BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of: Astro Auto Wrecking, LLC Federal Way, Washington Respondent.	DOCKET NO. CWA-10-2021-0097

MEMORANDUM IN SUPPORT OF COMPLAINANT'S MOTION FOR DEFAULT

I. INTRODUCTION

This memorandum is filed in support of a motion for default and request for the assessment of civil penalties brought by the Director of the Enforcement and Compliance Assurance Division of the United States Environmental Protection Agency, Region 10 ("Complainant"), in accordance with 40 C.F.R. § 22.17 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.

This case concerns Astro Auto Wrecking, LLC's ("Respondent") ownership and operation of a 5-acre auto wrecking, recycling, and storage facility located at 37307 Enchanted Parkway South in Federal Way, Washington ("Facility"). On May 20, 2019, Complainant's inspector, accompanied by a Stormwater Inspector and Compliance Specialist from the Washington Department of Ecology, conducted a stormwater inspection at the Facility to determine Respondent's compliance with its Washington State Department of Ecology ("Ecology") Industrial Sector General Permit ("ISGP") number WAR011869, and the federal stormwater regulations at 40 C.F.R. Part 122. Exhibit 1. On July 23, 2019, Complainant's inspector finalized an inspection report that documented his observations during the inspection and conversations with Respondent's representatives. Complainant also reviewed publicly available information from Ecology's Permit and Reporting Information System ("PARIS") database and from the court docket for *Waste Action Project v. Astro Auto Wrecking*, No. 2:15-cv-796-JCC (W.D. Wash.), a federal civil action against Respondent alleging stormwater and ISGP permit violations brought pursuant to Section 505 of the CWA, 33 U.S.C. § 1365. Based on the inspector's observations, supported by photographs taken during the inspection, a review of information in the PARIS database, the finding of facts and conclusions of law in the federal

civil action against Respondent, and a review of permit compliance documents received from Respondent on June 8, 2019, Complainant determined that Respondent violated multiple conditions of its ISGP.

II. PREFILING COMMUNICATIONS

On September 14, 2020, Complainant provided notice of its intent to file an administrative complaint against Respondent for violations of the CWA and the opportunity to discuss the violations before a complaint would be filed. Exhibit 2. On October 29, 2020, Complainant and Respondent held a conference call to discuss the violations. Exhibit 3. During the call, Complainant described each of the violations and the evidence supporting the violations, explained the administrative enforcement process and offered Respondent the opportunity to respond or provide additional information for Complainant's consideration. Complainant also provided Respondent a copy of its Inspection Report documenting the findings of the May 20, 2019 inspection. Exhibit 4. Respondent stated its intent to provide additional information to Complainant and agreed to do so by November 13, 2020. On November 23, 2020, Complainant emailed Respondent asking whether it still intended to provide additional information related the identified violations. Exhibit 5. On December 9, 2020, after receiving no response to its prior email, Complainant sent a second email stating that because no information had been received it was proceeding under the assumption that Respondent no longer intended to provide any information and proposed a penalty amount of $47,500 to settle the case. Exhibit 6. On December 23, 2020, Respondent emailed Complainant stating it had corrected most violations but provided no additional information concerning the violations and no response to Complainant's December 9th settlement offer. *Id*. On January 7, 2021, Complainant contacted Respondent to ask if it intended to respond to the settlement offer and requested a response by no later than January 15, 2021. *Id*. On February 16, 2021, Complainant again contacted Respondent asking that it respond to the settlement offer by no later than February 26, 2021, and that if no

response was received it intended to proceed with filing an administrative complaint. Exhibit 7. On February 18, 2021, Respondent replied providing brief but unsupported statements concerning its compliance status with respect to the identified violations and a statement that the proposed penalty would be better spent keeping Respondent in compliance. Exhibit 8.

III. PROCEDURAL HISTORY

On April 29, 2021, Complainant filed the complaint in the above captioned matter against Respondent under CWA section 309(g)(2), 33 U.S.C. § 1319(g)(2). Dkt. 1 ("Compl."); Exhibit 9. Complainant served the Complaint on Respondent by U.S. Postal Service, certified mail, and Respondent accepted service on April 30, 2021. Dkt. 2, Exhibit 10. In accordance with CWA section 309(g)(1), 33 U.S.C. § 1319(g)(1), Complainant also provided the Washington State Department of Ecology with notice of the Complaint and an opportunity to consult. Exhibit 11.

The Complaint charged Respondent with 38 counts of violating ten separate ISGP conditions, Compl. ¶¶ 3.31 to 3.70. Complainant did not set forth a specific penalty demand, reserving its right to seek the maximum authorized penalty. 40 C.F.R. § 22.14(a)(4)(ii); Compl. ¶ 4.1. The Complaint notified Respondent of its right to request a hearing, Compl. ¶ 5.1, and of its obligation to file an answer to the Complaint with the Regional Hearing Clerk within 30 days after service of the Complaint. 40 C.F.R. § 22.15(a), Compl. ¶ 5.2. Because the Complaint was served by U.S. mail, Respondent had an additional three days to file its answer. 40 C.F.R. § 22.7(c).

As of the date of this filing, Respondent has not served an answer on Complainant. Complainant's counsel also contacted the Regional Hearing Clerk who confirmed on December 1, 2021, that no answer from Respondent had been filed or received. Exhibit 12. To the best of Complainant's knowledge, throughout the prefiling period and after filing of the Complaint, Respondent has not been represented by counsel and has engaged in the proceedings *pro se*.

IV. GOVERNING LAW

CWA section 309(g)(2), 33 U.S.C. § 1319(g)(2), provides for the assessment of administrative penalties for violations of permits issued under section 402 of the Act, 33 U.S.C. § 1342. Pursuant to the Consolidated Rules, because Respondent has not filed an answer to the Complaint, the Regional Judicial Officer is the Presiding Officer granted the authority to adjudicate all issues, including ruling on motions, to issue an initial decision, and to determine the amount of penalty. 40 C.F.R. § 22.4(b) and (c); § 22.27(a) and (b).

Motions for default are governed by section 22.17 of the Consolidated Rules which provides that:

> "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."

40 C.F.R. 22.17(a). A motion for default may seek resolution of all or part of the proceeding, and a movant seeking the assessment of a penalty must specify the penalty and state the legal and factual grounds for the requested relief. *Id.* at § 22.17(b).

The Consolidated Rules state that the Presiding Officer "*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. *Id*. § 22.17(c) (emphasis added). A good cause determination "has traditionally applied a 'totality of circumstances' test to determine whether a default order should be…entered…" *JHNY, Inc. A/K/A Quin-T Technical Papers and Boards*, 12 E.A.D. 372, 384 (EAB 2005). Several factors are considered under the "totality of circumstances" test, including the alleged procedural omission, namely whether a procedural requirement was indeed violated, whether a particular procedural violation is grounds for a default order, and whether there was a valid excuse or justification for not complying with the procedural requirement. *Id.* If the Presiding Officer issues a default order that resolves all

outstanding issues and claims in the proceeding, the order shall constitute the initial decision and "[t]he 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." 40 C.F.R. § 22.17(c).

Adjudication is the preferred method of resolving administrative enforcement actions and default judgments are generally disfavored. *JHNY, Inc.* 12 E.A.D. 384; *In re Thermal Reduction Co.* 4 E.A.D. 128, 131 (EAB 1992) (same). Nevertheless, the Environmental Appeals Board has not hesitated to affirm default orders in cases where the circumstances clearly indicate that such a remedy is warranted. *E.g., In re Rocking BS Ranch, Inc.*, CWA Appeal No. 09-04 at 13 (EAB Apr. 21, 2010) (affirming default order where respondent lacked an excuse for failing to file a timely answer); *In re Four Strong Builders, Inc.*, 12 E.A.D. 762, 772 EAB 2006); *In re B&L Plating, Inc*., 11 E.A.D. 183, 191-192 (EAB 2003); *In re Jiffy Builders, Inc.*, 8 E.A.D. 315, 320-21 (EAB 1999); *In re Rybond, Inc.*, 6 E.A.D. 614, 625-38 (EAB 1996).

In administrative proceedings under the Consolidated Rules, "[a]ny party may appear in person or by…other representative" and such representative "must conform to the standards of conduct and ethics required of practitioners before the courts of the United States. 40 C.F.R. § 22.10. As a general matter, *pro se* respondents are afforded more lenient standards of compliance and competence. *See Rybond*, 6 E.A.D. at 627. However, the fact that a party is not represented by counsel is not an excuse for failure to file an answer to the complaint. *Id.* at 626-27 ("[A] litigant who elects to appear *pro se* takes upon himself or herself the responsibility for complying with the procedural rules and may suffer adverse consequences in the event of noncompliance"); *Jiff Builders*, 8 E.A.D. at 320 ([P]arties who choose to proceed *pro se*, while held to a more lenient standard than parties represented by members of bar, are not excused from compliance with the Consolidated Rules of Practice."); *In re House Analysis & Associates & Fred Powell*, 4 E.A.D. 501, 505 (EAB 1993) ("[t]he fact that [respondent], who is apparently not

a lawyer, chooses to represent himself….does not excuse respondent from the responsibility of complying with the applicable rules of procedure."). Accordingly, a respondent's lack of representation does not excuse failure to comply with the Consolidated Rules.

V. DEFAULT HAS OCCURRED IN THIS MATTER

Respondent defaulted because it failed to file a timely answer to the Complaint by the deadline specified at 40 C.F.R. § 22.15(a). Specifically, 40 C.F.R. § 22.15(a) requires that "any answer to the complaint must be filed with the Regional Hearing Clerk within 30 days after service of the complaint." Where service of a complaint is made by U.S. Postal Service, including by certified mail, 40 C.F.R. § 22.7(c) provides that three additional days shall be added to the time specified in the Consolidated Rules to file a responsive document. Accordingly, Respondent's answer was due no less than 33 days after service of the Complaint. Service of the Complaint on Respondent was completed on April 30, 2021, Exhibit 10; accordingly, the deadline for Respondent to file its answer was June 2, 2021. As noted previously, counsel for Complainant contacted the Regional Hearing Clerk who confirmed on December 1, 2021, that Respondent had not filed an answer to the Complaint. Exhibit 12. Respondent's failure to file a timely answer by June 2, 2021, and ongoing failure to file such answer as of the date of this Motion, entitles Complainant to an Order of Default against Respondent in accordance with 40 C.F.R. § 22.17.

Applying the totality of circumstances test supports a finding that Respondent lacks good cause for its failure to file a timely answer. The primary factors considered under the totality of circumstances test are: (1) whether a procedural requirement was indeed violated, (2) whether the particular procedural violation is proper grounds for default, and (3) whether there was a valid excuse or justification for not complying with the procedural requirement. *JHNY, Inc.*, 12 E.A.D. at 384.

With respect to the first factor, as discussed above, Respondent clearly violated the procedural requirement to file its answer by June 2, 2021 and, more than seven months later, has still not filed its answer. This failure is consistent with the behavior exhibited by Respondent as Complainant attempted to discuss and resolve the identified violations prior to filing the Complaint. *See supra* Section II Prefiling Communications. Respondent agreed to provide additional information for Complainant's consideration by a date certain but failed to do so despite a number of follow-up requests. Exhibits 5, 6 and 7. In fact, the only response Complainant received concerning the identified violations amounted to general statements from Respondent, unsupported by any evidence or supporting information, that the violations had been, or were being corrected. Exhibits 6 and 8.

Respondent fares no better under the second factor. The particular procedural requirement violated – failure to timely answer a complaint or to answer at all – is a significant procedural omission and evinces a general disregard for the procedural requirements of the Consolidated Rules and a lack of seriousness for the enforcement matter at hand. Respondent's failure to answer the Complaint complicates and delays Complainant's ability to enforce violations of the CWA and to seek general and specific deterrence to such violations through the assessment of penalties. Accordingly, there are proper grounds for default resulting from Respondent's ongoing failure to answer the Complaint.

In assessing the final factor, Complainant has no information to assess whether Respondent has a valid justification for not filing an answer. However, Respondent was placed on notice that its failure to answer the Complaint could result in a default judgment which constitutes an admission of all facts alleged in the Complaint, waiver of the right to a hearing, and the potential assessment of penalties. Compl. ¶¶ 6.2 and 6.3. In addition, on July 21, 2021, Complainant again notified Respondent that if no answer was filed by August 6, 2021 – more than 60 days after the initial answer was due – it intended to move for default judgment. Exhibit

13. Complainant never received a response to its final notification and Respondent never provided any explanation or reason why it was unable to answer the Complaint. As a result, Complainant lacks knowledge as to whether Respondent has a valid excuse or justification for not complying with the procedural requirements in the Consolidated Rules. In the event Respondent files a response to this Motion asserting it had a valid excuse or justification for its failure to file a timely answer, Complainant will consider and address such assertions in its reply. *See* 40 C.F.R. § 22.16(a).

VI. THE COMPLAINT PLEADS FACTS TO ESTABLISH LIABILITY

The factual allegations in the Complaint provide ample basis to find that Respondent is liable for the violations alleged therein. Therefore, the Presiding Officer should find that default has occurred and issue a default order consistent with the Proposed Order submitted with this Motion. Specifically, the Complaint sets forth the following facts:

1. Respondent is a limited liability corporation organized under the laws of Washington State and is a "person" under CWA section 502(5), 33 U.S.C. § 1362(5), Compl. ¶ 3.1;

2. Respondent operates a Facility for auto wrecking, recycling and storage which are industrial activities under Standard Industrial Classification codes 5015 and 5093 (metal scrap and recycling yards, batter reclaimers, salvage yards and automobile junk yards), and are defined to be industrial activities subject to the stormwater permitting regulations. 40 C.F.R. § 122.26(b)(14)(vi), Compl. ¶¶ 2.9, 3.2 and 3.3;

3. Respondent's Facility discharges stormwater associated with industrial activity from point sources to Hylebos Creek, a navigable water regulated under the CWA, which flows into Hylebos Waterway, an inlet of Commencement Bay in Puget Sound. Compl. ¶¶ 3.4 to 3.7;

4. At all times relevant to the violations alleged in the Complaint, Respondent was covered under, and required to comply with, the Washington Department of Ecology ISGP, Compl. ¶¶ 2.10 to 2.12, 3.8;

5. Complainant conducted an inspection of Respondent's Facility on May 20, 2019, reviewed permit compliance documents provided by Respondent and publicly available information on Ecology's PARIS database, reviewed findings of fact and conclusions of law in the District Court case *Waste Action Project v. Astro Auto Wrecking*, No. 2:15-cv-796-JCC (W.D. Wash.), and compiled its findings in an Inspection Report dated July 23, 2019; Compl. ¶¶ 3.9 to 3.28;

6. Based on the facts set forth in the Complaint, Complainant determined that, between January 1, 2018 and May 20, 2019, Respondent violated the following conditions of its ISGP:

- Violation 1: Failure to Immediately Clean Up Spills (Condition S3.B.4.b.i.3.d), three counts, Compl. ¶¶ 3.31 to 3.34;
- Violation 2: Failure to Provide for Secondary Containment (Condition S3.B.4.b.i.4.a), eight counts, Compl. ¶¶ 3.35 to 3.38;
- Violation 3: Failure to Locate Spill Kit Within 25 feet of Fueling Station (Condition S3.B.4.b.i.4.c), one count, Compl. ¶¶ 3.39 to 3.42;
- Violation 4: Failure to Use Drip Pan (Condition S3.B.4.b.i.4.h), one count, Compl. ¶¶ 3.43 to 3.46;
- Violation 5: Failure to Cover Dumpster (Condition S3.B.4.b.i.2.d), one count, Compl. ¶¶ 3.47 to 3.50;
- Violation 6: Failure to Maintain Records Onsite (Conditions S3.A.4.a, S9.C.1), one count, Compl. ¶¶ 3.51 to 3.54;

- Violation 7: Failure to Maintain Complete and Updated Stormwater Pollution Prevention Plan (SWPPP) (Conditions S3.B.3, S3.B.1.c), two counts, Compl. ¶¶ 3.55 to 3.58;
- Violation 8: Failure to Conduct or Document Annual Training (Conditions S3.B.4.b.i.5, S9.C.1.e), one count, Compl. ¶¶ 3.59 to 3.62;
- Violation 9: Failure to Complete Monthly Inspections (Condition S7.C.1), 17 counts, Compl. ¶¶ 3.63 to 3.66; and
- Violation 10: Failure to Complete Discharge Monitoring Report (Condition S9.A.4), one count, Compl. ¶¶ 3.67 to 3.70.

VII. REQUEST FOR CIVIL PENALTY

"Where the motion [for a default order] requests the assessment of a civil 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 requested relief." 40 C.F.R. § 22.17(b). The Consolidated Rules authorize the assessment of a penalty in the event of a default. *Id.* at § 22.27(b). Specifically, the Consolidated Rules provide, in pertinent part, "[i]f the respondent has defaulted, the Presiding Officer shall not assess a penalty greater than that proposed in the….motion for default…" *Id.* "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." *Id.* at § 22.27(c).

This Motion specifies the penalties sought and the legal and factual grounds for these penalties. *Id.* at 22.17(b). The requested relief is consistent with the record of this proceeding and the CWA and the Presiding Officer should order the requested relief. *Id.* at 22.17(c). Issuance of a default order and assessment of a civil penalty would resolve all outstanding issues and claims in this proceeding and would therefore constitute an initial decision. *Id.*

A. Statutory Factors for Assessment of Civil Penalties

Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), authorizes the administrative assessment of civil penalties in an amount not to exceed $10,000 per day for each day during which the violation continues, up to a maximum total penalty of $125,000. Pursuant to the Civil Monetary Penalty Inflation Adjustment Rule of 2020, 40 C.F.R. Part 19, civil administrative penalties of up to $22,584 per day for each day during which a violation continues, up to a maximum of $282,293, may be assessed for violations of CWA sections 301 and 402, U.S.C. §§ 1311 and 1342, that occurred after November 2, 2015, if penalties are assessed on or after December 23, 2020. 40 C.F.R. § 19.4.

In determining the amount of penalty, CWA section 309(g)(3), 33 U.S.C. § 1319(g)(3), provides that EPA "…shall take into account 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 violations, and such other matters as justice may require." An appropriate penalty is one which reflects consideration of each factor the governing statute requires, and which is supported by an analysis of those factors. *In re B.J. Carney Industries, Inc.*, 7 E.A.D. 171, 219 (EAB 1997).

B. Application of Penalty Factors and Factual Grounds for Requested Penalty

Complainant's requested relief, based on the information available and consideration of the statutory penalty factors set forth in the CWA, is a civil penalty of $35,400. The following provides a narrative description of how this penalty was calculated in consideration of the enumerated statutory penalty factors in CWA section 309(g)(3), 33 U.S.C. § 1319(g)(3). In applying the facts and record of proceeding to the enumerated penalty factors, Complainant endeavored to resolve any uncertainty to the benefit of Respondent. This approach explains the difference between Complainant's proposed settlement offer, Exhibit 6, and the penalty amount

justified in this Memorandum of Support. The facts set forth in the Complaint and referenced below are deemed to be admitted because default has occurred. 40 C.F.R. § 22.17(a).

1. Nature, Circumstances and Gravity of the Violations

The purpose of the ISGP is to establish, implement and maintain best management practices intended to prevent or limit the conveyance of pollutants to surface waters through stormwater runoff. Because the ISGP does not establish numeric effluent limitations or impose specific treatment requirements for stormwater prior to discharge, it relies on the identification and implementation of best management practices to prevent or limit stormwater pollution, and the use of benchmark pollutant levels to assess the adequacy of these measures. The ISGP requires the preparation of a SWPPP that identifies and describes best management practices. The SWPPP is a critical part of ISGP compliance and must be maintained onsite and updated to accurately reflect operations and practices at a facility. The ISGP also requires that facility employees who have duties or responsibilities in areas where stormwater pollution may occur receive training on the SWPPP requirements at least once per year. Finally, the ISGP requires that a facility be visually inspected once a month to verify proper implementation of best management practices and that stormwater discharges from a facility be sampled once every three months to assess the effectiveness of such practices in achieving pollutant benchmark levels. Each of the aforementioned ISGP conditions are necessary to ensure the facility is designed, operated and maintained in a manner that limits or prevents stormwater pollution.

Respondent violated the best management practices related to the immediate cleanup of spills, requirements for secondary containment and use of drip pans to prevent spills, and maintaining proximate access to spill response kits to quickly clean up any spills that do occur. These conditions are directed at preventing pollutant exposure to stormwater and subsequent conveyance of such pollutants to surface waters. In addition, the potential for environmental harm from Respondent's failure to comply with these best management practices is not

hypothetical. Complainant's inspector observed several areas around Respondent's Facility with heavy staining and oil sheens, including outdoor areas exposed to precipitation and a noticeable leak from a 1000-gallon diesel fuel storage tank. Compl. ¶¶ 3.15 to 3.17, 3.32, 3.36, 3.40, 3.44. The Inspector also observed totes and other containers with motor oil, anti-freeze, transmission oil and other petroleum substances that were stored in areas without secondary containment as required by the ISGP, and observed that a few of the totes and containers were leaking their contents to the ground. *Id*. The inspector also concluded that Respondent had failed to immediately address these spills and leaks and lacked a fuel response kit required for fueling stations. *Id.* at ¶¶ 3.32 and 3.40. A stormwater catch basin at the Facility near the car crushing area lacked filtration or other best management practices to prevent the introduction of pollutants to the stormwater conveyance system. *Id.* at ¶ 3.18. Respondent's failure to immediately respond to and clean up these spills and leaks are significant violations that greatly increase the potential for stormwater pollution from the Facility to reach surface waters. This conclusion is supported by the District Court's finding in *Waste Action Project v. Astro Auto Wrecking* that it is more likely than not that stormwater discharges from Respondent's Facility were contaminated with petroleum or petroleum byproducts. Exhibit 14 pp. 4-5. Adding to the nature, circumstances and gravity of these violations is the fact that there are known sources of zinc and copper present in Respondent's stormwater dischargers, and the immediate receiving water, Hylebos Creek, is listed by Ecology as impaired for copper, as are the downstream waters of Hylebos Waterway and Commencement Bay. *Id.* at p. 2; Compl. at ¶¶ 3.5 to 3.6.

Much like the imposition of best management practices, the ISGP imposes planning, inspection, monitoring, and training conditions that aid in the prevention or mitigation of stormwater pollution by assuring the Facility has developed and documented best management practices, that such best management practices are adequate to prevent or limit stormwater

pollution, are being properly implemented and maintained, and that Facility staff are aware of and trained to implement and maintain the necessary best management practices.

Respondent failed to maintain a complete and updated SWPPP, to provide compliance records when requested and to submit complete and accurate monthly and quarterly reports required by the ISGP. *Id.* at ¶¶ 3.56, 3.60, 3.64 and 3.68. Respondent's failure to maintain a complete and updated SWPPP and to fully comply with monthly inspection and quarterly reporting requirements inhibits its ability to assess and evaluate, on a continuing basis, the effectiveness of its stormwater pollution prevention measures and to identify pollution problems. Failure to implement these core permit requirements undermines a critical condition of the ISGP that requires implementation of corrective action measures to address ineffective pollution prevention measures and to reduce stormwater pollution that exceeds specified monitoring benchmarks. Respondent's failure to comply with these monitoring and reporting requirements, in addition to its failure to maintain and make available required compliance documentation, complicates Complainant and Ecology's regulatory oversight efforts. Without access to the self-monitoring and reporting that the ISGP requires of all permittees, Complainant and Ecology cannot fully understand and evaluate, and therefore address, impacts the Facility may be causing to water quality and, by extension, impacts the Facility may be causing to human health and the environment. The ISGP requires Respondent to monitor and sample its stormwater discharge for pollutants including turbidity, pH, copper, zinc, lead and petroleum hydrocarbons. These are the pollutants that could reasonably be expected to be present in Respondent's stormwater discharges. As noted above, Hylebos Creek and the downstream waters of Hylebos Waterway and Commencement Bay are listed as impaired for copper, meaning that the levels of copper in these waters exceed standards that are established to protect designated uses. Copper is a toxic pollutant that causes adverse impacts to aquatic life including threatened and endangered salmonids in Puget Sound.

2. History of Violations

Respondent has a history of non-compliance with its ISGP permit. Since it obtained coverage under the 2015 ISGP, Respondent has received correspondence from Ecology concerning Respondent's failure to submit required discharge monitoring reports in 2015, 2016 and 2017. Exhibit 15. On June 20, 2018, Ecology assessed Respondent a $3,000 penalty for failure to submit quarterly discharge monitoring reports in 2016. *Id.* In 2015, Respondent was sued by a citizen group alleging violations of its ISGP. *Waste Action Project v. Astro Auto Wrecking*, No. 2:15-cv-796-JCC (W.D. Wash.). On summary judgement, and again after trial, the Court found Respondent liable for numerous permit violations including failure to implement secondary containment for fluid storage, failure to indicate compliance status on numerous inspection reports, failure to prepare noncompliance reports and implement remedial actions, failure to complete accurate and complete annual reports over a period of years, and failure to sample stormwater discharges over a period of four years. Exhibits 14 and 16. The prior violations, documented by Ecology and the District Court, are the same types of violations at issue in the present matter and demonstrate Respondent's history of noncompliance. In bringing the present action, Complainant only alleged violations that occurred after January 1, 2018, and up to the date of the May 20, 2019 inspection. Compl. ¶ 3.30. The scope of the violations detailed in the Complaint therefore excludes the prior violations in 2015, 2016 and 2017 identified by Ecology (Exhibit 15), and the violations addressed by the District Court's orders dated December 6, 2016 and April 4, 2017 (Exhibits 14 and 16). Accordingly, although the type, nature and gravity of violations addressed in this action are similar to those addressed by Ecology and the District Court, the violations in the present action are separate and distinct.

3. Economic Impact of Penalty on Respondent

Complainant has no current information to evaluate the economic impact of the civil penalty on Respondent or any information to evaluate whether Respondent is capable of paying the specified civil penalty. Complainant is aware that the District Court in *Waste Action Project v. Astro Auto Wrecking* assessed a deferred penalty of $50,000, to be paid in the event Respondent failed to comply with ordered injunctive relief, and awarded attorney fees against Respondent in the amount of $203,463. Exhibit 14 ¶ 18 and Exhibit 17. However, Complainant lacks knowledge or information to determine whether Respondent paid the deferred penalty or attorney fee award and, if so, how such payments affect Respondent's ability to pay the civil penalty in this matter.

4. Other Matters as Justice May Require

Complainant is unaware of any other matters that support a reduction of the proposed penalty amount. However, as described above, Respondent has been largely uncooperative with Complainant's attempt to resolve this case through settlement and has not responded to the Complaint. In addition, Respondent has exhibited a high degree of culpability and noncompliance toward Complainant and Ecology. These considerations support Complainant's proposed penalty. For example, in 2015, Ecology conducted an inspection of Respondent's Facility that concluded:

> "The facility is grossly out of compliance with their Industrial Stormwater General Permit. The required documentation was not available for review. The site is situated on a hill side above Hylebos Creek. At the time of inspection it was raining moderately. Visible oil sheens were everywhere and present on all stormwater flowing through the site. There was a noticeable lack of commonly employed best management practices (BMPs). The facility operates a crusher onsite. The crusher was leaking oil to the ground."

Exhibit 18 at pp. 2-3. Although the inspection did not lead to formal enforcement to substantiate and penalize Respondent for any specific violations, and therefore should not be considered evidence of prior violations, the report identifies many of the same violations that are at issue in the present matter and is evidence of Respondent's general disregard for compliance with the ISGP. Furthermore, in 2017, Respondent was ordered by a federal court to implement injunctive measures to improve its stormwater management to be completed no later than May 2019. Exhibit 14 pp. 6-8. On August 13, 2018, the District Court issued an order concluding that Respondent had violated the Court's order regarding injunctive relief and directed Respondent to file a declaration confirming compliance with the ordered injunctive relief. Exhibit 19. On October 1, 2018, Respondent submitted a declaration confirming that it had completed part, but not all, of the ordered injunctive relief. Exhibit 20. Specifically, Respondent did not attest to completion of the injunctive measure related to the installation of a stormwater collection, conveyance and infiltration system. Exhibit 14 pp. 6-8 and Exhibit 20. At the time Complainant conducted its inspection of the Facility in May 2019, Respondent had still not completed this injunctive measure. Respondent's long-running disregard for the requirements of the ISGP and its failure to take measures to correct violations even when brought to its attention by Ecology and the District Court for the Western District of Washington supports a high degree of culpability for the violations alleged herein.

VIII. CONCLUSION

For the reasons detailed in this Memorandum, Complainant respectfully requests that the Presiding Officer issue a default order finding:

- that Respondent committed default by not filing a timely answer;
- that the default in this case constitutes an admission by Respondent of all facts alleged in the Complaint, and a waiver by Respondent of a right to a hearing regarding such factual allegations; and

- that consistent with the record of proceeding and Clean Water Act, Respondent is liable to pay a civil penalty of $35,400.

The Consolidated Rules authorize the Presiding Officer to order Complainant's requested relief. 40 C.F.R. § 22.17(c).

Respectfully Submitted,

Date: _____

By: EVAN FIDIS Digitally signed by EVAN FIDIS Date: 2022.02.16 14:05:52 -08'00' _____

E. Alexander Fidis, Assistant Regional Counsel
(206) 553-4710, fidis.alexander@epa.gov
U.S. EPA, Region 10
1200 6th Avenue, Suite 155 M/S 11-C07
Seattle, WA 98101