UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

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FILED
EPA REGION VIII
HEARING CLERK

IN THE MATTER OF:	
47th Street Townhouses, LLC, Jordahl Custom Homes, Inc., and Master Construction Co., Inc.	**Docket No. CWA-08-2009-0021 Proceeding under Section 301(a) and 402(p) of the Clean Water Act, 33 U.S.C. § 1311(a) and 1342(p)**
Respondents.	

ORDER ON MOTION TO RE-OPEN HEARING

Respondent requests, through its Motion to Re-Open Hearing, that the Default Initial Decision and Order issued in this matter be vacated and a hearing on liability be granted.

I. BACKGROUND

On July 9, 2009, the United States Environmental Protection Agency, Region 8 ("EPA" or "Complainant") filed a Penalty Complaint and Notice of Opportunity for Hearing ("Complaint"). The Complaint named three Respondents: 47th Street Townhouses, LLC, Jordahl Custom Homes, Inc., and Master Construction Co., Inc... The Complaint alleges stormwater control violations under the CWA in connection with the construction of a 5,2 acre multi-family residential complex in Fargo, North Dakota. The Complaint also proposes that Respondents pay a $25,000 penalty. EPA mailed a copy of the Complaint to each Respondent on July 9, 2009.

Pursuant to 40 C.F.R. § 22.15(a), a Respondent must file an Answer to the Complaint within 30 days of service of the Complaint.[1] Respondents 47th Street Townhouses, LLC and Jordahl Custom Homes, Inc. filed an Answer with the Regional Hearing Clerk on August 17, 2009.[2] Master Construction Co., Inc. ("Master Construction" or "Respondent") did not file an Answer. On December 9, 2009, Complainant sent 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 the Complaint on December, 14, 2009 according to the return receipt card. Mr. Schlanser also received the Complaint

[1] According to the domestic return receipt card indicating service for certified mail received by 47th Street Townhouses, LLC and Jordahl Custom Homes, Inc., Answers to the Complaint were due no later than August 14, 2009. A return receipt card was not returned for Master Construction Co., Inc. verifying service. However, the United States Postal Service website, which tracks certified mail, shows the Complaint, #7008-18300000-5157-1796, was delivered on July 13, 2009.

[2] Respondents 47th Street Townhouses, LLC and Jordahl Custom Homes, Inc. filed a joint Answer.

based on a return receipt card returned to EPA on December 18, 2009 with his signature. The date received is not known because Mr. Schlanser signed but did not date the return receipt card. (See, Affidavit of Margaret J. Livingston, dated April 10, 2010).

The Complaint iterates Respondents' obligations with respect to responding to the Complaint, including filing an Answer. (See, Complaint, p. 8). Specifically, the Complaint states:

> FAILURE TO FILE AN ANSWER AND REQUEST FOR HEARING WITHIN 30 DAYS MAY WAIVE A RESPONENT'S RIGHT TO DISAGREE WITH THE ALLEGATIONS AND/OR THE PROPOSED PENALTY. IT MAY ALSO RESULT IN A DEFAULT JUDGMENTAND ASSESSMENT OF THE FULL PENALTY PROPOSED IN THE COMPLAINT OR THE MAXIMUM PENALTY AUTHORIZED BY THE ACT." (emphasis in original document).

On May 13, 2010, this Presiding Officer issued a Default Initial Decision and Order finding Respondent, Master Construction in default for failure to file an Answer. On May 28, 2010, the law firm of Montgomery, Goff and Bullis sent a letter to the Office of Administrative Law Judges stating "the law firm has been retained to represent Master Construction, Inc...."[3] On June 7, 2010, Respondent Master Construction's Motion to Re-Open the Hearing was filed.[4] On June 17, 2010, Complainant filed an Unopposed Request for Extension of Time to Respond to Respondent's Motion to Re-Open Hearing until June 30, 2010. This request was granted. Complainant filed its Objection to Motion to Re-Open Hearing on June 30, 2010. Respondent did not file a reply.

II. Discussion

Respondent's main argument in its Motion is that it was not aware of the requirements. This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, and the Revocation or Suspension of Permits ("Consolidated Rules" or "Part 22"), 40 C.F.R. §§ 22.1-22.32. These rules are provided to Respondents with any Complaint that is sent from the Agency. See, 40 C.F.R. 22.14(b). Furthermore, the rules are codified and easily accessible on the internet or through a public library. In this matter, the Consolidated Rules were provided to Master Construction twice, each time the Complaint was served, and Ms. Leonila Hanley, a representative from EPA, contacted Master Construction and advised them of the process to file an Answer. (See, Complainant's Objection to Motion to Re-Open Hearing and Affidavit of Leonila Hanley). Master Construction's argument that it was not aware of the procedures for this matter is spurious.

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[3] The letter requests that any information relating to Alternative Dispute Resolution with respect to Master Construction be forwarded to the law firm. However, pursuant to 40 C.F.R. § 22.10, counsel has not made an appearance on behalf of Respondent, Master Construction. The Region 8 Hearing Clerk called the law firm of Montgomery, Goff and Bullis, on several occasions, and spoke with a legal assistant to try and confirm that counsel is in fact representing Master Construction. The Hearing Clerk's calls were never returned.

[4] Respondent Master Construction filed its Answer on June 7, 2010, in conjunction with the Motion to Re-Open Hearing, three weeks after the Default Initial Decision and Order was issued.

Master Construction admits it did not file a timely Answer to the Complaint. Master Construction claims it "was unrepresented by counsel and therefore was unaware of the various requirements of Part 22 – Consolidated Rules of Practice." (See, Respondent's Memo in Support of Respondent's Motion to Re-Open Hearing, pp. 2-3). It is not entirely clear from the Motion to Re-Open Hearing what Respondent's defense is for failing to file an Answer pursuant to Part 22. On the one hand, Master Construction seems to say that because it was unaware of the rules it lacked notice under the Fair Notice Doctrine. If this is Master Construction's argument, it must show that it was unable to interpret the requirements of 40 CFR § 22.15 with ascertainable certainty. See, *Morton I. Friedman & Schmitt Construction Co.*, 11 EAD 302, 2004 EPA App. LEXIS 3, 45 (EAB 2004) (citing the standard from *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir 1995)). There has been no demonstration by Respondent of its inability to interpret the Consolidated Rules.

Generally, the Fair Notice Doctrine can provide a defense in some circumstances "where a regulation 'fails to give fair warning of the conduct it prohibits or requires.'" *Morton I. Friedman & Schmitt Construction Co.*, 11 EAD 302, 2004 EPA App. LEXIS 3, 42 (2004) (citing *Gates & Fox Co. v. Occupational Safety and Health Review Comm'n*, 790 F.2d 154, 156 (D.C. Circ. 1986)). A rule or regulation may be successfully challenged under the Fair Notice Doctrine if it "does not give fair warning that the allegedly violative conduct was prohibited." *Qwest Corporation v. Minnesota PUC*, 427 F.3d 1061, 1068 (8th Cir. 2005) (citing *United States v. Chrysler Corp.*, 332 U.S. App. D.C. 444, 158 F.3d 1350, 1355 (D.C. Cir. 1998). In *Quest*, the regulation at issue had an "extensive…checklist" that specified what Respondent was required to include. See, 427 F.3d at 1069. Because of this checklist, the regulation allowed for ascertainable certainty in determining what was required and Respondent could not claim that the regulation failed to provide fair notice. As noted above, Master Construction was provided the necessary information to comply with 40 C.F.R. § 22.15.

Furthermore, 40 CFR § 22.15 states clearly and concisely the requirements for filing an answer. Section 22.15 explains when a respondent must file an answer, what information the answer should contain, what will happen if something in the initial complaint is not addressed in the answer, and how to amend an answer. It provides a nearly step by step process in how and when to file an answer to a complaint. In addition, 40 CFR § 22.17 clearly delineates that a default may be found upon failure to file a timely answer to a complaint. Therefore, the Consolidated Rules provide ascertainable certainty when determining what is necessary to file an answer and Master Construction cannot claim it was not provided fair notice.

Even if this Court were to assume the federal regulatory text was ambiguous, Master Construction's fair notice defense would fail on the grounds that they did not show any effort to seek clarification from EPA. The courts and the Environmental Appeals Board ("EAB") have noted that a member of the regulated community, when confused by a regulatory text and confronted by a choice between alternative courses of action, assumes a calculated risk by failing to inquire about the meaning of the

regulations at issue. *See, Morton I. Friedman & Schmitt Construction Co.*, 11 EAD 302, 2004 EPA App. LEXIS 3, 57 (2004) (citing *DiCola v. FDA*, 77 F.3d 504, 508 (D.C. Cir. 1996); *Tex. E. Prods. Pipeline Co.*, 827 F.2d at 50 (finding fault with company's failure to make any inquiry of the administrative agency responsible for the regulations at issue); *In re Tenn. Valley Auth.*, 9 E.A.D. 357, 411-16 (EAB 2000), *appeals dismissed for lack of jurisdiction*, 336 F.3d 1236 (11th Cir. 2003); *see also, Hoechst Celanese*, 128 F.3d at 224 ("A claim of lack of notice 'may be overcome in any specific case where reasonable persons would know their conduct is at risk.'" (quoting *Maynard v. Cartwright*, 486 U.S. 356, 361, (1988))). There is no evidence that Master Construction made any attempt to seek clarification.

In addition, Respondent's counsel argues that "very few licensed attorneys out side of EPA have knowledge of" the requirements of the Consolidated Rules. (See, Respondent's Memo in Support of Respondent's Motion to Re-Open Hearing, p. 3). The Consolidated Rules were published in 1999, 64 FR 40176, July 23, 1999, and have been actively in use for the last 11 years in their current form. The EPA Administrative Law Judge ("ALJ") website, http://www.epa.gov/oalj/rules.htm, is a good place to discover that non-EPA attorneys as well as many pro-se Respondents have effectively navigated through the Consolidated Rules, have advocated their positions and were afforded the requisite due process with little trouble. This court is not persuaded by counsel's argument.

Furthermore, ignorance of the law is not a valid excuse. See, *In Re Barber, d/b/a Barber Trucking, 2007* EPA ALJ LEXIS 17, 48 (2007) (ALJ Gunning held, professed ignorance of the law does not obviate Respondent's liability for violating federal law.). Knowledge of a law or regulation may be charged upon the appropriate party as soon it becomes public. The Supreme Court held, "the principle that ignorance of the law is no defense applies whether the law be a statute or a duly promulgated and published regulation." *United State v. International Minerals & Chemical Corp.*, 402 U.S. 558, 563 (1971). Time and again, courts have determined that ignorance of the law is not defensible.

Conversely, Master Construction, through counsel, seems to argue that it made an appearance in this matter by filing a section 308 information response on January 28, 2009, before EPA filed a Complaint; and therefore, should not be found liable or in default. (See, Respondent's Memo in Support of Respondent's Motion to Re-Open Hearing, p. 2). In this instance, the Agency has spelled out on many occasions what Master Construction's rights and obligations are with respect to filing an Answer. (See, Complainant's Objection to Motion to Re-Open Hearing). It is difficult to see how a document that was sent to EPA prior to a Complaint being filed constitutes an Answer in any legal setting. Respondent may believe that it has set forth its evidence for why it is not responsible for the underlying CWA violations in its section 308 response of January 28, 2009, but that document did not formally become part of the record in this proceeding until June 7, 2010, when it was attached as "Exhibit A" to the Motion to Re-Open the Hearing. A lack of willful intent is not by itself a sufficient excuse for failure to file a required document. *Jiffy Builders, Inc.*, 8 E.A.D. 315, 319, 1999 EPA App. LEXIS 15 *15

(EAB 1999); *JHNY, Inc.*, 12 E.A.D. 372, 2005 EPA App. LEXIS 22 (EAB 2005). The logic of counsel's argument is a stretch.

Last, Respondent's counsel argues that Master Construction has a statutory right to demand a hearing and that EPA is not prejudiced by re-opening the hearing. When determining whether or not a default order should be reversed, the EAB will "consider the totality of the circumstances presented." *Jiffy Builders, Inc.*, 8 E.A.D. 315, 319, 1999 EPA App. LEXIS 15 *15 (EAB 1999); *JHNY, Inc.*, 12 E.A.D. 372, 2005 EPA App. LEXIS 22 (EAB 2005, citing *In re Rybond*, 6 E.A.D. 614, 616 (EAB 1996). In *Jiffy Builders, Inc.*, the EAB determined that "the Presiding Officer unquestionably has the authority to issue a default order for failure to comply with a Prehearing Order, particularly where, as here, noncompliance has occurred more than once." Id. at 319. Master Construction admits to its failure to file a timely Answer and has provided no real justification for why the default should be vacated. The Judge is not bound by the standard for default under Federal Rules of Civil Procedure in EPA administrative proceedings. *Pyramid Chem. Co.*, 11 E.A.D. 657 n. 9, 2004 EPA App. LEXIS 32 *15 (EAB 2004). Given the circumstances presented, there is no basis for this Presiding Officer to vacate or reverse the Default Initial Decision and Order.

As to Respondent's request to re-open the hearing, The Default Initial Decision and Order finds only that Master Construction is liable for the stormwater violations. Therefore, this court would only be able to re-open the hearing as to Master Construction's liability if it were so inclined. A hearing on penalties has not occurred. As Complainant points out, Master Construction remains entitled to a hearing on the penalty amount including the opportunity to present its case in determining the appropriate penalty. The ALJ assigned to this matter will determine how Master Construction can proceed moving forward to present its case. See, 40 C.F.R. Part 22. Therefore, this Presiding Officer will not re-open the hearing for liability at this juncture.

III. ORDER

Respondent's Motion to Re-Open Hearing is **DENIED**.

It is so ORDERED this 12th day of August, 2010.

Elyana R. Sutin
Regional Presiding Officer
EPA, Region 8

CERTIFICATE OF SERVICE

The undersigned certifies that the original of the attached **ORDER ON MOTION TO RE-OPEN HEARING,** in the matter of **47th STREET TOWNHOMES, LLC., JORDAHL CUSTOM HOMES, INC. and MASTER CONSTRUCTION CO., INC.; DOCKET NO.: CWA-08-2009-0021** was filed with the Regional Hearing Clerk on August 12, 2010.

Further, the undersigned certifies that a true and correct copy of the documents was delivered to Margaret "Peggy" Livingston, Senior Enforcement Attorney, U. S. EPA – Region 8, 1595 Wynkoop Street, Denver, CO 80202-1129. True and correct copies of the aforementioned documents were placed in the United States mail certified/return receipt requested and e-mailed on August 13, 2010, to:

Attorney for Respondents 47th Street Townhomes, LLC., Jordahl Custom Homes, Inc. and Master Construction Co., Inc.:

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And E-mailed to:

Honorable Spencer T. Nissen
Administrative Law Judge
U. S. Environmental Protection Agency
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August 13, 2010

Tina Artemis
Paralegal/Regional Hearing Clerk