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FILED
EPA REGION VIII
HEARING CLERK

December 1, 2011

Regional Hearing Clerk (8RC)
US EPA Region 8
1595 Wynkoop Street
Denver, Co 80202-1129

Re: EPA v. Gowan Construction, Inc. and NDDOT
Answer and Demand for Hearing and Settlement Conference
Docket #: CWA-08-2011-0039

Dear Clerk,

Enclosed herewith for filing is an Answer and Demand for Hearing and Settlement Conference and Certificate of Service. If you have any questions, please do not hesitate to contact me.

Sincerely,



DeWayne Johnston
Attorney at Law

enclosure

cc: Sheldon Muller
Michael Waller

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

IN THE MATTER OF:) ANSWER AND DEMAND FOR
Gowan Construction, Inc.) HEARING AND SETTLEMENT
P.O. Box 228) CONFERENCE
Oslo, MN 56744)
and) Proceedings to Assess a Civil
North Dakota Dept. of Transportation) Penalty Under Section 309(g)
608 E. Boulevard Ave.) of the Clean Water Act,
Bismarck, ND 58505) 33 U.S.C. § 1319(g)
Respondents.) Docket No. CWA-08-2011-0039
)

ANSWER AND DEMAND FOR HEARING AND SETTLEMENT CONFERENCE

Gowan Construction, Inc. and the North Dakota Department of Transportation for their answer to the Administrative Complaint and Notice for Opportunity of Hearing, herewith state and allege as follows:

1. The answering parties herewith deny each and every allegation contained in the complaint unless herein specifically admitted, qualified or explained.
2. The answering parties herewith specifically reserve and preserve all defenses afforded to them and specifically reserve the right to raise affirmative defenses as appropriate in the course of litigation and pursuant to the rules.
3. The following paragraphs state legal assertions or conclusions to which no responsive pleading is required and except as expressly admitted herein the answering parties deny the rest and remainder of these paragraphs:

1-21, 35 as to the cite to 40 C.F.R § 122.26, 38 inasmuch as the paragraph is reiterating § 502(6) of the Clean Water Act, 41-46, 49 to the extent the paragraph is quoting permit language, 51-57 to the extent that the paragraph either paraphrases or restates language of the permit, 61, 63 to the extent it recites sections of the permit and various statutes, 64, 66 inasmuch as the paragraph reiterates or cites various statutes, 67, 69 inasmuch as the paragraph paraphrases or cites language of various statutes, 70, 72 inasmuch as the paragraph recites statute sections of law, 73, 75 to the extent the paragraph reiterates statutory language, 76, 78 to the extent the paragraph reiterates or cites statutory language, 80, 81, 82-86 to the extent that complainant is describing its conduct and the legal theories behind the act and/or intergovernmental relationships, 87-95.

4. The responding parties hereby admit the following paragraphs:

22-31, 32 is admitted with the qualification that Gowan is *only* responsible for the construction activities delegated to it by NDDOT and the owner is responsible to and for compliance with the act, its regulations, and the permit which have published minimum parameters, 33, 34 to the extent delegated by the owner, 35 that the parameters of the project anticipated approximately 220 acres of land that may be subject to disturbance, 36 to the extent that water leaving the site are influenced by a number of factors including time of year, conditions, and job status with the Sheyenne River, legal drain number 13, legal drain number 40, and adjacent wetlands potential recipients of said water, 37 admits storm water runoff and surface runoff originating from the site would constitute storm water,

38 admit that at times relevant to this action there were discharges of storm water runoff and surface runoff from the site, 49, 58, 59, 60, 85 in that the memorandum of understanding between the North Dakota Department of Health and the North Dakota Department of Transportation sets out responsibilities with respect to storm water compliance.

5. The parties hereby deny the following paragraphs of the complaint not already denied by reference in the foregoing paragraphs:

39, 40, 50 to the extent the paragraph discusses mental impressions of others but specifically denies that they were not acting appropriately under the permit, 51, 52, 53, 54, 55, 56, 57, 62, 63, 65, 68, 71, 74, 77.

6. The answering parties specifically state that the proposed penalty is excessive.

7. The answering parties specifically state that once notice was given by the complaining party, adequate and immediately remedial measures were taken to address those complaints irrespective of the validity or origin of those complaints.

8. The answering parties specifically state that the time frame associated with any potential violations is nominal.

9. That the answering parties specifically state that a SWPP was located on site at all times.

10. That the answering parties specifically state that photos taken by the NDDOT referenced in the complaint were taken while work was in progress.

11. The answering parties are decisive in the fact that they operate with the highest level of integrity and concern in relation to the agency and its wishes.

12. The answering parties specifically indicate that they have no prior compliance infractions and the degree of culpability is lacking along with the fact that there were no economic benefit specifically to Gowan Construction, Inc. (Gowan stands to acknowledge a larger economic benefit by compliance) and any economic benefit to the North Dakota Department of Transportation is negligible or nonexistent at best and as such there is no savings accruing from any violations cited within the complaint, and the respondents ability to pay the proposed penalty is negligible as it is a public works contract bid to negligible margins.

13. The answering parties specifically indicate that the prior Harwood construction project was not even seeded nor did it achieve final stabilization prior to the start of work on the contract complained of in the agency complaint.

14. The answering parties specifically indicate that the area around the site is submerged annually with the spring thaw and associated flooding.

15. That Gowan Construction, Inc. specifically indicates that it is held to the directives of the owner in application of structures required by the permit.

16. That the moving parties specifically indicate that the permitting documents, specifically the SWPP schema, were radically changed during the time the original permit was granted and the agency inspection/recommendations were received by the answering parties.

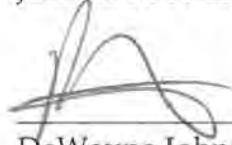
17. The answering parties expressly state that it is in the best interests of all to cooperate and to fully comply with all relevant federal regulation stemming from the bidding process certified by the state of North Dakota. However, even though the answering parties wish to resolve this matter without ulterior proceedings, the proposed penalty is excessive and unreasonable.

WHEREFORE, the responding parties pray for judgment as follows:

1. That the complainant dismiss the complaint with prejudice against the moving parties, as the moving parties immediately responded to any and all directives handed down informally by the agency and the fact that any deficiencies sought or pointed out by the agency have been set out with specificity and the parties investment in maintaining future work in excess of any permit constraints or SWPP directives,
2. That the complainant agrees to substantially reduce the amount of the proposed penalty and allow the responding parties to enter into a payment plan to remedy any reduced civil penalty agreed to or imposed,
3. That prior to any further litigation the parties participate in the ALJ Sanctioned Settlement Conference.

Respectfully submitted this 1st day of December, 2011.

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Attorney for Respondent Gowan
Construction Inc. and by contractual
provision the North Dakota Department
of Transportation

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was on the 1st day of December, 2011, mailed and emailed to the following:

Sheldon H. Muller
Senior Enforcement Attorney
US EPA, Region 8
1595 Wynkoop St.
Denver, CO 80202-1129
Muller.Sheldon@epamail.epa.gov

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Dated this 1st day of December, 2011.

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