

RE: Proposed Assessment of Civil Penalty Against Old Orchard, LLC and Meridian Commercial Construction, LLC
Respondent's Prehearing Exchange
Docket No. CWA 08-2009-0015

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2009 DEC 28 AM 11:35

STATE OF NORTH DAKOTA)
)ss. AFFIDAVIT OF SERVICE BY MAIL
COUNTY OF CASS)

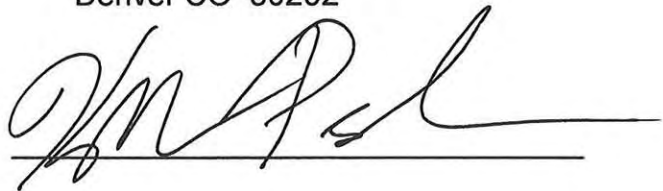
The undersigned, being first duly sworn, says that a copy of the attached:

Meridian Commercial Construction, LLC's Prehearing Exchange

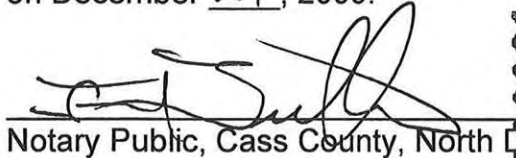
was served upon the following by enclosing the same in an envelope addressed to such attorney(s) and/or person(s) at their address(es) with postage fully prepaid and by depositing the said envelopes in a United States Postal Service mailbox at Fargo, North Dakota, on December 21, 2009.

The Honorable Susan L. Biro
Chief Administrative Law Judge
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Mail Code 1900L
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

Peggy Livingston
Office of Enforcement, Compliance
and Environmental Justice
Region 8
United States EPA
1595 Wynkoop Street (ENF-L)
Denver CO 80202



Subscribed and sworn to before me
on December 21, 2009.



Notary Public, Cass County, North Dakota

JAMES R. BULLIS
Notary Public
State of North Dakota
My Commission Expires Oct 16, 2010

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

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In the Matter of:)
)
)
Meridian Commercial Construction, LLC,) Docket No. CWA 08-2009-0015
)
Respondents.)
_____)

RESPONDENT'S PREHEARING EXCHANGE

The Respondent, Meridian Commercial Construction, LLC (Meridian) submits the following as its initial prehearing exchange, in response to the Prehearing Order issued by the Honorable Susan L. Biro, Chief Administrative Judge on November 5, 2009.

1. Witnesses, exhibits, and place of hearing.

- a. **Names of the expert and other witnesses intended to be called at hearing with a brief narrative summary of their expert testimony.**

Brooks Johnson – fact witness. Brooks Johnson was the initial foreman for Meridian on the Site. Mr. Johnson will testify that he filed an application for a North Dakota general NDPES storm water discharge permit with the State of North Dakota prior to the commencement of construction. Mr. Johnson also signed the original SWPPP for the project. Mr. Johnson can also testify that during all phases of construction Meridian adhered to their SWPPP and:

- i. regularly inspected the Site; and,
- ii. maintained the Storm Water protections as required under the terms of the SWPPP.

Raymond Reading – fact witness. Raymond Reading is the owner of Agassiz Land Management company. Agassiz Land Management was hired by Meridian commencing at the time of construction to regularly inspect the Site for Storm Water compliance and to maintain their SWPPP from time to time. Mr.

Reading will testify that he personally inspected the site commencing at the beginning of construction in 2006.

Gary Martin – fact witness. Mr. Martin will testify that Meridian regularly maintained the property in accordance with its SWPPP and best management practices since he commenced day-to-day construction oversight on this Site.

b. Copies of all documents and exhibits intended to be introduced into evidence.

See attached hereto as Exhibit A.

c. Views as to appropriate place of hearing and estimated time to present case.

The Respondent is in agreement with the EPA that the appropriate location for this hearing would be Fargo, North Dakota. All witnesses with the exception of the EPA's inspectors are located in the City of Fargo. Additionally, the project is located in Fargo should physical inspection be necessary. Respondent estimates it can present its case in chief in one day.

2. Additional Statements by Meridian.

A. A detailed narrative statement that fully elaborates upon the exact factual and legal bases, and copies of all documents in support thereof, for Respondent's denial in its Answer of the truth of the allegations made in paragraphs 6, 24-26, 31, 38 of the Complaint.

Paragraph 6. The Respondent was not in existence until late 2006, at which time, it had no involvement with this project. Also, this development contains several different apartment complexes owned by separate owners and constructed by different construction companies.

Paragraph 24. Each building in this development are owned by separate owners and were built at different times. The lot in which the apartment building in question is located on consists of substantially less than 5 acres. Disturbances cause by water, if any, would not have effected more than 5 acres.

Paragraph 25. Respondent submitted an Application to Obtain Coverage Under NDPDES General Permit for Storm Water Discharges Associated with Construction Activity (NDR10-0000) on March 1, 2008. This application was stamped "received" by the North Dakota Department of

Health (NDDH) on March 24, 2008. The Respondent also applied for an Erosion and Sediment Control Permit from the City of Fargo on June 5, 2008.

Paragraph 26. The only sediments found in the storm drains was hardened concrete. This concrete was used in the construction of the storm water drainage system when the City of Fargo installed the storm sewer in this subdivision. A Storm Water Pollution Prevention Plan (SWPPP) had been filed with the NDDH on October 17, 2006 by Old Orchard, LLC.

Paragraph 31. The SWPPP dated October 17, 2006 contained all of the elements outlined in paragraph 30 of the EPA's complaint.

Paragraph 32. The Respondent is unaware of any consultation by the EPA with the NDDH regarding this matter and more specifically the alleged penalties.

Paragraph 33. Construction of the apartment complex in question did not begin until the spring of 2008. The Respondent applied for permits in the spring of 2008 when it began construction on the building in question.

Paragraph 34. On March 1, 2008, the Respondent submitted an Application to Obtain Coverage Under NDPDES General Permit for Storm Water Discharges Associated with Construction Activity, which was stamped "received" on March 24, 2008 by the North Dakota Department of Health.

Paragraph 35. The Respondent's applied for permits from both the State of North Dakota and the City of Fargo. The EPA has offered no evidence that suggests any water was discharged from the construction site.

Paragraph 36. The Respondent's applied for permits from both the State of North Dakota and the City of Fargo. The EPA has offered no evidence that suggests any water was discharged from the construction site.

Paragraph 37. The originally filed SWPPP was amended on November 4, 2008 to comply with changes requested by the EPA.

Paragraph 38. The Respondent developed and adhered to a comprehensive Storm Water Pollution Prevention Plan. Respondent retained Agassiz Land Management to insure compliance with the applicable federal, state and local rules regarding Storm Water Discharge. This firm, Agassiz Land Management, is a Certified Professional in Erosion and Sediment Control (CPESC).

B. A detailed narrative statement that fully elaborates on the period(s) in time and the extent to which Respondent had any responsibility in regard to all or some portion of “the Site,” as that term is defined in paragraph 4 of the Complaint. Include in your Answer a statement describing Respondent’s responsibilities in regard to permit acquisition, permit compliance and/or storm water discharges from some or all portion of the Site.

RESPONSE: Paragraph 4 of the EPA’s complaint makes reference to apartment complexes located at 4424 31st Avenue South, 3120 South 44th Street and a third unaddressed building. The Respondent was only involved with the construction of the “third unaddressed building”, which began in the spring of 2008.

C. A detailed narrative statement that fully elaborates on Respondent’s position as to whether the Site, or the portions thereof as to which it admits involvement or responsibility, “disturbed more than 5 acres”.

RESPONSE: The apartment complex known as “Old Orchard” consists of 4 separate apartment buildings all owned separately. Each building is located on separate lots which are approximately 2 acres in size. At the time of the alleged infractions, two of the four apartment buildings were completed, and one had not commenced construction. Therefore, any infraction would have disturbed less than 4 acres.

D. A copy of all documents evidencing the request for authority to discharge storm water from the Site, or any portion thereof, and/or relating or referring to such requests, and any documents evidencing the granting thereof.

RESPONSE: Applications to the NDDH and the City of Fargo are attached hereto as Exhibit “B”

E. A copy of all Storm Water Pollution Prevention Plans (SWPPP) for the Site and a statement as to the effective date of each such Plan and/or amendments thereto.

RESPONSE: The SWPPPS are attached hereto as Exhibit “C”.

F. A detailed narrative statement that fully describes the extent to which the SWPPP in effect for the Site on or before November 4, 2008 included the information described in Paragraph 30 of the Complaint.

RESPONSE: See the 2006 SWPPP attached hereto as Exhibit "C". As indicated, Meridian retained Agassiz Land Management to insure compliance with the applicable federal, state and local rules regarding Storm Water Discharge.

G. Copies of any and all agreements between Respondent and Agassiz Land Management or any other person or entity regarding acquiring storm water permits for the Site or any portion thereof, and/or providing Best Management Practices or other compliance activities in connection therewith.

RESPONSE: No written contract exists between Respondent and Agassiz Land Management. However, the work performed by Agassiz Land Management is memorialized by the invoices attached hereto as Exhibit "D".

H. Copies of any and all documents, including monitoring reports, activity logs, invoices, photographs, plans, diagrams, etc. evidencing the implementation of any measures or practices to reduce the discharge of pollutants in the storm water from the Site or any portion.

RESPONSE: Attached hereto as Exhibit "E".

I. If Respondent takes the position that it is unable to pay the proposed penalty, a narrative statement explaining the precise factual and legal basis for its position and a copy of any and all documents it intends to rely upon in support of such position.

RESPONSE: N/A.

J. If Respondent takes the position that the proposed penalty should be reduced or eliminated on any other grounds, a narrative statement explaining the precise factual and legal basis for its position and a copy of any and all documents it intends to rely upon in support of such position.

RESPONSE: N/A.

Supplemental Pre-Hearing Exchange.

Respondent reserves the right to move to supplement this prehearing exchange with any information that may subsequently become available to Respondent.

Dated: December 21, 2009.

MONTGOMERY GOFF & BULLIS, P.C.

By: 

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