

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8

2014 MAR 17 AM 8:10

IN THE MATTER OF)

West Valley Contracting, Inc.)
P.O. Box 1711)
Bismarck, ND 58503)

Respondent.)
_____)

COMBINED COMPLAINT AND
CONSENT AGREEMENT

Docket No. CWA-08-2014-0015

FILED
EPA REGION VIII
HEARING CLERK

The Complainant, the United States Environmental Protection Agency, Region 8 (EPA or Complainant), and the Respondent, West Valley Contracting, Inc. (Respondent), by their undersigned representatives, hereby consent and agree as follows:

I. PRELIMINARY STATEMENT

1. This matter is subject to 40 C.F.R. part 22. This Combined Complaint and Consent Agreement (CCCA) is entered into by the parties for the purpose of simultaneously commencing and concluding this matter, as authorized by 40 C.F.R. § 22.18(b)(2) and (3).
2. The EPA has jurisdiction over this matter pursuant to section 309(g)(1)(A) and (g)(2)(B) of the Clean Water Act (Act), 33 U.S.C. § 1319(g)(1)(A) and (g)(2)(B).
3. For the purposes of this settlement only, the Respondent admits the jurisdictional allegations contained herein and neither admits nor denies the specific legal or factual allegations.
4. The Respondent waives its right to contest the allegations in the Complaint and to appeal any final order (Final Order) that an EPA Regional Judicial Officer may issue to approve this CCCA.
5. The Complainant asserts that settlement of this matter is in the public interest, and the Complainant and the Respondent agree that entry of this CCCA and its incorporation into a Final Order without further litigation and without adjudication of any issue of fact or law will avoid prolonged and potentially complicated litigation between the parties.

6. Upon integration into a Final Order by the EPA Regional Judicial Officer, this CCCA applies to and is binding upon the Complainant and upon the Respondent, and the Respondent's officers, directors, agents, successors and assigns. Any change in ownership, corporate organization, structure or status of the Respondent, including, but not limited to, any transfer of assets or real or personal property, shall not alter the Respondent's responsibilities under this CCCA.

7. This CCCA contains all civil penalty settlement terms agreed to by the parties.

II. GENERAL ALLEGATIONS

8. Section 301(a) of the Act, 33 U.S.C. § 1311(a), among other things, prohibits the "discharge of any pollutant" into waters of the United States except in compliance with a permit issued pursuant to section 402 of the Act.

9. Section 502(12) of the Act, 33 U.S.C. § 1362(12), defines the term "discharge of a pollutant" as, inter alia, "any addition of any pollutant to navigable waters from any point source."

10. Section 402 of the Act, 33 U.S.C. § 1342, establishes a National Pollutant Discharge Elimination System (NPDES) program, under which the EPA and, upon receiving authorization from the EPA, states may permit discharges of pollutants into navigable waters, subject to specific terms and conditions.

11. The EPA approved the State of North Dakota's NPDES program on October 12, 2009, pursuant to section 402(b) of the Act, 42 U.S.C. § 1342(b). North Dakota may issue permits authorizing certain discharges into navigable waters.

12. Section 402(p)(3)(A) of the Act, 33 U.S.C. § 1342(p)(3)(A), requires an NPDES permit for stormwater discharges associated with industrial activity.

13. The regulations further defining requirements for NPDES permits for storm water discharges associated with industrial activity are found at 40 C.F.R. part 122.

14. The term "stormwater discharge associated with industrial activity" includes, but is not limited

to, any discharge from construction activity that disturbs at least five acres or that disturbs a piece of land that is less than five acres but is part of a larger common plan of development ultimately disturbing over five acres. 40 C.F.R. § 122.26(b)(14)(x).

15. The EPA regulations also define the term “stormwater discharge associated with small construction activity” to include stormwater discharges from construction activities, including clearing, grading, and excavation activities, that result in a disturbance of equal to or greater than one acre and less than five acres and/or less than one acre of total land area that is part of a larger common plan of development or sale if the larger common plan will ultimately disturb equal to or greater than one acre. 40 C.F.R. § 122.26(b)(15)(i).

16. Each person who intends to discharge stormwater associated with industrial activity must either apply for an individual permit or seek coverage under an existing and lawful general permit. 40 C.F.R. §§ 122.21(a) and (c), 122.26(c), 122.28.

17. Under 40 C.F.R. § 122.21(c), a discharger proposing a new discharge of stormwater associated with construction activity covered by 40 C.F.R. § 122.26(b)(14)(x) or 15(i) must submit an application within 90 days before the date of construction is to commence, or by the deadlines provided by the terms of any applicable general permit. See 40 C.F.R. 122.28(b)(2).

18. The Respondent is and was at all relevant times a North Dakota corporation doing business in North Dakota and registered with the North Dakota Secretary of State and defined as a “person” within the meaning of section 502(5) of the Act and therefore, subject to the requirements of the Act and implementing regulations. 33 U.S.C. § 1362(5).

19. Respondent has been engaged in construction activities as defined by 40 C.F.R. § 122.26(b)(14), at two subdivisions known as Eagle Crest 4 (approximately 6.4 acres) and Eagle Crest 5 (approximately 13 acres) (the Facilities).

20. The Eagle Crest 4 subdivision is located west of Valley Drive and north of Round Top Road; and the Eagle Crest 5 subdivision is located along High Creek Road near the intersection of High Creek Road and Mustang Drive in Bismarck.

21. Stormwater discharges from the Facilities flow into the Tyler Coulee and the Missouri River, “traditionally navigable waters” and interstate, “navigable-in-fact” waterways, and “Waters of the United States,” as defined by the Act and EPA regulations, 33 U.S.C. § 1362(7);

40 C.F.R. § 122.2, definition of “Waters of the United States”, subsection (e).

22. Respondent engaged in construction activities at the Facilities at all times relevant to this action and Respondent, therefore, is, or was engaged in an “industrial activity” as defined at 40 C.F.R. § 122.26(b)(14).

23. Stormwater runoff associated with Respondent's construction activities at the Facilities is “stormwater discharge associated with industrial activity” as defined at 40 C.F.R. § 122(b)(14)(x).

24. NDDH issued a general NPDES permit authorization for stormwater discharges associated with construction activities (number NDR103944) effective July 1, 2011 (Permit). The Permit sets forth stormwater management requirements for Respondent’s construction activities at the Facilities.

25. On June 24, 2011, Respondent submitted a notice of intent to be covered under the Permit application for a general North Dakota Department Health (NDDH) NPDES permit for stormwater discharges associated with its construction activities at the Eagle Crest #4 Facility which was subsequently amended to include the Eagle Crest #5 Facility.

26. The Permit requires, among other things, that Respondent develop and implement a stormwater pollution prevention plan (SWPPP) that contains specific elements, conduct regular specified stormwater inspections, and implement best management practices (BMPs) at the Facilities. BMPs

include structural controls (such as storm drain inlet protection) and management practices (such as minimizing any off-site pollutant discharges). Any person subject to the Permit is required to develop a stormwater pollution prevention plan (SWPPP), which sets forth a plan to control and reduce pollutants in stormwater discharges from construction activities (Permit, Parts 3.1.B.2 and 3.4.A). The SWPPP must meet specific requirements and include certain information (Permit, Part 3).

27. On June 6, 2013, authorized EPA and NDDH inspectors entered the Facilities with the consent of Respondent to inspect it for compliance with the Act, Permit and regulations (Inspection).

III. DESCRIPTION OF VIOLATIONS

28. On the date of the Inspection, Respondent's SWPPP and Permit for the Facilities were not available onsite, but were subsequently provided to the EPA by Respondent on June 12, 2013.

29. On the date of the Inspection, Respondent had failed to implement the SWPPP and to properly operate and maintain the BMPs described in Parts 3.1.D, and 3.6.A. of the Permit.

30. As of the date of the Inspection, Respondent had not documented and retained stormwater self-inspections at the Facilities as required by the Permit.

31. Respondent's failures described above, constitute violations of Parts I.D., Part II.C., Part III.B. and Appendix I.A. of the Permit.

IV. CIVIL PENALTY

32. Pursuant to section 309(g)(2)(B) of the Act, 33 U.S.C. § 1319(g)(2)(B), and after consideration of the facts of this case as they related to the factors set forth in section 309(g)(3) of the Act, 33 U.S.C. § 1319(g)(3), the EPA has determined that a civil penalty of twenty eight thousand dollars (\$28,000.00) is appropriate to settle this matter.

33. The Respondent consents and agrees to pay a civil penalty in the amount of twenty eight thousand dollars (\$28,000.00) in the manner described below:

- a. The first payment of nine thousand three hundred and thirty four dollars (\$9,334) shall be due no later than 30 calendar days from the date of the Final Order. The second payment of nine thousand three hundred and thirty three dollars (\$9,333) shall be due on or before September 1, 2014. The third and final payment of nine thousand three hundred and thirty three dollars (\$9,333) shall be due on or before February 1, 2015. If the due date for any payment falls on a weekend or federal holiday, then the due date is the next business day. The date the payment is made is considered to be the date processed by U.S. Bank, as described below. Payment must be received by 11:00 a.m. Eastern Standard Time to be considered as received that day.
- b. Each payment shall be made by remitting a check or making a wire transfer or on-line payment. The check or other payment shall designate the name and docket number of this case, be in the amount stated in part "a," above, and be payable to "Treasurer, United States of America. The payment shall be sent as follows:

If sent by regular U.S. mail:

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

If sent by any overnight commercial carrier:

U.S. Bank
1005 Convention Plaza
Mail Station SL-MO-C2GL
St. Louis, Missouri 63101

If sent by wire transfer: Any wire transfer must be sent directly to the Federal Reserve Bank in New York City with the following information:

Federal Reserve Bank of New York
ABA = 021030004
Account = 68010727
SWIFT address = FRNYUS33
33 Liberty Street
New York, New York 10045
Field Tag 4200 of the Fedwire message should read "D 68010727 Environmental Protection Agency"

Automated Clearing House (ACH) for receiving US currency:

U.S. Treasury REX / Cashlink ACH Receiver
ABA: 051036706
Account Number: 310006, Environmental Protection Agency
CTX Format Transaction Code 22 -- checking

Physical location of U.S. Treasury facility:
5700 Rivertech Court
Riverdale, Maryland 20737

Contacts: John Schmid (202-874-7026) and REX (Remittance Express)
800-234-5681

On-line Debit and Credit Card payment:

There is now an On-Line Payment Option available through the Dept. of Treasury. This payment option can be accessed from the information below:

WWW.PAY.GOV
Enter sfo 1.1 in the search field
Open form and complete required fields.

At the time of payment, a copy of the check (or notification of other type of payment) shall also be sent to:

Seth Draper, Enforcement Officer
Water Enforcement Program (8ENF-W)
U.S. EPA Region 8
1595 Wynkoop Street
Denver, Colorado 80202-1129

and

Tina Artemis, Regional Hearing Clerk (8RC)
U.S. EPA Region 8
1595 Wynkoop Street
Denver, Colorado 80202-1129

- c. If the payments are not received by the specified due dates, *interest accrues from the date of the Final Order, not the due dates*, at a rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717 and will continue to accrue until payment in full is received (e.g., on the 1st late day, 30 days of interest will have accrued).

- d. A handling charge of fifteen dollars (\$15) shall be assessed the 31st day from the date of the Final Order, and for each subsequent 30-day period that the debt, or any portion thereof, remains unpaid. In addition, a 6% per annum penalty shall be assessed on any unpaid principal amount if payments are not received within 90 days of the due date. Payments are first applied to outstanding handling charges, second to penalty assessments, third to accrued interest, and then to the outstanding principal amount.
- e. The Respondent agrees that the penalty shall never be claimed as a federal or other tax deduction or credit.

34. Nothing in this CCCA shall relieve the Respondent of the duty to comply with the Act and any regulation, order, or permit issued pursuant to the Act.

35. Any failure by the Respondent to comply with this CCCA shall constitute a breach of this CCCA and may result in referral of the matter to the United States Department of Justice for enforcement of this CCCA and such other relief as may be appropriate.

36. Nothing in this CCCA shall be construed as a waiver by the EPA or any other federal entity of its authority to seek costs or any appropriate penalty associated with any collection action instituted as any failure by the Respondent to comply with this CCCA.

37. The undersigned representative of the Respondent certifies that he/she is fully authorized to enter into and bind the Respondent to this CCCA.

38. The parties agree to submit this CCCA to the appropriate the EPA regional judicial officer, with a request that it be incorporated into a inal Order following provision of public notice pursuant section 309(g)(4) of the Act, 33 U.S.C. § 1319(g)(4) and 40 C.F.R. § 22.45.

39. Each party shall bear its own costs and attorney's fees in connection with this matter.

40. This CCCA, upon incorporation into a Final Order and full satisfaction by the parties, shall be a complete and full resolution of the Respondent's liability for federal civil penalties for the violations and facts alleged in the CCCA.

In The Matter Of: West Valley Contracting
(Continued)

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, REGION 8,
Complainant.

Date: 3/6/14

By: Eddie A. Seira
for Andrew M. Gaydosh
Assistant Regional Administrator
Office of Enforcement, Compliance,
and Environmental Justice
U.S. EPA Region 8
1595 Wynkoop St.
Denver, Colorado 80202-1129

Date: 3-26-14

By: Daniel Hjelman
Daniel Hjelman, President
West Valley Contracting, Inc.

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY REGION 8
1595 Wynkoop Street, Denver, CO 80202-1129**

**PUBLIC NOTICE OF PROPOSED COMBINED COMPLAINT CONSENT
AGREEMENT AND OPPORTUNITY TO COMMENT ON CLEAN WATER ACT
COMPLAINT**

Action: EPA is providing notice of a proposed combined complaint consent agreement and the opportunity to comment on the proposed agreement for alleged violations of the Clean Water Act (the Act) at the Eagle Crest #4 and #5 homebuilding construction project located in Bismarck, North Dakota. The Eagle Crest #4 and #5 homebuilding site was subject to the North Dakota Department of Health's (NDDH) general permit for the discharge of storm water associated with construction activities (NDPDES Permit No. NDR10-3944).

Summary: EPA is authorized by section 309(g)(2) of the Act, 33 U.S.C. § 1319(g)(2), to issue an order assessing a civil administrative penalty for violations of certain provisions of the Act, after providing (1) an opportunity for the persons to be assessed the penalty (the Respondents) to request a hearing to contest the penalty, and (2) notification to the public of its rights to submit written comments and to participate in any hearing. The deadline for the public to submit comments is thirty days after issuance of this notice.

On February 19, 2014, the EPA commenced a civil administrative action by settling an administrative complaint against the Respondents identified below, alleging violations of the Act and its regulations. Pursuant to section 309(g)(4) of the Act, EPA hereby notifies the public of EPA's proposed penalty assessment against:

West Valley Contracting
PO Box 1711
Bismarck, ND 58503

EPA Docket Number: CWA-08-2014-0015

Proposed penalty in the Complaint: \$28,000.00

Alleged violations: 1) failure to develop, implement and update a complete storm water pollution prevention plan; 2) failure to implement and maintain site best management practices; and 3) failure to conduct and document inspections.

PUBLIC COMMENTS

Written comments on the complaint are encouraged and will be accepted at the address listed below for a period of thirty (30) days after the publication of this notice. Written comments submitted by the public as well as information submitted by respondent will be available for public review, subject to the provisions of law restricting the disclosure of confidential information. Any person submitting written comments has a right to participate in a hearing, if

one is held. The complaint is available for review between 9:00 a.m. and 4:00 p.m. at the address listed below and on the internet at: <http://yosemite.epa.gov/oa/rhc/epaadmin.nsf>.

Please submit written comments to:

Tina Artemis (8RC)
Regional Hearing Clerk
U.S. EPA, Region 8
1595 Wynkoop Street
Denver, Colorado 80202-1129.
Telephone: (303) 312-6765

FOR FURTHER INFORMATION: Persons wishing to receive a copy of the complaint or other documents in this proceeding (such as the regulations in 40 C.F.R. part 22, which establish procedures for the hearing), or to comment upon the proposed penalty assessment or upon any other aspect of the matter, should contact the Regional Hearing Clerk identified above. No action will be taken by EPA to finalize a settlement in this matter until 30 days after this public notice.