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EPA -- REGION 10

ORIGINAL

BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:

DOCKET NO. CWA-10-2007-0147

BLACK DIAMOND ENGINEERING,
Sandpoint, Idaho

COMPLAINANT'S OPENING
PREHEARING EXCHANGE

Respondent.

Pursuant to 40 C.F.R. §§ 22.19 and 22.52, and the Presiding Officer's Order of October 16, 2007, Complainant U.S. Environmental Protection Agency Region 10 ("EPA") submits this Opening Prehearing Exchange. EPA respectfully reserves the right to supplement this Prehearing Exchange if necessary prior to hearing with proper notice to Respondent Black Diamond Engineering ("Respondent"). For purposes of this Opening Prehearing Exchange, "Site" refers to the parcel of real property located at 400 Schweitzer Cutoff Road in Sandpoint, Idaho.

I. WITNESSES

1. Robert Grandinetti. Mr. Grandinetti is an Environmental Engineer with EPA in the Hanford Operations Office in Richland, Washington. Mr. Grandinetti conducted the October 24,

1 2006 Site inspection that led to this enforcement action. He will testify regarding the Clean
2 Water Act ("CWA") violations that he observed during the Site inspection. Mr. Grandinetti will
3 also testify about the environmental harm caused by Respondent's activities as well as the
4 requirements of EPA's construction storm water regulatory program. Mr. Grandinetti will be
5 called as both an expert and fact witness.

6 2. David Domingo. Mr. Domingo is an Environmental Engineer with EPA in the Region 10
7 office in Seattle, Washington. He is the case development officer for this case. Mr. Domingo
8 reviewed maps of the area to trace the drainage from the Site to the Pend Oreille River. In
9 addition, Mr. Domingo prepared the letter requesting additional information from Respondent,
10 dated June 5, 2007. As the case development officer, Mr. Domingo is familiar with the facts of
11 the case and will testify to environmental harm and the economic benefit associated with the
12 violations. Mr. Domingo will be called as an expert and fact witness.

13 3. Lloyd Oatis. Mr. Oatis is a Financial Analyst with EPA in the Region 10 office in
14 Seattle, Washington. He has reviewed the financial information that was provided to him and
15 has determined the economic benefit associated with the alleged violations using the BEN
16 computer program. Mr. Oatis will testify to the BEN analysis for this case. Mr. Oatis will be
17 called as an expert and fact witness.

18 3. EPA reserves the right to call all fact witnesses named by Respondent.

19 **II. EXHIBITS**

20 For purposes of the list of documents below, "Complainant's Exhibit No." is abbreviated
21 as "C-." The documents themselves are labeled "Complainant's Exhibit No."

- 22 C-1 Google Earth satellite maps tracing drainage from the Site to Lake Pend Oreille
23 C-2 Economic Analysis of the Final Phase II Storm Water Rule, Ch. 4, EPA Office of
24 Wastewater Management (October 1999)
25

- 1 C-3 Fact Sheet for the NPDES General Permit for Storm Water Discharges from Construction
2 Activities (dated July 1, 2003, modified January 21, 2005)
- 3 C-4 NPDES General Permit for Storm Water Discharges from Construction Activities
4 (effective July 1, 2003, modified January 21, 2005)
- 5 C-5 Revised Expedited Settlement Offer for Storm Water (Construction) Policy, EPA Office
6 of Civil Enforcement (May 2006)
- 7 C-6 Rainfall Data for the Sandpoint, Idaho Area from July 2006 to November 2006
- 8 C-7 Notice of Intent Application Detail, EPA NOI Database (submitted August 23, 2006)
- 9 C-8 Inspection Report with Photographs (October 24, 2006)
- 10 C-9 Information provided by Joel Petty, Black Diamond Engineering, to EPA (submitted
11 December 2006)
- 12 C-10 Information Request Letter from EPA to Joel Petty, Black Diamond Engineering (June 5,
13 2007)
- 14 C-11 Email response re: June 5th Information Request from Joel Petty, Black Diamond
15 Engineering to David Domingo, EPA Compliance Officer (June 7, 2007)
- 16 C-12 Resume of Robert Grandinetti
- 17 C-13 Resume of David Domingo
- 18 C-14 Agreement for Sale and Assignment of Membership Interest in Cedars at Sand
19 Creek, LLC (May 10, 2007)
- 20 C-15 Resume of Lloyd Oatis
- 21 C-16 BEN v. 4.3 Analysis (performed December 13, 2007)

22 **III. PENALTY**

23 40 C.F.R. § 22.19(a)(3) states that "[i]f a proceeding is for the assessment of a penalty
24 and complainant has already specified a proposed penalty, complainant shall explain in its
25

1 prehearing information exchange how the proposed penalty was calculated in accordance with
2 any criteria set forth in the [CWA]....” Here, EPA specified a penalty amount of \$5,000 in the
3 Complaint. As such, the following paragraphs explain how the proposed penalty was calculated
4 in accordance with the criteria set forth in the CWA.

5 CWA Section 309(g)(3) sets forth the criteria that EPA must consider in assessing a
6 CWA penalty. *See* 33 U.S.C. § 1319(g)(3). These are: the nature, circumstances, extent and
7 gravity of the violation, or violations, and, with respect to Respondent, ability to pay, any prior
8 history of such violations, the degree of culpability, economic benefit or savings (if any)
9 resulting from the violation, and such other matters as justice may require. Since EPA has not
10 issued a penalty policy for use by Presiding Officers in determining penalties under the CWA,¹
11 Presiding Officers rely on the wording of the statutory penalty factors set forth in Section
12 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3), to assess a penalty. *See In re Larry Richner*, 10
13 E.A.D. 617, 633 (EAB 2002) (“Because there are no CWA penalty guidelines, a CWA penalty
14 must be calculated based upon the evidence in the record and the penalty criteria set forth in
15 CWA § 309(g).”); *In re Britton Construction*, 8 E.A.D. 261, 278 (EAB 1999) (“The statute
16 requires EPA to take into account a number of factors in assessing penalties, such as the extent of
17 the violations and the violator’s culpability, but it prescribes no precise formula by which these
18 factors must be computed.” (citations omitted)). EPA’s proposed penalty amount is based on
19 the applicable CWA Section 309(g)(3) penalty factors.

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23 ¹ The Consolidated Rules of Procedure require that the Presiding Officer, in addition to considering the applicable
24 statutory penalty factors, “shall consider any civil penalty guidelines issued under the Act.” 40 C.F.R. § 22.27(b).
25 Since EPA has not issued any specific CWA penalty policy guidelines applicable to the present action, this section is
inapplicable.

1 A. The Nature, Circumstances, Extent and Gravity of the Violations

2 The nature, circumstances, extent, and gravity of the violations in this case are moderate.

3 Respondent obtained coverage under the NPDES General Permit for Storm Water Discharges
4 from Construction Activities ("CGP") prior to the commencement of construction activities at
5 the Site. Respondent, however, did not comply with all of the conditions set forth in the CGP
6 after obtaining permit coverage. These conditions include, but are not limited to, failure to
7 properly install and maintain best management practices at the Site, failure to conduct
8 inspections at the Site, failure to properly certify inspection reports, and failure to post a sign or
9 notice at the Site. During the Site inspection, EPA inspectors found that the silt fences used to
10 prevent discharges of sediment and other pollutants to the receiving waters were not properly
11 installed or maintained. These BMP deficiencies may have been corrected if inspections were
12 conducted in accordance with the CGP. Further, the storm water pollution prevention plan
13 ("SWPPP") for the Site had several deficiencies, in violation of the CGP. Last, Respondent has
14 failed to respond to an information request that EPA sent to Respondent in June 2007.

15 These violations could lead to potential environmental harm at the Site. For example,
16 improper installation or maintenance of storm water controls at the Site could lead to highly
17 turbid discharges into Sand Creek, Little Sand Creek, and their adjacent wetlands. This is
18 especially so where these receiving waters are adjacent to the Site. Moreover, there is the
19 potential for environmental harm when a person disregards the permitting and reporting
20 requirements of a regulatory program. *See In re Phoenix Construction Services, Inc.*, 11 E.A.D.
21 379, 397 (EAB 2004) ("risk to a regulatory program by disregarding the monitoring, reporting or
22 permitting requirements of an environmental statute also often results in potential environmental
23 harm.").

1 B. Ability to Pay

2 The general financial information about Respondent available to EPA supports the
3 inference that Respondent is able to pay a penalty of \$5,000. In *In re New Waterbury, Ltd.*, 5
4 E.A.D. 529 (EAB 1994), the Environmental Appeals Board (“EAB”) set forth a now well-
5 established process for considering and proving in the context of an administrative hearing a
6 violator’s ability to pay a civil penalty.

7 Where ability to pay is at issue going into a hearing, the Region will need to
8 present some evidence to show that it considered the respondent’s ability to pay a
9 penalty. The Region need not present any *specific* evidence to show that the
10 respondent *can pay* or obtain funds to pay the assessed penalty, but can simply
11 rely on some *general* financial information regarding the respondent’s financial
12 status which can support the *inference* that the penalty assessment need not be
13 reduced. Once the respondent has presented *specific* evidence to show that despite
14 its sales volume or apparent solvency it cannot pay any penalty, the Region as
15 part of its burden of proof in demonstrating the “appropriateness” of the penalty
16 must respond either with the introduction of additional evidence to rebut the
17 respondent’s claim or through cross examination it must discredit the
18 respondent’s contentions.

19 *Id.* at 542-430 (emphasis in original); *see also In re Chempace Corp.*, 9 E.A.D. 119, 132-
20 133 (EAB 2000). Accordingly, while EPA has the initial burden of production to establish that
21 the respondent has the ability to pay the proposed penalty, “[t]he burden then shifts to the
22 respondent to establish with specific information that the proposed penalty assessment is
23 excessive or incorrect.” *In re Chempace Corp.* at 133. Failure by a respondent to provide
24 specific evidence substantiating a claimed inability to pay results in waiver of that claim. *In re*
25 *Spitzer Great Lakes Ltd.*, 9 E.A.D. 302, 322-321 (EAB 2000).

 At the time the Complaint was filed, EPA possessed little information concerning
Respondent’s ability to pay the proposed penalty. Respondent’s recent sale of its membership
interest in the Cedars at Sand Creek construction project and apparent solvency, however,
support an inference of an ability to pay a penalty. To date, Respondent has not claimed an

1 inability to pay the proposed penalty nor has Respondent provided tax returns or other financial
2 information to document an inability to pay the proposed penalty. Should such information be
3 included in Respondent's prehearing exchange, EPA will consider an appropriate adjustment to
4 the proposed penalty amount.

5 **C. Prior History of Violations**

6 Respondent has no prior history of violations known to EPA at this time.

7 **D. Degree of Culpability**

8 Under the CGP, the operator of the construction site must obtain coverage under the
9 CGP. Here, Respondent applied for and obtained coverage under the CGP. On the NOI,
10 Respondent was listed as the operator of the Site. Since Respondent applied for coverage under
11 the CGP, it is presumed that Respondent was aware of the conditions set forth in the CGP.
12 Therefore, as the operator of the Site, Respondent had a high degree of culpability.

13 Further, Respondent acknowledged receipt of the June 2007 information request. As
14 such, EPA assumes that Respondent reviewed the information request which contained a June
15 13, 2007 deadline for submitting the information. To date, EPA has not received the requested
16 information.

17 **E. Economic Benefit**

18 The economic benefit associated with the alleged violations arises from the avoided costs
19 associated with the failure to develop an adequate storm water pollution prevention plan, the
20 failure to conduct and document required inspections, and the failure to properly install and
21 maintain best management practices at the Site.

22 For the reasons set forth above, EPA proposes to assess a penalty of \$5,000 for the
23 violations.
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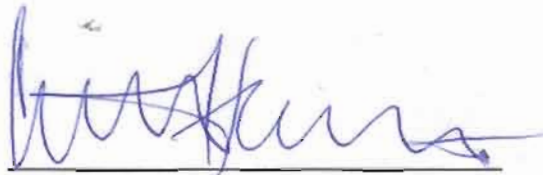
1 **IV. ESTIMATE REGARDING LENGTH OF HEARING**

2 Absent lengthy cross-examination, EPA estimates that it will require approximately one
3 day to present its case-in-chief. The length of time required for rebuttal testimony and cross-
4 examination of Respondent's witnesses will depend on the quantity and substance of documents
5 and witnesses disclosed in Respondent's Opening Prehearing Exchange.

6 **V. LOCATION OF HEARING**

7 EPA proposes Sandpoint, Idaho for the hearing location. The Site is located in Sandpoint
8 and Respondent is located in Sandpoint.

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10 DATED: December 17, 2007

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13 Courtney J. Hamamoto
14 Assistant Regional Counsel
15 U.S. EPA Region 10
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1 CERTIFICATE OF SERVICE

2 I certify that the foregoing "Complainant's Opening Prehearing Exchange" was sent to
3 the following persons, in the manner specified, on the date below:

4 Original plus one copy, by hand delivery to:

5 Regional Hearing Clerk
6 U.S. EPA Region 10
1200 Sixth Avenue, Suite 900, ORC-158
Seattle, WA 98101

7 A true and correct copy, by hand delivery to:

8 Richard McAllister
9 Regional Judicial Officer
U.S. EPA Region 10
10 1200 Sixth Avenue, Suite 900, ORC-158
11 Seattle, WA 98101

12 A true and correct copy by certified mail, return receipt requested to:

13 Joel Petty
14 Black Diamond Engineering, P.C.
1555 W. Ontario Street
15 Sandpoint, Idaho 83864

16 DATED: December 17, 2007

17 
18 J. Eason, Secretary
U.S. EPA, Region 10