

Margaret J. (Peggy) Livingston
Margaret J. (Peggy) Livingston
Enforcement Attorney
Office of Enforcement, Compliance
and Environmental Justice
U.S. EPA Region 8
1595 Wynkoop Street
Denver, CO 80202
Telephone Number: (303) 312-6858
Facsimile Number: (303) 312-7202

Certificate of Service

The undersigned certifies that on the date indicated below, copies of the preceding Complainant's Motion for Default on Liability and the accompanying Memorandum in Support of Complainant's Motion for Default on Liability and affidavit of Margaret J. (Peggy) Livingston were sent or delivered to each of the following:

One copy to:

Duane Baumgart
General Superintendent
Master Construction Company, Inc.
1572 45th Street NW
Fargo, ND 58102
Certified Mail, Return Receipt No.
7008 3230 0003 0730 4222

One copy to:

Fred J. Schlanser, Jr.
Registered Agent for Master Construction Co., Inc.
1572 45th Street NW
Fargo, ND 58102
Certified Mail, Return Receipt No.
7008 3230 0003 0730 4215

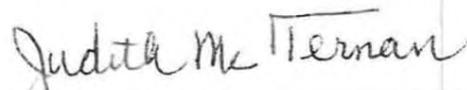
Original and one copy hand delivered to:

Tina Artemis
Regional Hearing Clerk
U.S. EPA Region 8
1595 Wynkoop Street
Denver, CO 80202

One copy hand delivered to:

Hon. Elyana R. Sutin
Regional Judicial Officer
U.S. EPA Region 8
1595 Wynkoop Street
Denver, CO 80202

Dated: 4/8/10


Judith McTernan

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8**

IN THE MATTER OF)	
)	
47 th Street Townhomes, LLC,)	Docket No. CWA-08-2009-0021
Jordahl Custom Homes, Inc.,)	
and)	AFFIDAVIT OF
Master Construction Co., Inc.,)	MARGARET J. (PEGGY) LIVINGSTON
)	
Respondents.)	
_____)	

My name is Margaret J. (Peggy) Livingston. I am employed by Region 8 of the United States Environmental Protection Agency (EPA) as an attorney in the Legal Enforcement Program. I did not receive a copy of any return receipt card indicating that Master Construction Co., Inc. (Master Construction) received the complaint that EPA issued in this matter on July 9, 2009. On December 9, 2009, EPA Region 8 sent a second copy of the complaint to Fred J. Schlanser, Jr., Registered Agent for Master Construction, and to Duane Baumgart. On December 18, 2009, I received two signed return receipt cards that had accompanied the December 9th mailing. The card for Mr. Baumgart indicated a December 14, 2009, date of delivery. The card for Mr. Schlanser did not indicate a date of delivery.

Margaret J. (Peggy) Livingston
Margaret J. (Peggy) Livingston

Subscribed and sworn to before me this 7th day of April, 2010.

Shirley A. Kelley

Notary Public in and for
City and County of Denver, Colorado