

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

2012 APR -3 AM 11:07

IN THE MATTER OF)
)
Lake Sakakawea & Associates, LLC)
2500 9th Avenue NW Apt.1)
Mandan, ND 58554-1526)
Respondent.)
)
Proceeding to assess Class II penalty under)
Section § 309(g) of the)
Clean Water Act, 33 U.S.C. § 1319(g))
_____)

Docket No. CWA-08-2011-0017

FILED
EPA REGION VIII
MAY 07 2012

**COMPLAINANT'S MOTION
FOR DEFAULT**

Pursuant to 40 C.F.R. § 22.17, Complainant United States Environmental Protection Agency Region 8 (EPA), by its undersigned counsel, files this MOTION FOR DEFAULT against Respondent Lake Sakakawea & Associates, LLC (Respondent). As shown in the accompanying memorandum in support of this motion, the presiding officer should (1) find the Respondent liable for the violations alleged in the Complaint and Notice of Opportunity for Hearing (Complaint) filed in this matter on June 22, 2011; and (2) impose the civil penalty of \$84,000 assessed against the Respondent in the Complaint, plus interest and late fees. EPA moves for a default order based on the Respondent's failure to file a timely answer to or otherwise contest the Complaint, and subsequent waiver of Respondent's right to contest all facts alleged in the Complaint.

Respectfully submitted,

**UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, REGION 8**

Date: 4/3/2012

By: 
Amy Swanson, Enforcement Attorney
U.S. EPA Region 8
1595 Wynkoop Street (8ENF-L)
Denver, Colorado 80202-1129
Colorado Atty. Reg. No. 26488
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the original and one copy of the MOTION FOR DEFAULT and MEMORANDUM IN SUPPORT were hand-carried to the Regional Hearing Clerk, EPA Region 8, 1595 Wynkoop Street, Denver, Colorado, and that true copies of the same were sent as follows:

Via hand delivery to:

The Honorable Elyana R. Sutin
Regional Judicial Officer
U.S. EPA Region 8 (SRC)
1595 Wynkoop Street
Denver, CO 80202-1159

Via Certified Mail to:

Lake Sakakawea & Associates, LLC
3765 Highway 1806
Mandan, ND 58554-8240

4/3/2012

Date

Judith M. McTernan
Signature

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

2012 APR -3 PM 1:02

IN THE MATTER OF)
)
Lake Sakakawea & Associates, LLC)
2500 9th Avenue NW Apartment 1)
Mandan, ND 58554-1526)
)
Respondent.)

Docket No. CWA-08-2011-0017

FILED
EPA REGION VIII
RECEIVED

**MEMORANDUM IN SUPPORT OF MOTION
FOR DEFAULT**

Introduction

This memorandum is filed in support of a motion for default and request for the assessment of civil penalties brought by Complainant, the United States Environmental Protection Agency (EPA), 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.

Basis

This request for a default order and assessment of penalties is based on Respondent Lake Sakakawea & Associates, LLC's (Respondent) failure to file a timely answer to the Complaint, and subsequent waiver of Respondent's right to contest all facts alleged in the Complaint.

Background

Respondent is a North Dakota limited liability company doing business within the State of North Dakota. Respondent is a person within the meaning of section 502(5) of the Clean Water Act (Act), 33 U.S.C. § 1362(5), and therefore subject to the requirements and/or

regulations of the Act. On October 12, 2007, Respondent submitted to the North Dakota Department of Health (NDDH) National Pollutant Discharge Elimination System (NPDES) Program and the EPA a copy of a Storm Water Pollution Prevention Plan (SWPPP) for the Eagle Catch Casino & Resort Construction Site (Site) development. The Site is located in Section 17, Township 146 North, Range 88 West, Mercer County, North Dakota, within the exterior boundaries of the Fort Berthold Indian Reservation.

Effective July 1, 2003 (and modified January 21, 2005), the EPA issued a NPDES General Permit for Storm water Discharges from Construction Activities (Permit), authorizing discharges of storm water associated with large and small construction activities that result in a total land disturbance of equal to or greater than one acre, where those discharges enter surface waters of the United States, if done in compliance with the conditions of the permit. The Permit has been in effect at all times relevant to this action. On December 21, 2007, Respondent submitted a Notice of Intent (NOI) to the EPA for construction requesting authorization to discharge storm water at the Site pursuant to the Permit. Coverage for the Site under the Permit (# NDR10A581) was obtained on December 28, 2007.

The receiving water for the Site's storm water, snow melt, surface drainage and run off is Lake Sakakawea (Lake). The Lake is a navigable water and a water of the U.S. as defined by the Act and EPA regulations, respectively, 33 U.S.C. § 1362(7); 40 C.F.R. § 122.2. Storm water contains "pollutants" as defined by the Act, 33 U.S.C. § 1362(6). The storm water discharge from the Site is a "discharge pollutant" as defined in section 502(12) of the Act, 33 U.S.C. § 1362(12), and 40 C.F.R. § 122.2. The Site constitutes a "point source" within the meaning of section 502(14) of the Act, 33 U.S.C. § 1362(14), and 40 C.F.R. § 122.2.

Respondent commenced construction activities during the spring of 2008 at the Site on a 75 acre Indian Allotment held by Dale Little Soldier. Specifically, Respondent began Phase I of the planned development project including, but not limited to, site work and road construction consisting of clearing and grading. Respondent's construction activities at the Site resulted in the disturbance of approximately 12 acres of land. Through Respondent's construction activities, Respondent engaged in an "industrial activity" within the meaning of 40 C.F.R. § 122.26(b)(14).

Construction activities at the Site ceased in the fall of 2008 prior to the completion of Phase I of the construction. On June 24, 2009, an authorized representative of the U.S. Army Corps of Engineers (Corps) inspected the Site and observed, among other things, the following: no erosion control measures; erosion around the perimeter of the disturbed area; growth of noxious weeds; no topsoil, vegetation, or reseeded; and un-stabilized site conditions.

On September 29, 2009, the NDDH Division of Water Quality conveyed to the EPA complaints regarding the Site that were expressed to the Mercer County Commission (Commissioners). Such complaints received by the NDDH included extensive erosion and growth of noxious weeds resulting from the removal of top soil and ineffective sediment control measures or native vegetation reseeded. Erosion and invasive, non native vegetation are potentially threatening the Site, surrounding slopes, and the Lake.

On December 3, 2009, the EPA issued a Request for Information (Request) to Respondent pursuant to section 308 of the Act, 33 U.S.C. § 1318, with a response being due within forty five days of receipt. The EPA first sent the Request via certified mail in December 2009 to the mailing address submitted with the NOI. Absent receipt, EPA again sent the Request via certified mail in February 2010 to the Respondent at his Mandan address located in the

phonebook. The Respondent signed for the Request on February 3, 2010, resulting in the response being due on or before March 4, 2010. The EPA sent the Respondent a reminder letter of the past due response on April 21, 2010, requesting notice of the Respondent's intent to comply with the Request within fourteen days. On May 5, 2010, the EPA received an e-mail from an engineering firm on the Respondent's behalf indicating that the Respondent intended to comply with the Request and would provide background information within a few days.

Because the EPA did not receive the promised background information much less a response to the Request, the EPA issued a Notice of Opportunity to Confer regarding the Request on June 29, 2009. Among other things, the request required the Respondent to provide the EPA with copies of items required by the Permit, such as, the SWPPP, description and site map of Best Management Practices (BMPs) installed at the Site, and all storm water self-inspections conducted at the Site.

The EPA received a response to the Request (Response) on behalf of Respondent, dated July 15, 2010, stating that Respondent could not find certain information including, but not limited to, the self-inspection dates and corresponding reports. The Response contained a SWPPP which failed to meet the following Permit requirements: identification of all construction site operators and their area of control, a description of interim stabilization practices, post authorization records, a description of non-storm water discharges, and documentation of permanent eligibility as related to Endangered Species. The Response contained a SWPPP which described and located BMPs which were not installed at the Site as observed by the Corps.

On June 22, 2011 the Complaint and Notice of Opportunity for Hearing (Complaint) was filed in this matter under section 309(g) of the Act, 33 U.S.C. §1319(g) and successfully served on the Respondent on July 11, 2011. The Complaint seeks the assessment an administrative penalty proposed against the Respondent in the amount of \$84,000. This proposed penalty amount is based on consideration of the applicable statutory penalty factors in section 309(g)(3) of the Act, 33 U.S.C. §1319(g)(3). The statutory factors include the nature, circumstances, extent and gravity of the violation(s); the violator's ability to pay; any history of prior violations; the degree of culpability; any economic benefit to the violator resulting from the violations; and other factors as justice may require.

Standard for Finding Default

The regulation governing default in the Consolidated Rules of Practice is found at § 22.17 of the Rules of Practice, 40 C.F.R. § 22.17. Section 22.17(a) of the Rules of Practice provides as follows:

A party may be found to be in default: after motion, upon failure to file a timely answer to the complaint; ...or upon failure to appear at a conference or hearing...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.

Additionally, § 22.17(b) provides that when a default motion requests the assessment of a civil penalty, the moving party must specify the penalty and give the legal and factual grounds for the relief requested.

40 C.F.R. § 22.17(c) provides when the Presiding Officer finds that default has occurred, he 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. If the order resolves all outstanding issues and claims in the proceeding, it shall constitute the initial decision...The relief proposed in the complaint...shall be ordered unless the requested relief is clearly inconsistent with the Act.

Argument

I. Respondent Failed to File an Answer

40 C.F.R. § 22.17(a) provides in pertinent part: "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. § 22.15(a) specifies that an "answer to the complaint must be filed with the Regional Hearing Clerk within 30 days after service of the complaint."

The EPA filed the Complaint in this matter on June 22, 2011. In accordance with 40 C.F.R. § 22.5(b)(1) (Filing, service, and form of all filed documents; business confidentiality claims), the Complaint along with a copy of the Consolidated Rules were served on Respondent by certified mail, return-receipt requested. The return-receipt prepared by the United States Postal Service and completed by Respondent's Registered Agent indicates that the Registered Agent accepted service for the Complaint on July 15, 2011. In accordance with 40 C.F.R. § 22.5(b)(1), Respondent's thirty-day timeframe for filing an answer expired on August 16, 2011.

In this instance, Respondent failed not only to file a timely answer, but failed to file an answer altogether. Respondent was warned of the consequences of failure to file a timely answer in the Complaint and the accompanying cover letter. The Complaint included specific, highlighted language, informing Respondent of its right to request a hearing and file an answer. Additional language specified the potential consequences of not filing an answer, including a possible default judgment and assessment of the proposed penalty. The cover letter stressed the

need for a timely answer, and provided information regarding the process for Respondent to file an answer.

Despite such warning, Respondent failed to comply with the answer requirements set forth in the Consolidated Rules, and/or failed to seek an order from the Presiding Officer granting an extension of time in which to file the Respondent's answer. Such failure to respond provides an appropriate basis for finding the Respondent in default.

II. Prima Facie Case of Liability

A default order is appropriate when the EPA has established a prima facie case of liability against the Respondent. A prima facie case is shown by establishing jurisdiction and facts sufficient to conclude Respondent violated the Act. The EPA has jurisdiction over Respondent as the agency responsible for monitoring Respondent's compliance with the Act. The facts underlying Respondent's noncompliance with the SWPPP, the BMPs, and the requirement to conduct site inspections and prepare reports establish a prima facie case of liability which is clearly demonstrated by the administrative record.

When a Respondent fails to file an answer, the Respondent presents no evidence to contradict the alleged violations, and Respondent waives its right to contest them. *See In the Matter of: Pan American Growers Supply, Inc.*, Docket No. FIFRA-04-2010-3029 (November 30, 2010, ALJ Barbara A. Gunning), *In the Matter of: James Bond, Owner, Bond's Body Shop*, Docket Nos. CWA-08-2004-0047 and RCRA-08-2004-0004 (January 11, 2005, Chief ALJ Susan L. Biro); and *Water Enterprises Northwest, Inc.*, Docket No. SDWA-10-2003-0086 (July 22, 2004, RJO Alfred C. Smith). The strict language set forth in 40 C.F.R. § 22.17(a) for not filing an answer, and the number of administrative decisions consistently enforcing this language,

support a waiver of Respondent's rights and imposition of the penalty proposed in this matter.

III. Respondent's Noncompliance with the Act and the Administrative Proceedings Pose Various Potential Threats to the Lake

Respondent's disregard for the Act and EPA's authority pose a potential health threat to the persons and wildlife served by Lake Sakakawea, as well as to the quality of the Lake itself. The Corps observed excessive erosion from the Site down gradient toward the Lake. The BMPs required by the Act, but missing throughout most of the Site, would have minimized sediment discharges. Additionally, the Respondent would have controlled its discharges and minimized sediment erosion threatening surrounding slopes, land owned by the Corps and the Lake had the Respondent implemented their SWPPP and properly installed and maintained their BMPs.

Section 305(b) of the Act requires each state to conduct water quality surveys to determine a water body's overall health, including whether designated uses are being met. States and other jurisdictions conduct water quality surveys and report the findings to the EPA every two years. The EPA then prepares a biennial report to Congress, which represents the most complete and up-to-date snapshot of water quality conditions around the country. High sediment loads can cause sedimentation of our nation's waters, which the EPA found in 2004 to be one of the top ten causes of impaired water quality in rivers, streams, lakes, ponds and reservoirs. *See* USEPA. 2009. *National Water Quality Inventory: 2004 Report to Congress*. EPA841-R-08-001. U.S. Environmental Protection Agency, Office of Water, Washington, DC.

Discharges from construction sites have been identified as a source of pollution in 14 percent of impaired rivers and 6 percent of impaired lakes, ponds, and reservoirs. Other pollutants can be absorbed into fine sediment, causing nutrients, especially phosphorus, metals,

and organic compounds, to move into aquatic ecosystems. *See* USEPA, 1998, *National Water Quality Inventory: 1996 Report to Congress*. EPA841-R-97-008. U.S. Environmental Protection Agency, Office of Water, Washington, DC.

The EPA has found that erosion rates from construction sites are much greater than from almost any other land use. Suspended sediment concentrations from construction sites have been found to be many times the concentrations from developed urban areas. Excess sediment is associated with increased turbidity, reduced light penetration in the water column, long-term habitat destruction, and increased difficulty in filtering drinking water. *See* 64 Fed. Reg. 68722, 68728-68731 (Dec. 8, 1999) for more information on how discharges from construction sites cause water pollution.

The EPA and states with authorized NPDES programs rely on the permit program to implement the controls needed to prevent water pollution. The Respondent's failure to properly comply with the Permit and SWPPP jeopardizes the integrity of EPA's and NDDH's programs to control sediment pollution. Such negligent disregard for the wellbeing of the Lake and the land owned by the Corps cannot be condoned. A default order holding the Respondent accountable for its inaction is necessary to ensure adequate protection for those persons and wildlife serviced by the Lake.

IV. Legal and Factual Grounds in Support of the Penalty Sought

The legal authority for assessing a penalty for alleged violations of the Act is set forth in Section 309(g) of the Act, 33 U.S.C. § 1319(g), and 40 C.F.R. § 22.13. Section 309(g) of the Act, 33 U.S.C. § 1319(g), authorizes the assessment of a civil administrative penalty of up to \$11,000 per day for each violation of an order issued under section 309(g) of the Act, 33 U.S.C.

§ 1319(g). Based on the foregoing findings, the authority set forth in section 309(g)(1)(A) of the Act, 33 U.S.C. § 1319(g)(1)(A), and the inflationary adjustment rate at 40 C.F.R. § 19.4, the Complainant proposes that the Administrator issue a Final Order assessing civil administrative penalties in the amount of \$84,000 for violations of section 301 of the Act, 33 U.S.C. § 1311, and for violations of a condition or limitation of a permit issued under section 402 of the Act, 33 U.S.C. § 1342.

In particular, the Complaint alleges that Respondent failed to abide by an adequate SWPPP, failed to implement effective BMPs, failed to temporarily and permanently stabilize the soil on the Site, and failed to comply with the inspection requirements under the Permit. If the Respondent had complied with the requirements of the Act, the Respondent would have controlled its discharges and minimized sediment erosion threatening surrounding slopes, land owned by the Corps, and the Lake. The Respondent failed to abide by an adequate SWPPP from December 21, 2007, the date the NOI was submitted, to the date the Casino project ended, on or about April 20, 2011, for a total of 375 days.

The Respondent failed to comply with the requirements for effective BMPs and inspections under the Permit from May 1, 2008, the estimated project start date, to the date the penalty was calculated, April 20, 2011, for a total of 1,084 days. Final stabilization activities were never completed at the Site and the SWPPP remains inadequate.

In accordance with the section 309(g) of the Act, 33 U.S.C. § 1319(d), and the Civil Penalty Inflation Adjustment Rule (Rule), 20 C.F.R. Part 19, courts are allowed to assess penalties of up to \$32,500 per day for each violation occurring between March 15, 2004, and January 12, 2009, and up to \$37,500 per day for each violation after January 12, 2009. The

statutory maximum penalty allowable under the Act and Rule between December 21, 2007 and January 12, 2009 is \$21,807,500 and the maximum allowable after January 12, 2009 is \$33,975,000. The total maximum penalty allowable under the Act and Rule totals \$55,782,500.

Section 309(g)(3) of the Act, 33 U.S.C. § 1319(g)(3) sets forth the applicable statutory penalty factors to consider in assessing a civil administrative penalty, including the nature, circumstances, extent and gravity of the violation(s); the violator's ability to pay; any history of prior violations; the degree of culpability; any economic benefit to the violator resulting from the violations; and other factors as justice may require. The statutory factors were used in calculating the proposed penalty because EPA's CWA programs have not adopted pleading (complaint-based) penalty policies and EPA guidance specifically bars the use of settlement penalty policies in administrative litigation. See OECA Guidance on Use of Penalty Policies in Administrative Litigation at p.2, fn.2.

The proposed penalty in this matter, comprised solely of gravity and economic benefit, is consistent with these statutory factors. Please see the attached Declaration of Natasha Davis for a comprehensive discussion of how the penalty in this matter was calculated based on the applicable statutory factors. A general discussion on the penalty calculation is as follows.

Gravity is a monetary value reflective of the seriousness of the violations and the population at risk. In this matter, the EPA calculated a gravity component of \$64,718.40 for the months of May 2008 when the project began, until it ended in April 2011. The Corps found during inspections conducted in 2009 that the Respondent failed to initially install adequate BMPs to manage storm water on the Site. Furthermore, the Respondent failed to adequately

manage storm water on site during the duration of the project as found during inspections conducted by the Corps in 2010.

The Lake is the receiving water for the construction site. Receiving waters where the water provides high-quality habitat for fish, other aquatic life and wildlife, is suitable for secondary contact recreation, and a source of public water supply is considered to provide high quality water. The State of North Dakota's water quality division has listed the Lake as a Class I surface water. Class I waters are defined by the state as being suitable for the propagation and/or protection of resident fish species and other aquatic biota and for swimming, boating, and other recreation.

The Site posed substantial potential harm to the environment. The potential runoff from the Site had a likelihood of impacting the Lake's coldwater fishery through sedimentation from bank erosion from the Site. Sediment erosion had the potential to impact the coldwater fishery designation for the Lake due to the absence of BMPs at the Site during the following months when precipitation was greater than 0.5 inches: June to October 2008, May to July 2009, September and October 2009, and April 2010. (Precipitation data was provided by Utah State University Climate Center. *See* website <http://climate.usurf.usu.edu/products/data.php>. Last visited February 21, 2012.)

The Site disturbed a total of approximately 12 acres. Although the Respondent prepared a SWPPP dated October 2007, the SWPPP does not include all required elements as required by the Permit. The EPA identified that the SWPPP was missing the following elements: identification of all construction site operators and their area of control, a description of interim

stabilization practices, post authorization records, a description of non-storm water discharges, and documentation of permanent eligibility as related to Endangered Species.

The specific SWPPP deficiencies that could have impacted actual site conditions include, implementation of BMPs or discharge of pollutants were the failure to identify all construction site operators and their area of control, interim stabilization practices, and the documentation of eligibility as related to Endangered Species. The SWPPP should have been corrected during the months of June to October 2008, May to July 2009, September and October 2009, and April 2010. During an inspection by the Corps in 2009, it was determined that the 12 acre Site was unprotected due to the absence of BMPs. The BMPs that were to have been installed as listed in the SWPPP were not observed by the inspectors and no temporary stabilization practices were utilized especially in regards to the vulnerable steep hill located on the Site which was previously stripped of vegetation.

The Permit requires that an inspection frequency must be identified in the SWPPP. The Respondent's SWPPP states that inspections will occur every 14 days or within 24 hours of a storm event greater than 0.5 inches of rain. However, the Permit states that inspections must be conducted every 14 days and within 24 hours of a storm even greater than 0.5 inches. To ensure compliance with the permit, Respondent would need to conduct 26 inspections per year according to the 14 day schedule. In addition, data from May 1, 2008 to April 20, 2011 indicates that there were 14 days where precipitation was 0.5 inches or greater. *Id.* Thus, the Respondent avoided conducting an estimated 30 inspections per year of the project.

In addition to gravity, the EPA calculated an economic benefit component of \$18,792 which consists of (1) the costs of creating an adequate SWPPP and keeping it up to date and

complete for the months of January 2008 to April 2011 (\$2); (2) the cost of implementing and maintaining BMPs for the months of January 2008 through April 2011 (\$16,649); and (3) the cost of performing inspections to satisfy the permit requirements for the months of January 2008 to April 2011 (\$2,141). These three costs would have been incurred by the Respondent had the Respondent been in compliance with the provisions under the Act. By including these costs in the penalty, the economic benefit enjoyed by Respondent for not complying with the regulations is eliminated. The gravity and economic benefit components combined, adjusted upwards for pleading purposes, totals \$84,000.

The penalty proposed in the Complaint is consistent with the applicable statutory factors. Courts have readily imposed penalties in default actions where the requested relief is consistent with the statute. See *In the Matter of: Mr. Allen Barry, Mr. Tim Barry d/b/a Allen Barry Livestock*, Docket No. CWA-05-2010-0008 (2011), *In the Matter of: Parry Farms, LLC*, Docket No. CWA-08-2010-0002 (2010), *In the Matter of: Blackinton Common, LLC and CG2, Inc.*, Docket No. RCRA-01-2007-0164 (2009), *In the Matter of: Keenhold Associates, ET AL.*, Docket No. TSCA-03-2007-0084 (2007), *In the Matter of: Frank D. Smith & Sons, Inc.*, Docket No. CWA-02-2005-3801 (2006), *In the Matter of: Avon Fuel and Supply Co. and Frebro, Inc.*, Docket No. CWA-03-2003-0269 (2004).

Conclusion

Respondent failed to file an answer to the Complaint. For the reasons set forth above, Complainant requests that the Presiding Officer find the Respondent in default and issue a default order assessing the proposed penalty amount of \$84,000.

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

2012 APR -3 PM 1:02

FILED
EPA REGION VIII
PREPARING CLERK

IN THE MATTER OF:)

Lake Sakakawea & Associates, LLC)
2500 9th Avenue NW Apartment 1)
Mandan, ND 58554-1526)

Docket No. CWA-08-2011-0017

)DECLARATION OF NATASHA DAVIS

Respondent.)
_____)

This declaration is filed in support of a motion for default and request for assessment of civil penalties brought by the Complainant, the U.S. Environmental Protection Agency (EPA) Region 8, to supplement the record with respect to its proposed penalty, Natasha Davis, Life Scientist, NPDES Enforcement Unit, EPA Region 8 Water Technical Enforcement Program, hereby submits the following Declaration.

I, Natasha Davis, declare as follows:

1. I am employed by EPA in the Region 8 Water Technical Enforcement Program. Since February 2009, I have held the position of Life Scientist, NPDES Enforcement Unit.
2. In my capacity as a scientist, I am involved with the development of penalty calculations developed for violations of section 301 of the Clean Water Act (CWA).
3. I was involved with development of, and reviewed the final penalty calculation for, the complaint in this matter and have personal knowledge of the matters set forth in this

¹USEPA. 2009. *National Water Quality Inventory: 2004 Report to Congress*. EPA841-R-08-001. U.S. Environmental Protection Agency, Office of Water, Washington, DC.

²USEPA. 1998. *National Water Quality Inventory: 1996 Report to Congress*. EPA841-R-97-008. U.S. Environmental Protection Agency, Office of Water, Washington, DC.

Declaration.

4. On June 22, 2011, EPA filed an Administrative Complaint and Notice of Opportunity for Hearing in this matter, alleging that the Respondent, Lake Sakakawea & Associates, LLC (LSA), violated section 402 of the CWA, 33 U.S.C. § 1342, by failing to respond to comply with the provisions of the NPDES permit issued to the Respondent for construction of a casino within the exterior boundaries of the Fort Berthold Indian Reservation. The Complaint proposes a penalty of \$84,000.

5. In calculating a penalty, section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3), requires that EPA take into account the nature, circumstances, extent and gravity of the violation, 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 violation, and such other matters as justice may require. The proposed penalty in this matter is consistent with these statutory factors. The CWA statutory factors were used in calculating the proposed penalty because EPA's CWA programs have not adopted pleading (complaint-based) penalty policies and EPA guidance specifically bars the use of settlement penalty policies in administrative litigation. See OECA Guidance on Use of Penalty Policies in Administrative Litigation at p.2, fn.2. A discussion of the application of each of the CWA statutory factors in this matter follows.

6. As to statutory factor 1, the nature, circumstances, extent and gravity of the violation, the Army Corps of Engineers inspected the Site and observed, among other things, the following: no erosion control measures; erosion around the perimeter of the disturbed area; growth of noxious weeds; no topsoil, vegetation, or reseeded; and un-stabilized site conditions. Had the Respondent implemented their SWPPP and properly installed and maintained their BMPs, the

Respondent would have controlled its discharges and minimized sediment erosion threatening surrounding slopes, land owned by the Corps, and Lake Sakakawea. I used the "Supplemental Guidance to the Interim Clean Water Act Settlement Policy for Violation of the Construction Storm Water Requirements" (Penalty Policy) to apply the statutory penalty factors in a fair and consistent manner (Exhibit 1) to calculate a gravity component of \$64,718.40 which consists of (1) Health and Environmental Harm and (2) Significance of the Non-effluent Limit Violation.

Section 305(b) of the CWA requires each State to conduct water quality surveys to determine a water body's overall health, including whether designated uses are being met. States and other jurisdictions conduct water quality surveys and report the findings to EPA every two years. EPA then prepares a biennial report to Congress, which represents the most complete and up-to-date snapshot of water quality conditions around the country. High sediment loads can cause sedimentation of our nation's waters, which the EPA found in 2004 to be the one of the top ten causes of impairment of water quality in rivers, streams, lakes, ponds and reservoirs¹. Other pollutants can be adsorbed onto fine sediment, causing nutrients, especially phosphorus, metals, and organic compounds, to move into aquatic ecosystems². Discharges from construction sites have been identified as a source of pollution in 14 percent of impaired rivers and 6 percent of impaired lakes, ponds, and reservoirs¹.

The EPA has found that erosion rates from construction sites are much greater than from almost any other land use. Suspended sediment concentrations from construction sites have been found to be many times the concentrations from developed urban areas. Excess sediment is

¹USEPA. 2009. *National Water Quality Inventory: 2004 Report to Congress*. EPA841-R-08-001. U.S. Environmental Protection Agency, Office of Water, Washington, DC.

²USEPA. 1998. *National Water Quality Inventory: 1996 Report to Congress*. EPA841-R-97-008. U.S. Environmental Protection Agency, Office of Water, Washington, DC.

associated with increased turbidity, with reduced light penetration in the water column, with long-term habitat destruction, and with increased difficulty in filtering drinking water. See 64 Fed. Reg. 68722, 68728-68731 (Dec. 8, 1999) for more information on how discharges from construction sites cause water pollution.

The EPA and states with authorized NPDES programs rely on the permit program to implement the controls needed to prevent water pollution. The Respondent's failure to properly comply with the Permit and SWPPP jeopardizes the integrity of EPA's and NDDH's programs to control sediment pollution.

7. As to statutory factor 2, ability to pay, EPA is without knowledge regarding Respondent's finances, and therefore did not reduce the penalty based upon this statutory factor.

8. As to statutory factor 3, prior history of violations, the complaint is the first enforcement action EPA Region 8 has issued to the Respondent regarding noncompliance with the storm water requirements, EPA did not factor history of violations into the penalty calculation.

9. As to statutory factor 4, degree of culpability, EPA's storm water program has been in place since 1990. The Respondent should have been aware of the applicable storm water requirements because prior to commencing with the development project, Respondent hired a professional engineering firm as a project consultant to prepare the specifications and proposal for site work, road construction, lagoon construction and related items; and otherwise provide technical assistance. In 1990, EPA promulgated Phase I of its storm water program. (55 Fed. Reg. 47990-48091, November 16, 1990.) Phase I required NPDES permit authorization for storm water discharges from construction activity disturbing five or more acres of land, either by itself or in conjunction with other parts of a common development. (55 Fed. Reg. at 48066.) In

1999, EPA extended this requirement to storm water discharges from construction activity disturbing between 1 and 5 acres of land. (64 Fed. Reg. 68722, 68839, December 9, 1999.) The NDDH has conducted numerous training and outreach activities over the past several years to increase the regulated community's awareness of storm water control requirements. Since 2002, these have included at least 40 presentations to contractors and construction engineers on permit compliance and sediment/erosion control. Therefore, the Respondent should have been fully aware of its responsibility to meet the requirements related to storm water control.

10. As to statutory factor 5, economic benefit or savings resulting from the violation, I estimated that by not spending the required funds to install and maintain all necessary BMPs (e.g., storm inlet protection, straw wattles, silt fence), temporarily and/or permanently stabilize the Site in a timely manner, inspect the construction site, and develop and maintain a complete SWPPP the Respondent avoided costs that created an economic benefit. Using information on cost of materials, site conditions, and labor wages I estimated an avoided cost of \$18,792.00. This figure includes the following: (1) the costs of creating an adequate SWPPP and keeping it up to date and complete for the months of January 2008 to April 2011 (\$2); (2) the cost of implementing and maintaining BMPs for the months of January 2008 through April 2011 (\$16,649); and (3) the cost of performing inspections to satisfy the permit requirements for the months of January 2008 to April 2011 (\$2,141).

11. As to statutory factor 6, such other matters as justice may require, EPA is unaware of any such matters and did not make any adjustments to the proposed penalty based on this statutory

¹USEPA. 2009. *National Water Quality Inventory: 2004 Report to Congress*. EPA841-R-08-001. U.S. Environmental Protection Agency, Office of Water, Washington, DC.

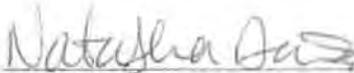
²USEPA. 1998. *National Water Quality Inventory: 1996 Report to Congress*. EPA841-R-97-008. U.S. Environmental Protection Agency, Office of Water, Washington, DC.

factor.

12. The facts related to the statutory factors discussed in paragraphs 6 - 11, above, support the proposed penalty of \$84,000 for the failure to fully comply with the NPDES permit issued to the Respondent.

I declare the foregoing to be true and correct to the best of my knowledge, information and belief under penalty of perjury.

Dated: 3/23/2012



Natasha Davis
NPDES Enforcement Unit
U.S. EPA, Region 8