

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 8

2010 APR -8 AM 9:46

FILED  
EPA REGION VIII  
HEARING CLERK

IN THE MATTER OF )

47<sup>th</sup> Street Townhomes, LLC, )  
Jordahl Custom Homes, Inc., )  
and )  
Master Construction Co., Inc., )

Respondents. )  
\_\_\_\_\_ )

Docket No. CWA-08-2009-0021

**COMPLAINANT'S  
MOTION FOR PARTIAL  
ACCELERATED DECISION  
ON LIABILITY**

EPA Region 8, the Complainant in this matter, requests a partial accelerated decision against Respondents 47<sup>th</sup> Street Townhomes, LLC (the LLC) and Jordahl Custom Homes, Inc. (Jordahl), on liability under Count 2 of the Complaint in this action, with the LLC to be held liable for the period of April 28, 2008, through November 4, 2008, and Jordahl to be held liable for the period of June 15, 2008, to November 4, 2008. Please see the accompanying Memorandum in Support of Complainant's Motion for Partial Accelerated Decision for more details in support of this motion.

Respectfully submitted,

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IN THE MATTER OF )  
 )  
47<sup>th</sup> Street Townhomes, LLC, ) Docket No. CWA-08-2009-0021  
Jordahl Custom Homes, Inc., )  
and ) **MEMORANDUM IN**  
Master Construction Co., Inc., ) **SUPPORT OF COMPLAINANT'S**  
 ) **MOTION FOR PARTIAL**  
 ) **ACCELERATED**  
Respondents. ) **DECISION ON LIABILITY**  
 )  
\_\_\_\_\_ )

**I. INTRODUCTION**

This memorandum is filed in support of a motion for partial accelerated decision filed by the United States Environmental Protection Agency (EPA).

EPA's Penalty Complaint and Notice of Opportunity for Hearing (the Complaint) in this matter was filed on July 9, 2009. It alleged that Respondents 47<sup>th</sup> Street Townhomes, LLC (the LLC), Jordahl Custom Homes, Inc. (Jordahl), and Master Construction Co., Inc. (Master Construction) violated storm water control requirements of the Clean Water Act (the CWA or Act), 33 U.S.C. § 1251 *et seq.*, in connection with the construction of a 5.2-acre multi-family residential complex known as the 47<sup>th</sup> Street Townhomes, and referenced here as the Site, in the Osgood Townsite Eighth Addition, on Lot 5, Block 1, in Fargo, North Dakota.

For the reasons set forth below, EPA requests a ruling that the LLC and Jordahl are liable under Count 2 of the Complaint for violating §§ 301(a) and 402(p) of the Act, 33 U.S.C. §§ 1311(a) and 1342(p), with the LLC being liable for the period of April 28, 2008, through

November 4, 2008, and Jordahl being liable for the period of June 15, 2008, to November 4, 2008.

In a separate Motion for Default, EPA has requested a ruling that Master Construction is liable for violating §§ 301(a) and 402(p) of the Act, 33 U.S.C. §§ 1311(a) and 1342(p), for the period of April 28, 2008, to May 30, 2008.

## II. STANDARD FOR GRANTING AN ACCELERATED DECISION

If no genuine issue of fact exists and a party is entitled to judgment as a matter of law, a Presiding Officer may issue an accelerated decision in favor of that party as to any or all parts of the proceeding. 40 C.F.R. § 22.20(a).

If a respondent does not dispute the elements of a claim EPA has made and does not raise any issues of fact that are material to that claim, EPA is entitled to judgment as a matter of law as to liability on that claim. See, *e.g.*, In the Matter of Service Oil, Inc., 2006 EPA ALJ LEXIS 6 (March 7, 2006).<sup>1</sup>

## III. ARGUMENT

In the answer they filed in this matter on August 17, 2009 (the Answer), the LLC and Jordahl admitted the following:

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 [municipal separate storm sewer system] without authorization by any permit issued under the Act from April 28, 2008 through November 4, 2008.

However, the LLC and Jordahl denied that the Respondents' discharge without permit authorization constitutes a violation of §§ 301(a) and 402(p) of the Act, 33 U.S.C. §§ 1311(a) and 1342(p), as alleged in Count 2 of the Complaint.

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<sup>1</sup>A subsequent Environmental Appeals Board decision in the Service Oil matter (2008 EPA App. LEXIS 35) was overturned on unrelated grounds. See Service Oil, Inc. v. United States Environmental Protection Agency, 2009 WL 5064042, 2009 U.S. App. LEXIS 28384 (8<sup>th</sup> Cir. 2009).

As demonstrated below, the admissions of the LLC and Jordahl establish that as a matter of law, they are liable for violating §§ 301(a) and 402(p) of the Act, 33 U.S.C. §§ 1311(a) and 1342(p). To prove a violation of § 301(a) of the Act, 33 U.S.C. § 1311(a), EPA must prove that a person discharged pollutants from a point source without authorization under the Clean Water Act. Committee to Save the Mokelumne River v. East Bay Utility District, 13 F.3d 305, 308 (9<sup>th</sup> Cir. 1993), cert. denied 513 U.S. 873, 115 S.Ct. 198, 130 L.Ed.2d 130 (1994); In re: Larry Richner / Nancy Sheepbouwer & Richway Farms, 2002 EPA App. LEXIS 13 (EAB, July 22, 2002).

The LLC and Jordahl have admitted each of these elements. They have admitted that they are each a “person” as defined in § 502(5) of the Act, 33 U.S.C. § 1362(5).<sup>2</sup> They have admitted that storm water contains “pollutants” as defined by §502(6) of the Act, 33 U.S.C. §1362(6).<sup>3</sup> They have admitted that from April 28, 2008, through November 4, 2008, they and Master Construction discharged storm water from the Site and that the storm water flowed into the City of Fargo’s MS4 and on to the Red River of the North.<sup>4</sup> They have admitted that the Red River of the North is a “navigable water” as defined by § 502(7) of the Act, 33 U.S.C. § 1562(7), and a “water of the United States” as defined by 40 C.F.R. § 122.2.<sup>5</sup> They have admitted that their discharge is from a point source.<sup>6</sup> They have admitted that the LLC has owned the Site at all relevant times and that Jordahl has had day-to-day responsibility for construction at the Site since approximately June 15, 2008.<sup>7</sup> They have admitted that no Respondent was authorized by

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<sup>2</sup> See Paragraph 2 of the Answer, admitting, among other allegations, Par. 1, 2, and 4 of the Complaint.

<sup>3</sup> See Paragraph 2 of the Answer, admitting, among other allegations, Par. 11 of the Complaint.

<sup>4</sup> See Paragraph 2 of the Answer, admitting, among other allegations, Par. 12, 13, and 37 of the Complaint.

<sup>5</sup> See Paragraph 2 of the Answer, admitting, among other allegations, Par. 14 of the Complaint.

<sup>6</sup> See Paragraph 2 of the Answer, admitting, among other allegations, Par. 16 of the Complaint.

<sup>7</sup> See Paragraph 2 of the Answer, admitting, among other allegations, Par. 5 and 9 of the Complaint.

any Clean Water Act permit to discharge pollutants from the Site from April 28, 2008 through November 4, 2008.<sup>8</sup>

In addition, EPA alleged in Count 2 of the Complaint that the Respondents violated § 402(p) of the Act, 33 U.S.C. § 1342(p). Section 402(p) provides an exemption from the permitting requirement for discharges prior to October 1, 1994, and composed entirely of storm water. However, the exemption does not apply to a “discharge associated with industrial activity.” CWA § 402(p)(2)(B), 33 U.S.C. § 1342(p)(2)(B). EPA has defined the term “storm water discharge associated with industrial activity” to include a discharge from clearing, grading, and excavating at a site of five or more acres. 40 C.F.R. § 122.26(b)(14)(x).

The LLC and Jordahl have admitted that the Site has at least 5 acres.<sup>9</sup> Consequently, any discharge of storm water from the site is a “storm water discharge associated with industrial activity.”<sup>10</sup> Therefore, the LLC and Jordahl’s discharges of storm water from the Site have also violated § 402(p) of the Act, 33 U.S.C. § 1342(p).

#### **IV. CONCLUSION**

Because the LLC and Jordahl have admitted all elements of a violation of §§ 301(a) and 402(p) of the Act, 33 U.S.C. §§ 1311(a) and 1342(p), EPA requests that the LLC and Jordahl be held liable as a matter of law under Count 2 of the Complaint for violating those provisions. Due

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<sup>8</sup> See Paragraph 2 of the Answer, admitting Par. 27, 29, and 37 of the Complaint. Par. 27 of the Complaint states that as of the EPA’s September 23, 2008, inspection, the Respondents had not sought or obtained authorization from the North Dakota Department of Health (NDDH) to discharge storm water from the Site. Par. 29 of the Complaint states that on November 4, 2008, the LLC and Jordahl submitted a notice of intent to the NDDH seeking discharge authorization. Par. 37 of the Complaint states that the Respondents discharged storm water into the Red River of the North via the City of Fargo’s MS4 without authorization by any permit issued under the Act from April 28, 2008, through November 4, 2008.

<sup>9</sup> See Paragraph 2 of the Answer, admitting Par. 6 of the Complaint, which states, among other things, that the Site encompasses 5.2 acres. In addition, Paragraph 2 of the Answer admits Par. 20 of the Complaint, which states that any discharge from construction activity that disturbs at least five acres constitutes a storm water discharge associated with industrial activity.

<sup>10</sup> See Paragraph 2 of the Answer, admitting Par. 20 of the Complaint, which states that any discharge from construction activity that disturbs at least five acres constitutes a storm water discharge associated with industrial activity.

to the times that the LLC and Jordahl owned and/or operated the Site, EPA requests that the LLC be held liable for the period April 28, 2008, through November 4, 2008, and that Jordahl be held liable for the period of June 15, 2008, to November 4, 2008.

Respectfully submitted,

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Certificate of Service

The undersigned certifies that on the date indicated below, a copy of this Motion for Partial Accelerated Decision on Liability and a copy of the accompanying Memorandum in Support of Complainant's Motion for Partial Accelerated Decision on Liability were delivered or sent to the following:

One copy to:

James R. Bullis  
Kyle G. Pender  
P.O. Box 9199  
Fargo, ND 58106-9199  
Certified Mail, Return Receipt No.  
7008 3230 0003 0730 4208

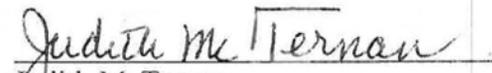
Original and one copy hand delivered to:

Tina Artemis  
Regional Hearing Clerk  
U.S. EPA Region 8  
1595 Wynkoop Street  
Denver, CO 80202

One copy hand delivered to:

Hon. Elyana R. Sutin  
Regional Judicial Officer  
U.S. EPA Region 8  
1595 Wynkoop Street  
Denver, CO 80202

Dated: 4/8/10

  
Judith McTernan  
Judith McTernan