



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8

1595 Wynkoop Street
DENVER, CO 80202-1129
Phone 800-227-8917
<http://www.epa.gov/region08>

Ref: 8ENF-W-NP

JUN - 3 2009

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Michael M. Thomas
Registered Agent for
Old Orchard, LLC
406 Main Ave, Suite 200
P.O. Box 2686
Fargo, ND 58108-2686

Brent C. Olson
Registered Agent for
Meridian Commercial Construction, LLC
73 Broadway
P.O. Box 932
Fargo, ND 58107-0932

Re: Notice of Proposed Assessment of Civil
Penalty against Old Orchard, LLC and
Meridian Commercial Construction, LLC

Dear Mr. Thomas and Mr. Olson:

Enclosed is a document entitled Penalty Complaint and Notice of Opportunity for Hearing ("Complaint"). The United States Environmental Protection Agency ("EPA") is issuing this Complaint against Old Orchard, LLC and Meridian Commercial Construction, LLC ("Respondents") pursuant to section 309 of the Clean Water Act ("Act"), 33 U.S.C. §1319. In the Complaint, EPA alleges that Respondents violated sections 301(a), 308, and 402(p) of the Act, 33 U.S.C. §§1311(a), 1318, and 1342(p) at the Old Orchard Apartments in Fargo, North Dakota. The Complaint proposes that a penalty of \$35,000 be assessed against the Respondents for these violations.

The Respondents have the right to a hearing to contest the factual allegations in the Complaint and/or the appropriateness of the proposed penalty. We have enclosed a copy of 40 C.F.R. part 22, which identifies the procedures EPA follows in administrative civil penalty assessments.

If the Respondents wish to contest the allegations in the Complaint or the penalty proposed in the Complaint, they must file an answer within thirty (30) days of receipt of

the enclosed Complaint. The answer must be filed with the EPA Region 8 Hearing Clerk at the following address:

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

If the Respondents do not file an answer within 30 days (see 40 C.F.R. §22.15(d)), they may be found in default. A default judgment may impose the full penalty proposed in the Complaint of \$35,000.

EPA encourages settlement of these proceedings at any time prior to a formal hearing if the settlement is consistent with the provisions and objectives of the Act and applicable regulations. (See 40 C.F.R. §22.18.) If a mutually satisfactory settlement can be reached, it will be formalized in a consent agreement signed by authorized representatives of each Respondent and EPA. Upon final approval of the consent agreement by the Regional Judicial Officer for EPA Region 8, the Respondents will be bound by the terms of the consent agreement and will waive their right to a hearing on, and judicial appeal of, the agreed upon civil penalty. The Respondents have the right to be represented by an attorney at any stage of the proceedings, including any informal discussions with EPA.

If either Respondent is a small business, the enclosed Small Business Regulatory Enforcement and Fairness Act (SBREFA) information sheet, containing information on compliance assistance resources and tools available to small businesses, may be useful. SBREFA does not eliminate either Respondent's responsibility to comply with the Act or to respond to this Complaint.

If the Respondents have any questions regarding this letter, the enclosed Complaint, or any other matters pertinent to compliance with the Act, the most knowledgeable people on my staff regarding these matters are Amy Clark, Environmental Scientist, at (303) 312-7014, or Peggy Livingston, Enforcement Attorney, at (303) 312-6858. Please note that arranging for a settlement meeting does not relieve either Respondent of the need to file a timely answer to EPA's Complaint.

Sincerely,



Eddie A. Sierra
Acting Assistant Regional Administrator
Office of Enforcement, Compliance
and Environmental Justice

Enclosures:

1. Penalty Complaint and Notice of Opportunity for Hearing
2. Consolidated Rules of Practice (40 C.F.R. part 22)
3. Small Business Regulatory Enforcement and Fairness Act Information Sheet

cc: Tina Artemis, Regional Hearing Clerk
David Glatt, North Dakota Department of Health

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

2009-02-11 11:35

In the Matter of:)
)
Old Orchard, LLC) PENALTY COMPLAINT AND
and) NOTICE OF OPPORTUNITY
Meridian Commercial Construction, LLC,) FOR HEARING
)
) Docket No. **CWA 08-2009-0015**
Respondents.)

INTRODUCTION

This civil administrative enforcement action is authorized by Congress in section 309(g) of the Federal Water Pollution Control Act, commonly known as the Clean Water Act (the CWA or Act), 33 U.S.C. §1319(g). The rules for this proceeding are 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 (Rules of Practice), 40 Code of Federal Regulations (C.F.R.) part 22, a copy of which is attached as Exhibit 1.

The United States Environmental Protection Agency (EPA) proposes to assess a civil administrative penalty against Old Orchard, LLC and Meridian Commercial Construction, LLC (Respondents), as more fully described below.

ALLEGATIONS

The following allegations apply to all times relevant to this action and to each count of this complaint:

1. Respondent Old Orchard, LLC (Old Orchard) is a North Dakota limited liability company.
2. Respondent Meridian Commercial Construction, LLC (Meridian) is a North Dakota limited liability company.
3. Each Respondent is a "person" as that term is defined in section 502(5) of the Act, 33 U.S.C. §1362(5), and 40 C.F.R. §122.2.

4. Old Orchard owns property at which an apartment complex known as the Old Orchard Apartments has been constructed, at 4425 31st Avenue South, 3120 South 44th Street, and a third unaddressed building, in Fargo, ND 58104 (the Site), encompassing approximately 7.5 acres.
5. Construction activities began at the Site in 2006.
6. Meridian has had day-to-day responsibility for construction at the Site.
7. The runoff and drainage from the Site is “storm water” as defined in 40 C.F.R. §122.26(b)(13).
8. Storm water contains “pollutants” as defined by section 502(6) of the Act, 33 U.S.C. §1362(6).
9. Storm water, snow melt, surface drainage and runoff water have been leaving the Site and have flowed into the City of Fargo’s municipal separate storm sewer system (MS4).
10. The City of Fargo’s MS4 discharges to the Red River of the North.
11. The Red River of the North is a “navigable water” as defined by section 502(7) of the Act, 33 U.S.C. 1562(7), and part of the “waters of the United States” as defined by 40 C.F.R. §122.2.
12. The storm water discharge from the Site is the “discharge of a pollutant” as defined by section 502(12) of the Act, 33 U.S.C. §1362(12), and 40 C.F.R. §122.2.
13. The storm water discharge from the Site is a discharge from a “point source” as that term is defined in section 502(14) of the Act, 33 U.S.C. §1362(14), and 40 C.F.R. §122.2.
14. In order to restore and maintain the integrity of the nation’s water, section 301(a) of the Act, 33 U.S.C. §1311(a), prohibits the discharge of any pollutant by any person into navigable waters, unless authorized by certain other provisions of the Act, including section 402 of the Act, 33 U.S.C. §1342.
15. Section 402 of the Act, 33 U.S.C. §1342, establishes a National Pollutant Discharge Elimination System (NPDES) program, under which EPA (and states with authorization from EPA) may permit discharges of pollutants into navigable waters, subject to specific terms and conditions.
16. Section 402(p) of the Act, 33 U.S.C. §1342(p), establishes a program under which NPDES permits may be issued to authorize discharges of storm water associated with industrial activities.

17. 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) constitutes a storm water discharge associated with industrial activity. 40 C.F.R. §122.26(b)(14)(x).
18. Each person discharging storm water associated with industrial activity must seek and obtain authorization to do so under either an individual NPDES permit or a promulgated NPDES general permit. 40 C.F.R. §122.26(c); Sections 301(a), 308, and 402(p) of the Act, 33 U.S.C. §§1311(a), 1318, and 1342(p).
19. Prior to beginning construction at the Site, the Respondents were required to have obtained NPDES permit authorization for their discharges of storm water from the Site. 40 C.F.R. §122.21(c).
20. The North Dakota Department of Health (NDDH) was approved by EPA to administer the NPDES program on June 13, 1975. 40 Fed. Reg. 28663, July 8, 1975. A permit issued by the NDDH under its EPA-approved NPDES program is known as an NDPDES permit.
21. Effective October 11, 2004, the NDDH issued a general permit (NDPDES Permit No. NDR10-0000, referenced as the Permit) authorizing discharges of storm water associated with construction activities, if done in compliance with its terms and conditions. Dischargers may apply for authorization to discharge under the Permit by submitting a notice of intent for coverage to the NDDH.
22. Parts I.A.2.a, I.D.2, and V of the Permit define “large construction activity” as land disturbance of equal to or greater than 5 acres. Large construction activity also includes the disturbance of less than 5 acres 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 5 acres.
23. Part V of the Permit defines “common plan of development or sale” as a contiguous area where multiple separate and distinct land disturbing activities may be taking place at different times, on different schedules, but under one proposed plan. One plan is broadly defined to include design, permit application, advertisement or physical demarcation indicating that land-disturbing activities may occur.
24. Each apartment building at the Site is part of a common plan of development that has ultimately disturbed more than 5 acres.

25. On September 23, 2008, EPA inspectors conducted a storm water inspection at the Site. At the time of the inspection, the Respondents had not sought or obtained authorization from the NDDH to discharge storm water from the Site under either the Permit or any individual NDPDES storm water discharge permit.
26. During the September 23, 2008 inspection, EPA inspectors observed excessive sediment in storm drains at the Site, missing or inadequate best management practices, and no storm water pollution prevention plan (SWPPP) on-site.
27. After the September 23, 2008, inspection, the Respondents submitted a notice of intent to the NDDH seeking authorization to discharge under the Permit. Effective September 25, 2008, the Respondents became authorized under the Permit to discharge storm water from the Site, subject to the Permit's terms and conditions applying to large construction activity.
28. Had Respondents obtained authorization to discharge storm water under the Permit prior to construction, they would have been required by the Permit to implement best management practices to reduce sediment in their discharges and prevent sediment from entering the street.
29. Had Respondents obtained authorization to discharge under the Permit prior to construction, they would have been required by the Permit to complete a SWPPP prior to beginning construction at the Site.
30. The Permit requires that the SWPPP for the Site include, among other things: the total area of soil disturbance, a proposed timetable of activities disturbing soils for major portions of the Site, a complete Site map, a description of good housekeeping and preventative maintenance practices, an identification of when each erosion and sediment control measure would be implemented, and a maintenance or clean-out interval for sediment controls.
31. The Respondent's SWPPP for the Site did not include any of the elements enumerated in the preceding paragraph until November 4, 2008.
32. Pursuant to section 309(g) of the Act, 33 U.S.C. §1319(g), EPA has consulted with NDDH regarding assessment of this administrative penalty by furnishing a copy of this complaint and inviting comments.

COUNT 1

33. Respondents failed to apply for authorization to discharge under either the Permit or under any individual storm water discharge permit prior to November of 2006, when they began construction at the Site. Respondents did not apply for permit authorization for discharges from the Site for almost two years after beginning construction.

34. Respondents' failure to apply for authorization to discharge under either the Permit or under any individual storm water discharge permit constitutes a violation of 40 C.F.R. §§122.21(c) and 122.26(c) and sections 308 and 402(p) of the Act, 33 U.S.C. §§1318 and 1342(p).

COUNT 2

35. Respondents have discharged storm water into waters of the United States from the Site to the Red River of the North via the City of Fargo's MS4 without authorization by any permit issued under the Act for a period of November 15, 2006, to September 25, 2008.
36. Respondents' discharge without permit authorization constitutes a violation of sections 301(a) and 402(p) of the Act, 33 U.S.C. §§1311(a) and 1342(p), for each day in which a discharge has occurred.

COUNT 3

37. From September 25, 2008, to November 4, 2008, Respondents' SWPPP failed to include all elements required by the Permit.
38. Respondents' failure to develop a complete SWPPP has violated the Permit.

PROPOSED CIVIL PENALTY

Section 309(g)(1)(A) of the Act, 33 U.S.C. §1319(g)(1)(A), authorizes the EPA to assess a civil administrative penalty for any violation of various provisions of the Act, including but not limited to sections 301 and 308 of the Act, 33 U.S.C. §§1311 and 1318, and for any violation of a condition or limitation of a permit issued under section 402 of the Act, 33 U.S.C. §1342. The amount of the penalty that EPA can assess is up to \$11,000 per day for each day during which a violation continues after March 15, 2004, through January 12, 2009, and up to \$16,000 per day for each day after January 12, 2009, during which a violation continues. For violations after March 15, 2004, through January 12, 2009, the maximum total penalty is \$157,500. For violations after January 12, 2009, the maximum is \$177,500. These amounts have been adjusted for inflation by 40 C.F.R. part 19.

Section 309(g)(3) of the Act, 33 U.S.C. §1319(g)(3), requires EPA to take into account the following factors in assessing a civil administrative penalty: the nature, circumstances, extent and gravity of the violation(s) and, with respect to the violator, ability to pay, any prior history of such violations, degree of culpability, any economic benefit or savings gained from the violation, and such other factors that justice may require.

In light of the statutory factors and the specific facts of this case, EPA proposes that a penalty of \$35,000 be assessed against Respondents for the violations alleged above, as explained below:

Nature, Circumstances, Extent, and Gravity of Violations

As mentioned above, EPA observed excessive sediment in storm drains at the Site and sediment tracking in the streets from the Site. Best management practices (BMPs) that would have minimized sediment discharges were missing throughout most of the Site. Had the Respondents obtained and complied with a storm water discharge permit, they would have controlled their discharges and minimized sediment discharges.

EPA has found that storm water discharges from construction sites can severely compromise the integrity of our nation's waters. High sediment loads can cause siltation, which EPA found in 1998 to be the largest cause of impaired water quality in rivers and the third largest cause of impaired water quality in lakes. Other pollutants can be preferentially absorbed into fine sediment, causing nutrients, especially phosphorus, metals, and organic compounds to move into aquatic ecosystems. Discharges from construction sites have been identified as a source of pollution in 6 percent of impaired rivers, 11 percent of impaired lakes, ponds, and reservoirs, and 11 percent of impaired estuaries. Sediment can fill lakes and reservoirs and clog stream channels, with effects extending far downstream of the discharge from the construction site. 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 already-developed urban areas. Excess sediment is 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.

EPA and states with authorized NPDES programs rely on the permit program to implement the controls needed to prevent water pollution. The Respondents' failure to seek permit authorization until after EPA's inspection and almost two years after construction commenced, jeopardizes the integrity of EPA's and the NDDH's programs to control storm water pollution.

Prior Compliance History

This complaint is the first enforcement action EPA Region 8 has issued to Respondents regarding noncompliance with the storm water requirements.

Degree of Culpability

Meridian operates numerous construction sites in Fargo, North Dakota. Meridian is a Class A contractor in North Dakota with construction contracts over \$250,000 per year.

EPA's storm water program has been in place since 1990. As companies with a construction background, both Respondents should have been aware of the applicable storm water requirements.

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.)

Additionally, 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. The training and outreach activities since 2002 include at least 7 trainings to the Home Builder Associations on "Storm water 101" and at least 7 trainings to contractors and construction engineers on permit compliance and sediment/erosion control.

Therefore, the Respondents should have been fully aware of their responsibilities to meet the requirements related to storm water control.

Economic Benefit

Respondents received an economic benefit from their failure to obtain Permit authorization and their failure to comply with the requirements in the storm water discharge permit. They benefited by not spending the required funds to install and maintain all necessary BMPs (e.g., storm inlet protection, straw waddles, street cleaning) and to develop a complete SWPPP.

Ability to Pay

EPA did not reduce the proposed penalty due to this factor, but will consider any information the Respondents may present regarding Respondents' ability to pay the penalty proposed in this complaint.

Other Matters that Justice may Require

EPA is making no adjustments regarding this factor at this time.

NOTICE OF OPPORTUNITY FOR A HEARING

Respondents have the right to a public hearing before an EPA judicial officer to disagree with any allegation EPA has made in this complaint and/or the appropriateness of the penalty EPA has proposed. If Respondents request a hearing in their answer, the procedures provided in 40 C.F.R. part 22 will apply to the proceedings, and an Administrative Law Judge (ALJ) will

preside. The ALJ will be responsible for deciding whether EPA's proposed penalty is appropriate.

To assert their right to a hearing, Respondents must file a written answer (an original and one copy) with the Regional Hearing Clerk of EPA Region 8 (1595 Wynkoop Street, Mail Code 8RC, Denver, Colorado 80202) within 30 days of receiving this complaint. The answer must clearly admit, deny or explain the factual allegations of the complaint, the grounds for any defense, the facts Respondents dispute, and whether they request a public hearing. Please see section 22.15 of the Rules of Practice for more information on what must be in the answer. The Respondents may answer separately. **FAILURE TO FILE AN ANSWER AND REQUEST FOR HEARING WITHIN 30 DAYS MAY WAIVE A RESPONDENT'S RIGHT TO DISAGREE WITH THE ALLEGATIONS AND/OR PROPOSED PENALTY. IT MAY ALSO RESULT IN A DEFAULT JUDGMENT AND ASSESSMENT OF THE FULL PENALTY PROPOSED IN THE COMPLAINT OR THE MAXIMUM PENALTY AUTHORIZED BY THE ACT.**

QUICK RESOLUTION

Respondents may resolve this proceeding at any time by paying the penalty amount proposed in this complaint. Respondents may make this payment by sending a cashier's or certified check for this amount, including the name and docket number of this case, payable to "Treasurer, United States of America," to the U.S. Environmental Protection Agency, Fines and Penalties, Cincinnati Finance Center, P.O. Box 979077, St. Louis, MO, 63197-9000, and by filing a copy of the check with the Regional Hearing Clerk for EPA Region 8 at the address given above. If the Respondents make this payment within 30 days of receiving this complaint, they need not file an answer. Such payment waives Respondents' right to contest the allegations and to appeal any final order resulting from this complaint. See section 22.18 of the Rules of Practice for more explanation of the quick resolution process.

SETTLEMENT NEGOTIATIONS

EPA encourages informal settlement conferences. If Respondents wish to pursue the possibility of settling this matter, or they have any other questions, Respondents (or, if they are represented by counsel, their counsel) should contact Peggy Livingston, Enforcement Attorney, by telephone at 1-800-227-8917, extension 6858, or 303-312-6858, or by mail at the address below. **Please note that contacting this attorney or requesting a settlement conference does NOT delay the running of the 30-day period for filing an answer and requesting a hearing.**

To discuss settlement or ask any questions about this case or process, Respondents should contact Peggy Livingston, Enforcement Attorney, by telephoning 303-312-6858, or by writing to the following address.

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

PUBLIC NOTICE

As required by section 309(g)(4) of the Act, 33 U.S.C. §1319(g)(4), prior to assessing a civil penalty, EPA will provide public notice of the proposed penalty and a reasonable opportunity for the public to comment on the matter and, if a hearing is held, to be heard and present evidence.

Dated: Jun 3, 2009.

By: Eddie A Sierra
Eddie A. Sierra
Acting Assistant Regional Administrator

By: Margaret J. (Peggy) Livingston
Margaret J. (Peggy) Livingston
Enforcement Attorney

Office of Enforcement, Compliance and
Environmental Justice,
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