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 **DEFAULT ORDER AND INITIAL DECISION**

1. INTRODUCTION

1.1 This case is brought under the authority of Section 309(g)of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(g). The Director of the Enforcement and Compliance Assurance Division of the United States Environmental Protection Agency ("EPA"), Region10 ("Complainant"), filed a complaint ("Complaint") alleging that Astro Auto Wrecking, LLC ("Respondent"), failed to comply with terms and conditions of Industrial Stormwater General Permit number WAR011869 ("ISGP"), issued by the state of Washington, in violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a). To address these alleged violations, Complainant proposes the assessment of a class II civil penalty against Respondent as authorized by Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B). Respondent did not file an answer to the Complaint.

1.2 Complainant has now filed Complainant's Motion for Default Judgement ("Motion"), together with a Memorandum in Support of Complainant's Motion for Default ("Memo") and

Exhibits to Memorandum in Support of Motion for Default ("Ex."), explaining that the failure of Respondent to answer to the Complaint provides the basis for a default order. Complainant obtained an initial stay of the Motion to allow Complainant and Respondent an opportunity to negotiate a resolution of the claims in this matter, but the parties were unable to reach a settlement. Complainant therefor requests issuance of a default order that includes a finding of liability for violations of the CWA and the assessment of a civil penalty in the amount of $35,400. Respondent did not file a response to the Motion.

1.3 Complainant has established a prima facie case of CWA liability which is neither rebutted nor contradicted by Respondent. In addition, Complainant has considered the statutory criteria in determining the requested penalty amount and Respondent has not opposed that consideration, determination, or amount. As a result, the Motion is hereby granted.

2. LEGAL FRAMEWORK

2.1 This proceeding is governed by 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 ("Rules"), 40 C.F.R. Part 22. The undersigned Regional Judicial Officer has authority as the Presiding Officer at this stage of the proceeding to rule on the Motion. 40 C.F.R. §§ 22.4(b), 22.16(c), 22.17(a)-(c).

2.2 Following an unsuccessful pre-filing attempt by Complainant to resolve its claims with Respondent, the Complaint was filed with the Regional Hearing Clerk on April 29, 2021. Memo at 3-4. Complainant has the delegated authority to issue the Complaint. Complaint ¶ 1.1. Prior to filing the Complaint, the state of Washington was notified of the Complaint and provided an

opportunity to consult with Complainant as prescribed by Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1). Memo at 4.

2.3 The Complaint was served on Respondent by certified mail, return receipt requested, as authorized by the Rules. *Id*. at 4; 40 C.F.R. § 22.5(b)(1)(i). Respondent accepted service of the Complaint on April 30, 2021. Memo at 4. Respondent had 33 days from service of the Complaint to file an answer. *Id*.; 40 C.F.R. §§ 22.15(a), 22.7(c). Respondent did not file an answer by the due date or anytime thereafter. Memo at 4.

2.4 The Motion was filed electronically with the Regional Hearing Clerk and served on Respondent by United States Postal Service, certified mail, on March 3, 2022. *Id*. Respondent had 18 days from service of the Motion, or until March 21, 2022, to file a response to the Motion. 40 C.F.R. §§ 22.7(a), 22.7(c), 22.16(b). Respondent has filed neither a timely nor late response to the Motion.

2.5 At the request of Complainant, a series of orders were issued by the undersigned Presiding Officer which stayed the Motion to allow the parties an opportunity to engage in settlement negotiations. Those negotiations were not successful in reaching a resolution of the claims in this matter and the Motion is therefore once again before the undersigned for decision.

2.6 The failure of Respondent to "admit, deny, or explain" any material factual allegation in the Complaint constitutes an admission of that allegation. 40 C.F.R. § 22.15(d). By not filing an answer to the Complainant, Respondent has, for purpose of this proceeding, admitted the facts alleged in the Complaint and forfeited its right to contest those factual allegations. 40 C.F.R. § 22.17(a); see also, *In re: Silky Associates, LLC*, Docket No. RCRA-03-2018- 0131, 2021 WL

2912094 (July 6, 2021); *In the Matter of Bar Development Water User's Association, et al.*, 2006 WL 4093131 (January 10, 2006).

2.7 According to the Rules, "[a] party may be found to be in default: after motion, upon failure to file a timely answer to the complaint..." 40 C.F.R. § 22.17(a). Adjudication is the preferred method of resolving administrative enforcement actions and default judgments are generally disfavored. *JHNY, Inc. A/K/A Quin-T Technical Papers and Boards*, 12 E.A.D. 372, 384 (EAB 2005); *In re Thermal Reduction Co.* 4 E.A.D. 128, 131 (EAB 1992). Nevertheless, the Environmental Appeals Board has affirmed default orders in cases where the circumstances 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).

2.8 The Rules prescribe 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." 40 C.F.R. § 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.*, 12 E.A.D. 384. The factors considered under the "totality of circumstances" test, include the alleged procedural omission, 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.*

2.9 With respect to the first factor of the "totality of circumstances" test, Respondent violated the procedural requirement in the Rules that mandated the filing of an answer by June 2, 2021, and almost two years later, Respondent has still not filed an answer to the Complaint. As to the second factor, the procedural requirement violated by Respondent is the filing of a timely answer, and this failure is a significant omission that delays Complainant's ability to enforce violations of the CWA and obtain deterrence to such violations through the assessment of penalties. Memo at 8. Regarding the final factor, Respondent engaged in communications with Complainant over the course of many months to reach a resolution of the claims in this matter but during that time never explained the failure to file an answer.

2.10 Respondent is *pro se* and although this status affords some degree of leniency in terms of compliance and competence, Respondent must nonetheless file an answer to the Complaint. *See Rybond*, 6 E.A.D. at 626-627; *Jiff Builders*, 8 E.A.D. at 320; *In re House Analysis & Associates & Fred Powell*, 4 E.A.D. 501, 505 (EAB 1993). Complainant provided Respondent with a copy of the Rules, referenced the applicable section of the Rules that pertains to the filing of an answer, explained the necessity of filing a timely answer, and warned about the potential consequences from not filing an answer. Complaint ¶¶ 5.1, 5.1, 6.1, 6.2, 6.3. Even for a *pro se* litigant, this was sufficient notice and opportunity to act in accordance with the Rules. Therefore, in applying the "totality of circumstances" test there are no grounds to deny the Motion based on good cause.

3. FINDINGS OF FACT AND CONCLUSIONS REGARDING MATERIAL ISSUES OF LAW OR DISCRETION

3.1 On April 29, 2021, Complainant filed the Complaint in this matter.

3.2 Complainant served the Complaint on Respondent by U.S. Postal Service, certified mail as prescribed by 40 C.F.R. § 22.5(b)(1), and Respondent accepted service of the Complaint on April 30, 2021.

3.3 Respondent was required by 40 C.F.R. §§ 22.15(a) and 22.7(c) to file an answer to the Complaint with the Regional Hearing Clerk by no later than June 2, 2021.

3.4 Respondent failed to file an answer by June 2, 2021, or anytime thereafter.

3.5 Respondent is a limited liability corporation and therefore a "person" within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

3.6 Respondent owns and operates an auto wrecking, salvage, and storage facility in Federal Way, Washington, which is a "point source" within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

3.7 There are and have been "discharges of pollutants" in industrial stormwater from Respondent's facility to "navigable waters" of the United States within the meaning of Sections 502(6), (7), (12), (16) and (19) of the CWA, 33 U.S.C. §§ 1362(6), (7), (12), (16) and (19).

3.8 Respondent is subject to Section 301(a) of the CWA, 33 U.S.C. § 1311(a), which requires that Respondent obtain a permit under Section 402(p) of the CWA, 33 U.S.C. § 1342(p) for the "discharges of pollutants" in industrial stormwater from Respondent's facility to "navigable waters" of the United States.

3.9 Respondent has been issued the ISGP by the state of Washington as authorized by Sections 301(a) and 402(p) of the CWA, 33 U.S.C. §§ 1311(a) and 1342(p).

3.10 The ISGP regulates the "discharge of pollutants" in industrial stormwater from Respondent's facility to "navigable waters" of the United States.

3.11 Based on an inspection and a review of records conducted by EPA, Respondent failed to comply with the terms and conditions of the ISGP.

3.12 Respondent committed over 35 violations of 10 conditions in the ISGP from January 1, 2018, to May 20, 2019.

3.13 The failures to comply with the ISGP are violations of Sections 301(a) and 402(p) of the CWA, 33 U.S.C. §§ 1311(a) and 1342(p), subjecting Respondent to the assessment of a civil penalty under Section 309(g) of the CWA, 33 U.S.C. § 1319(g).

3.14 Complainant has established a prima facie case for liability and relief. 40 C.F.R. § 22.24(a).

3.15 Based on a preponderance of the evidence, Respondent has committed the violations alleged in the Complaint and is subject to the assessment and payment of a civil penalty. 40 C.F.R. § 22.24(b).

3.16 Respondent is in default for having failed to file an answer to the Complaint. 40 C.F.R. § 22.17(a).

3.17 The default by Respondent constitutes an admission of all facts alleged in the Complaint and a waiver of a right to a hearing regarding those factual allegations. 40 C.F.R. §§ 22.15(d), 22.17(a).

3.18 Based on the record, all material factual allegations in the Complaint are hereby deemed admitted by Respondent and adopted herein, with the above findings of fact and conclusions regarding all material issues of law, or discretion providing the primary basis for this Default Order and Initial Decision. 40 C.F.R. §§ 22.15(d), 22.27(a).

4. PENALTY

4.1 Complainant proposes the assessment of a civil penalty in the amount of $35,400. In determining the appropriate penalty to be assessed in this matter, the undersigned is directed by the Rules to consider the evidence presented in the record, the penalty criteria set forth in Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3), and any civil penalty guidelines issued by EPA under the CWA. 40 C.F.R. § 22.27(b). The statutory criteria include "the nature, circumstances, extent and gravity of the violation, or violations, and with respect to 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." 33 U.S.C. § 1319(g)(3).

4.2 Complainant states that the requisite statutory criteria were considered in developing the proposed civil penalty. Memo at 12. Complainant summarizes its evaluation of many of these criteria. *Id*. at 13-18. In a Show Cause Order issued on February 27, 2023, the undersigned requested that Complainant also explain whether the proposed penalty civil was calculated in accordance with the Interim Clean Water Act Settlement Penalty Policy issued by EPA on March 1, 1995 ("Policy"). Accordingly, Complainant submitted the Declaration ("Decl.") of Raymond Andrews ("Declarant."), an experienced EPA compliance officer, who calculated the proposed

civil penalty for Complainant in this matter. Decl. ¶¶ 2-7, 12-34. Respondent was provided an opportunity to respond to the Show Cause Order and Declaration but did not do so.

4.3 Declarant expands on how CWA penalty criteria were considered in determining the proposed civil penalty. *Id*. ¶¶ 12-34. Declarant also states that in addition to the Policy, EPA has issued a Supplemental Guidance for Violations of Industrial Storm Water Requirements on September 8, 2016 ("Supplemental Guidance"). *Id*. ¶ 5. Declarant notes that the Policy and Supplemental Guidance apply to settlements but demonstrates how the proposed civil penalty was nonetheless calculated consistent with the Policy and Supplemental Guidance. *Id.* ¶¶ 1, 12-34. In doing so, with respect to the proposed penalty, Complainant shows that Respondent is being treated fairly, vis-à-vis other respondents in similar penalty proceedings.

4.4 A class II civil penalty was established under the CWA at $10,000 per day of violation up to a maximum of $125,000, but those amounts have been adjusted upward to account for inflation. 33 U.S.C. § 1319(g)(2)(B); Federal Civil Penalties Inflation Adjustment Act of 1990; Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015; Civil Monetary Inflation Adjustment Rule, 40 C.F.R. Part 19; Memo at 12; Decl. ¶ 12. As a result, for the instant matter where the violations occurred after November 2, 2016, and the associated penalty assessment is being rendered after January 6, 2023, a class II civil penalty may not exceed $25,847 per day of violation up to a maximum of $323.081. *Id*.[1]

[1] Declarant states that a class I civil penalty is being sought in this matter. Decl. ¶ 12. Previously, however, Complainant indicated it was seeking the assessment of a class II civil penalty. Complaint ¶ 1.2; Memo at 12. The Rules, CWA penalty criteria, Policy, and Supplemental Guidance apply to both classes of penalties. A primary difference between the two classes is that the maximum amount which may be sought for a class II penalty is higher than for a class I penalty. Since the proposed penalty is within the amount authorized for a class II civil penalty and the Complaint seeks such a penalty, this Default Order and Initial Decision pertains to a class II civil penalty.

4.5 In considering the nature, circumstances, and gravity of the violations, Complainant states that Respondent failed to employ practices required by the ISGP which would prevent, or limit spilled pollutants from impacting nearby surface waters through stormwater runoff. Memo at 13-14. As to the extent of these violations, Complainant explains that Respondent failed to comply with 10 conditions of the ISGP, with multiple violations of certain conditions such that there were over 35 total violations. Decl. ¶ 11. Complainant points out that the potential for harm is further increased due to the receiving surface waters already being impaired by one of the spilled pollutants. Memo at 13-14. Complainant also explains that Respondent had an incomplete pollution prevention plan and lacked the requisite compliance records and reports. *Id*. at 15. According to Complainant, the absence of such information makes it difficult to adequately assess the potential and actual human health and environmental impacts caused by Respondent. *Id*. Declarant describes in detail the calculation of the gravity component to the proposed penalty and demonstrates how the calculation comports with the Policy and Supplemental Guidance. Decl. ¶¶ 17-31.

4.6 Complainant goes on to describe a history of violations by Respondent that were much like the violations alleged in the instant matter. Memo at 16; Decl. ¶ 7. The state of Washington documented prior instances of Respondent having failed to produce required CWA reports, and on one occasion assessed an associated penalty against Respondent for this failure. Memo at 16; Ex. 15. In addition, in a previous citizen's suit action filed in federal district court, Respondent was found liable for approximately 4,015 CWA permit violations, including failures to report, sample, and provide preventative spill containment. *Id.*; Decl. ¶ 7; Exs. 16, 17. The federal

district court judge deferred the imposition of a penalty on the conditions of Respondent taking corrective action, but Respondent was subsequently monetarily sanctioned by the judge for failing to take such action. Memo at 16; Ex. 18. This history of violations provides a basis for increasing the proposed penalty amount, but Complainant has chosen not to do so. Decl. ¶ 32.

4.7 With respect to the degree of culpability demonstrated by Respondent, Complainant explains that Respondent was initially uncooperative with respect to providing Complainant with consent for access to undertake a compliance inspection of Respondent's facility. Complaint ¶¶ 3.9 to 3.13; Ex. 4. According to Complainant, Respondent also stated it had corrected at least some of the alleged violations, but despite repeat requests from Complainant for information demonstrating such compliance, Respondent never produced this information. Ex. 9. This behavior by Respondent provides another basis for increasing the proposed penalty amount, but Complainant has again chosen not to do so. Decl. ¶ 34.

4.8 Regarding "such other matters as justice may require," Complainant states that Respondent was mostly uncooperative in response to Complainant's efforts to resolve this matter. Memo at 17. This lack of cooperation could provide an additional basis to increase the proposed penalty amount, but Complainant once more has chosen not to do so. Decl. ¶ 34.

4.9 The economic benefit or savings which accrued to Respondent by failing to take compliant action was considered by Complainant. Decl. ¶¶ 15-16. A thorough evaluation of this statutory criterion is described by Declarant to arrive at an amount which Respondent likely saved by its actions. *Id.* This amount has been included by Complainant in determining the proposed penalty. *Id*. ¶ 34.

4.10 Neither Complainant nor Respondent have provided information on the ability of Respondent to pay the proposed civil penalty. Memo at 17; Decl. ¶ 33. The information which forms a basis for this statutory criterion is primarily within the purview of Respondent to present and explain, but Respondent has not done so. Respondent did not avail itself of the opportunities to address this issue in response to the Complaint, Motion, Show Cause Order, and Declaration. Absent ability to pay information, there is no record upon which to adjust the proposed penalty downward based on this statutory criterion. In response to this Default Order and Initial Decision, as part of a motion or appeal, Respondent has the right to claim an inability to pay the assessed penalty and to provide information corroborating such a claim.

4.11 Complainant has effectively considered the requisite statutory criteria in proposing a penalty amount in this matter. Although the actions of Respondent provide a basis to increase this amount based on three of the statutory criteria, Complainant has not proposed such an increase in a decision which inures to the benefit of Respondent. As a result, a civil penalty in the amount of $35,400 is statutorily authorized, fair, and reasonable, and is accordingly hereby assessed against Respondent.

5. ORDER

5.1 Default is entered against Respondent who is held to have committed the violations alleged in the Complaint.

5.2 Respondent is hereby assessed a civil penalty of $35,400.

5.3 No later than 30 days after the date that this Default Order becomes a Final Order, Respondent shall make payment in the amount of $35,400 by check (mail or overnight delivery),

wire transfer, ACH, or online payment. Payment instructions are available at: http://www2.epa.gov/financial/makepayment. Payments made by a cashier's check or certified check must be payable to the order of "Treasurer, United States of America" and delivered to the following address:

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

Respondent must note on the check the title and docket number for this matter.

5.4 Respondent must serve photocopies of the check, or proof of other payment method described in Paragraph 5.3, on the Regional Hearing Clerk and EPA Region 10 Compliance Officer, Mr. Raymond Andrews, at the following addresses:

Regional Hearing Clerk
U.S. Environmental Protection Agency
Region 10, Mail Stop 11-C07
1200 Sixth Avenue, Suite 155
Seattle, WA 98101
R10_RHC@epa.gov

Mr. Raymond Andrews
U.S. Environmental Protection Agency
Region 10, Mail Stop 20-C04
1200 Sixth Avenue, Suite 155
Seattle, WA 98101
andrews.raymond@epa.gov

5.5 Should Respondent fail to pay the penalty specified in Paragraph 5.2 above in full by the due date, the entire unpaid balance of penalty and accrued interest shall become immediately due and owing. Should such a failure to pay occur, Respondent may be subject to a civil action to collect the assessed penalty under the CWA. In any collection action, the validity, amount, and appropriateness of the penalty shall not be subject to review.

5.6 Should Respondent fail to pay the penalty in full by its due date, Respondent shall also be responsible for payment of the following amounts:

a. *Interest*: Pursuant to Section 309(g)(9) of the CWA, 33 U.S.C. § 1319(g)(9), any unpaid portion of the assessed penalty shall bear interest at a rate established by the Secretary of Treasury pursuant to 31 U.S.C. § 3717(a)(1) from the effective date of this order, provided, however, that no interest shall be payable on any portion of the assessed penalty that is paid within 30 days of the effective date of the Final Order.

b. *Attorneys Fees, Collection Costs, Nonpayment Penalty*: Pursuant to Section 309(g)(9) of the CWA, 33 U.S.C. § 1319(g)(9), if Respondent fails to pay on a timely basisits penalty set forth in Paragraph 5.2, Respondent shall pay (in addition to any assessed penalty and interest) attorneys fees and costs for collection proceedings and a quarterly nonpayment penalty for each quarter during which such failure to pay persists. Such nonpayment penalty shall be in an amount equal to twenty percent (20%) of the aggregateamount of that Respondent's penalties and nonpayment penalties which are unpaid as of the beginning of such quarter.

5.7 This Default Order constitutes an Initial Decision, in accordance with 40 C.F.R. § 22.17(c) of the Consolidated Rules. The Initial Decision shall become a Final Order 45 days after its service upon the parties, and without further proceedings unless: (a) a party moves toreopen the hearing: (b) a party appeals the initial decision to the Environmental Appeals Board; (c) a party moves to set aside a default order that constitutes an initial decision; or (d) the Environmental Appeals Board elects to review the initial decision on its own initiative.

5.8 Within 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. § 22.30.

5.9 Should Respondent fail to appeal this Initial Decision to the Environmental Appeals Board pursuant to 40 C.F.R. § 22.30 of the Rules, and this Initial Decision thereby becomes a Final Order pursuant to 40 C.F.R. § 22.27(c) of the Rules, Respondent will have waived its rights to judicial review.

IT IS SO ORDERED

RICHARD MEDNICK

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Date: 2023.05.01 07:14:34 -07'00'

Richard Mednick
Regional Judicial Officer
U.S. Environmental Protection Agency
Region 10