



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8

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

SEP 30 2011

Ref: 8ENF-W-NP

CERTIFIED MAIL #7008-3230-0003-0730-1580
RETURN RECEIPT REQUESTED

Milton Gowan
Gowan Construction, Inc.
16076 Hwy 54
Oslo, MN 56744

Francis G. Ziegler, P.E., Director
North Dakota Department of Transportation
608 E. Boulevard Ave.
Bismark, ND 58505

Re: Administrative Complaint and
Notice of Opportunity for Hearing
Docket No. **CWA-08-2011-0039**

Dear Messrs. Gowan and Ziegler:

Enclosed is a document entitled Administrative Complaint and Notice of Opportunity for Hearing (Complaint). The United States Environmental Protection Agency (EPA or Agency) is issuing this Complaint against Gowan Construction, Inc. and the North Dakota Department of Transportation (Respondents) pursuant to section 309 of the Clean Water Act (the Act), 33 U.S.C. § 1319. In the Complaint, EPA alleges that Respondents violated various provisions of North Dakota's general permit regarding discharges of storm water associated with construction activities (General Permit Authorization No. NDR10-3219) at the NDDOT Project No. IM-8-029(089)069, also known as the "I-29 Harwood" highway construction project. The Complaint proposes that a penalty of \$59,500 be assessed for these violations.

Please be advised that should Respondents decide to contest this matter, Respondents have the right to a hearing to, among other things, contest the factual allegations in the Complaint. We have enclosed a copy of 40 C.F.R. Part 22, which identifies the procedures EPA follows in Class II penalty assessments. Please note the requirements for an answer to the Complaint in 40 C.F.R. § 22.15(b).

If Respondents wish to contest the allegations in the Complaint or the penalty proposed in the Complaint, Respondents must file an answer to the enclosed Complaint within thirty (30) days of receipt thereof. 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 Street
Denver, CO 80202-1129

If Respondents do not file an answer by the applicable deadline, or seek and obtain an extension to file an answer, Respondents may be found in default. 40 C.F.R. § 22.17(a). A default judgment may impose the full penalty proposed in the Complaint. 40 C.F.R. § 22.17(b).

EPA has agreed to notify small businesses of their right to comment on regulatory enforcement activities at the time of an Agency enforcement activity pursuant to the Small Business Regulatory Enforcement and Fairness Act (SBREFA). SBREFA does not eliminate your responsibility to comply with the Clean Water Act or this Complaint, nor does it create any new rights or defenses under law. We have enclosed a SBREFA information sheet containing further information on compliance assistance resources and tools available to small businesses.

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. Upon final approval of the Consent Agreement by the Regional Judicial Officer, the settling Respondent(s) will be bound by the terms of the Consent Agreement and will waive its/their right to a hearing on, and judicial appeal of, the agreed-upon civil penalty. Respondents have the right to be represented by an attorney at any stage of the proceedings, including any informal discussions with EPA, although this is not required.

Please note that arranging for a settlement meeting does not relieve Respondents of the need to file a timely answer to the Complaint. If Respondents wish to discuss settlement of this matter, or have any other questions regarding this matter, the most knowledgeable person on my staff for legal issues is Sheldon Muller, Senior Enforcement Attorney, who can be reached at 303-312-6916. The most knowledgeable person on my staff for technical issues is Seth Draper, NPDES Enforcement Officer, who can be reached at 303-312-6763. We urge your prompt attention to this matter.

Sincerely,



Andrew M. Gaydosh
Assistant Regional Administrator
Office of Enforcement, Compliance and
Environmental Justice

Enclosures:

1. Administrative Complaint
2. Certificate of Service
3. Consolidated Rules of Practice (40 C.F.R. Part 22)
4. SBREFA Information Sheet

cc: Tina Artemis, EPA, Regional Hearing Clerk
Gary Bracht, NDDH
Dallas Grossman, NDDH

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY 2011 SEP 30 AM 8:32
REGION 8

FILED
EPA REGION VIII
BISMARCK, ND

IN THE MATTER OF:

Gowan Construction, Inc.
P.O. Box 228
Oslo, MN 56744
and
North Dakota Dept. of Transportation
608 E. Boulevard Ave.
Bismark, ND 58505

Respondents.

) ADMINISTRATIVE COMPLAINT AND
) NOTICE OF OPPORTUNITY FOR
) HEARING

) Proceedings to Assess a Civil Penalty
) Under Section 309(g)
) of the Clean Water Act,
) 33 U.S.C. § 1319(g)

) Docket No. CWA-08-2011-0039

I. STATUTORY AUTHORITY

1. This Administrative Complaint and Notice of Opportunity for Hearing (Complaint) is issued pursuant to section 309(g) of the Clean Water Act (Act), 33 U.S.C. § 1319(g), and 40 C.F.R. § 22.13. Section 309(g) of the Act authorizes the Administrator of the United States Environmental Protection Agency (EPA) to make findings and to assess civil penalties for violations of section 301 of the Act, 33 U.S.C. § 1311. This proceeding is subject to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. Part 22, a copy of which accompanies this Complaint. Complainant in this action is the Assistant Regional Administrator for the Office of Enforcement, Compliance and Environmental Justice, EPA Region 8, who has been properly delegated the authority to issue this Complaint.

II. STATUTORY AND REGULATORY FRAMEWORK

2. The objective of the Act is to restore and maintain the chemical, physical, and biological integrity of the nation's waters. 33 U.S.C. § 1251(a).

3. 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.

4. 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.

5. 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.

6. In accordance with section 402(p) of the Act, 33 U.S.C. § 1342(p), EPA has issued regulations that further define requirements for NPDES permits for storm water discharges. The regulations are found at 40 C.F.R. Part 122.

7. EPA's regulations define discharges associated with industrial activity to include construction activity. 40 C.F.R. § 122.26(b)(14)(x).

8. Any discharge from construction activity, including clearing, grading and excavation, 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 that will ultimately disturb over five acres) constitutes a storm water discharge associated with industrial activity. 40 C.F.R. § 122.26(b)(14)(x).

9. 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).

10. Pursuant to the Act, states may issue their own storm water permits if they are authorized by EPA to do so.

11. 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.

12. Effective October 12, 2009, NDDH issued a general permit (NDPDES Permit No. NDR10-0000 – referred to hereafter as the Permit) authorizing discharges of storm water associated with construction activities, if done in compliance with the Permit's terms and conditions. A discharger may apply for authorization to discharge under the Permit by submitting a notice of intent for coverage to the NDDH. The Permit has been in effect at all times relevant to this action. The Permit is attached hereto as Exhibit 1.

13. Any person subject to the Permit is required to develop, prior to commencing construction, a storm water pollution prevention plan (SWPP plan), which sets forth a plan for reducing and preventing discharges of storm water associated with construction activities. The SWPP plan must include the best management practices designed to prevent or reduce the discharges of pollutants from the site. These practices include measures to prevent erosion and to capture sediment before it leaves the site.

14. The Permit requires the permittee to implement the SWPP plan and to implement and maintain best management practices to prevent or reduce, to the best extent possible, discharges of pollutants from storm water. The permit also imposes additional requirements, including inspections of the site, maintenance of the SWPP plan, and final stabilization of the site.

15. Section 502(5) of the Act defines “person” as “an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.” 33 U.S.C. § 1362(5).

16. The terms “discharge of a pollutant” and “discharge of pollutants” are defined in section 502(12) of the Act to each mean, in pertinent part, “any addition of any pollutant to navigable waters from any point source” 33 U.S.C. § 1362(12). *See also*, 40 C.F.R. § 122.2, definition of “discharge of a pollutant.”

17. Section 502(6) of the Act defines “pollutant” as “dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.” 33 U.S.C. § 1362(6). *See also*, 40 C.F.R. § 122.2, definition of “pollutant.”

18. “Point source” is defined, in pertinent part, in section 502(14) of the Act as any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14). *See also*, 40 C.F.R. § 122.2, definition of “point source.”

19. “Navigable waters” is defined in section 502(7) of the Act as “waters of the United States, including the territorial seas.” 33 U.S.C. § 1362(7).

20. “Waters of the United States,” as defined in 40 C.F.R. § 122.2, include, *inter alia*: (a) all waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce; (b) all interstate waters including interstate wetlands . . . ; (c) tributaries of waters identified in paragraphs (a) through (d) of this definition . . . ; and (g) wetlands adjacent to waters identified in paragraphs (a) through (f) of this definition.

21. Section 309(g)(2)(B) of the Act, 33 U.S.C. § 1319(g)(2)(B), and 40 C.F.R. Part 19 authorize the assessment of a Class II civil penalty of up to \$16,000 per day per violation, up to a maximum of \$177,500, for violations of section 301 of the Act, 33 U.S.C. § 1311 occurring after January 12, 2009.

III. GENERAL ALLEGATIONS

22. At all times relevant to the Complaint, the Respondents either owned or otherwise controlled the real property that is the subject of this Complaint and/or otherwise controlled or engaged in the activities that occurred on the property.

23. Respondent North Dakota Department of Transportation (NDDOT) is and was at all times relevant to the Complaint a political subdivision of the State of North Dakota. NDDOT's office is located at 608 E. Boulevard Ave., Bismark, ND 58505.

24. NDDOT is and was at all times relevant to the Complaint a "person" within the meaning of section 502(5) of the Act, 33 U.S.C. § 1362(5).

25. Respondent Gowan Construction, Inc. (Gowan) is and was at all times relevant to the Complaint a corporation organized under the laws of the State of North Dakota. Gowan's office is located at 3596 15th Street NE, Oslo, MN 56744. Respondent's mailing address is P.O. Box 228, Oslo, MN 56744. The president and registered agent of Gowan is Milton Gowan. The address of Gowan's registered agent, on file with the North Dakota Secretary of State, is 16076 Hwy 54, Oslo, MN 56744.

26. Gowan is and was at all times relevant to the Complaint a "person" within the meaning of section 502(5) of the Act, 33 U.S.C. § 1362(5).

27. Respondent NDDOT owns and/or controls real property along southbound highway I-29, from Fargo, ND to Argusville, ND, where highway rebuilding project NDDOT

Project No. IM-8-029(089)069, also known as “I-29 Harwood,” has been and/or is being constructed (the Site).

28. The Site is located at 210 1st Ave. SE in Harwood, North Dakota and encompasses approximately 350 acres. Approximately 220 acres have been/will be disturbed as part of the I-29 Harwood project.

29. NDDOT contracted with Gowan to complete work at the Site.

30. Prior to beginning construction at the Site, NDDOT was required to have and did obtain NPDES permit authorization for their discharges of storm water from the Site.

31. NDDH and NDDOT entered into a Memorandum of Agreement (MOA) for construction storm water discharge permits. Under the MOA, when NDDOT is the owner of a project, it accepts responsibilities relating to the Permit, and is deemed to have provided its signature, as owner, where required by the Permit. On April 29, 2010, NDDOT submitted its application (Notice of Intent form for Construction Activity) to NDDH to obtain authorization under the Permit for the I-29 Harwood construction project. The effective date of the permit authorization was May 3, 2010, and NDDOT’s permit authorization number was NDR10-3219.

32. Under Part I.D of the Permit and the MOA, NDDOT, as the owner, and Gowan, as the operator, are jointly liable for compliance with the Permit. The Respondents were required to comply with all requirements and conditions of the Act, its regulations, and the Permit.

33. Construction activities began at the Site on or around May 19, 2010.

34. From approximately May 19, 2010, to approximately November 24, 2010, Gowan had day-to-day responsibility for construction at the Site.

35. At all times relevant to this Complaint, construction activities at the Site resulted in the disturbance of approximately 220 acres of land area. As such, the construction activities are

considered “industrial activities” within the meaning of 40 C.F.R. § 122.26(b)(14) (*see* 40 C.F.R. § 122.26(b)(14)(x)).

36. At all times relevant to this Complaint, storm water runoff, snow melt runoff, and surface runoff and drainage have been leaving the Site and have flowed into the Sheyenne River, Legal Drain #13, Legal Drain #40, and adjacent wetlands.

37. At all times relevant to this action, the storm water runoff, snow melt runoff, and surface runoff and drainage from the Site constituted “storm water” as defined in 40 C.F.R. §122.26(b)(13).

38. At all times relevant to this action, the discharges of storm water runoff, snow melt runoff, and surface runoff and drainage from the Site associated with the construction activities at the Site resulted in the discharge of pollutants, including soil, sediment, and/or residues of construction materials, all of which constitute pollutants as defined in section 502(6) of the Act, 33 U.S.C. § 1362(6), to Legal Drain #13, Legal Drain #40, and the Sheyenne River at or near the Site.

39. Legal Drain #13 discharges into the Sheyenne River approximately 2.5 miles from the Site. Legal Drain #13 typically flows year-round, is a relatively permanent water, and has a significant nexus to and/or significantly affects the chemical, physical or biological integrity of downstream traditional navigable waters, including the Sheyenne River and the Red River of the North.

40. Legal Drain #40 discharges into the Red River of the North approximately 4 miles from the Site. Legal Drain #40 typically flows year-round, is a relatively permanent water, and has a significant nexus to and/or significantly affects the chemical, physical or biological integrity of downstream traditional navigable waters, including the Red River of the North.

41. The Sheyenne River is currently used, was used in the past, or may be susceptible to use, in interstate or foreign commerce, including commercial navigation and commercial waterborne recreation. The Sheyenne River is navigable in fact and is a traditionally navigable water. Within approximately 10 miles of the Site, the Sheyenne River flows into the Red River of the North.

42. The Red River of the North is navigable in fact, is an interstate water that is currently used, was used in the past, or may be susceptible to use, in interstate or foreign commerce, and has been declared navigable under Section 10 of the Rivers and Harbors Act.

43. Legal Drain #13, Legal Drain #40, the Sheyenne River, the Red River of the North, and their adjacent wetlands are “waters of the United States” within the meaning of 40 C.F.R. § 122.2, and “navigable waters” within the meaning of section 502(7) of the Act, 33 U.S.C. § 1362(7).

44. Respondents’ construction activity at the Site is 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.

45. The discharged materials described in paragraph 38 of this Complaint are, and were at all times relevant to the Complaint, “pollutants” within the meaning of § 502(6) of the Act, 33 U.S.C. § 1362(6).

46. The discharge of storm water associated with Respondents construction activities into Legal Drain #13, Legal Drain #40, the Sheyenne River, and their adjacent wetlands constitutes the “discharge of a pollutant” or “discharge of pollutants” within the meaning of § 502(12) of the Act, 33 U.S.C. § 1362(12).

47. Pursuant to § 309(g)(1) of the Act, 33 U.S.C. § 1319(g)(1), EPA has consulted with the NDDH, Division of Water Quality, regarding assessment of this administrative penalty by furnishing a copy of this Complaint and inviting comments on behalf of the State of North Dakota.

IV. SPECIFIC ALLEGATIONS

48. On February 11, 2009, the U.S. Army Corps of Engineers (Corps) made a jurisdictional determination for the Site and concluded that EPA and the Corps have jurisdiction for the Site.

49. On August 3, 2010, EPA conducted a storm water inspection at the Site.

50. During the August 3, 2010 inspection, EPA inspectors observed excessive sediment in culverts at the Site, missing or inadequate best management practices (e.g., damaged or fallen silt fence, missing or misplaced or improperly trenched straw wattles, and unprotected disturbed areas and stockpiles), and the additional violations of the Permit noted in paragraphs 51 through 57 below.

51. Under Part II.C of the Permit, a SWPP plan must include descriptions of the following items: the identity of a person knowledgeable and experienced in the application of erosion and sediment control BMPs who will oversee the implementation of the SWPP plan, and the installation, inspection and maintenance of the erosion and sediment control BMPs before and during construction; potential sources of pollution; timetable of activities that disturb soils for major portions of the Site; a description of the soil within the disturbed areas; good housekeeping practices to maintain a clean and orderly site; an erosion and sediment control plan that identifies the appropriate control measures and when they will be implemented during the project for each major phase of site activity (e.g., clearing, grading and building phases); sediment basin rationale; and an inspection schedule. The SWPP plan did not include descriptions of the items listed above.

52. Under Part II.C.1.f of the Permit, the SWPP plan must include a site map that provides the location of major structural and nonstructural controls identified in the SWPP plan and the location of areas where stabilization practices are expected to occur. The SWPP plan site

map did not have up-to-date locations for six different BMPs which were major structural or nonstructural controls and/or areas where stabilization practices were expected to occur.

53. Under Part II.C.7.c of the Permit, a SWPP plan must be amended “whenever there is a change in design, construction, operation, or maintenance, which has a significant effect on the potential for the discharge of pollutants to waters of the state.” The SWPP plan and site map were not up to date so as to reflect changes in design, construction, operation, or maintenance, which had a significant effect on the potential for the discharge of pollutants to waters.

54. Part III.A.2 of the Permit states: “All inspections and maintenance conducted during construction must be recorded in writing and these records must be retained Records of each inspection and maintenance activity shall include: . . . c. Findings of inspections, including recommendations for corrective action.” Respondents’ inspection reports did not detail which BMPs needed maintenance.

55. Pursuant to Part III.B of the Permit, a copy of the completed and signed Notice of Intent, coverage letter from NDDH, the SWPP plan, site inspection records, and the Permit must be kept at the site of the construction activity in a field office, trailer, or shed, or in a vehicle that is on-site during normal working hours. During EPA’s inspection, a copy of the Permit was not at the Site.

56. Part IV.A.6.b of the Permit states that inspection reports must be signed by an authorized representative. Respondents’ reports were not signed by an authorized representative.

57. Pursuant to Part II.C.5 of the Permit, all erosion and sediment control measures and other protective measures (BMPs) in the SWPP plan must be maintained in effective operating condition. The SWPP plan must also indicate a schedule for maintenance and cleaning of the sediment controls. During the inspection, EPA noted seven deficiencies in BMPs at the Site: (1)

the silt fence was down or damaged in some areas; (2) BMPs were not installed adjacent to wetlands along the west boundary of the site; (3) disturbed areas adjacent to surface waters were left unprotected; (4) stockpiles of soil were not stabilized or protected; (5) onsite culverts were not protected and several culverts contained sediment; (6) the swale between north and south bound traffic conveyed concentrated flows to unprotected culverts; and (7) straw wattles were not installed correctly.

58. On August 16, 2010, NDDOT provided EPA with photos documenting updates to the Site. EPA noted that some, but not all of the deficiencies had been addressed and instructed NDDOT and Gowan to correct the remaining deficiencies.

59. On October 21, 2010, EPA sent a copy of the inspection report to Respondents and instructed them to provide EPA and NDDH a summary of the corrective actions taken to address the deficiencies identified in the report.

60. On November 24, 2010, Respondent Gowan sent EPA a response to the inspection report which included an updated SWPP plan and photos of the corrected BMPs.

V. VIOLATIONS

Count 1 – Failure to Develop an Adequate SWPP Plan

61. Paragraphs 1 through 60 of this Complaint are realleged and incorporated herein by reference.

62. From approximately May 19, 2010 to November 24, 2010, Respondents failed to develop a complete SWPP plan as required by Part II.C of the Permit, including Part II.C.1.f.

63. Respondents' failure to develop a complete SWPP plan as required by the Permit constitutes a violation of sections 301(a), and 402(p), of the Act, 33 U.S.C. §§ 1311(a) and 1342(p), and the Permit conditions and limitations specified above, and is subject to the

assessment of penalties pursuant to section 309(g) of the Act, 33 U.S.C. § 1319(g), for each day during which the violation continued.

Count 2 – Failure to Implement the SWPP Plan

64. Paragraphs 1 through 63 of this Complaint are realleged and incorporated herein by reference.

65. From approximately May 19, 2010 to November 24, 2010, Respondents failed to correctly implement the SWPP plan as required by Part II.C of the Permit.

66. Respondents' failure to correctly implement the SWPP plan as required by the Permit constitutes a violation of sections 301(a), and 402(p), of the Act, 33 U.S.C. §§ 1311(a) and 1342(p), and the Permit conditions and limitations specified above, and is subject to the assessment of penalties pursuant to section 309(g) of the Act, 33 U.S.C. § 1319(g), for each day during which the violation continued.

Count 3 – Failure to Implement and Maintain BMPs

67. Paragraphs 1 through 66 of this Complaint are realleged and incorporated herein by reference.

68. From at least August 3, 2010 to November 24, 2010, Respondents failed to correctly use and maintain BMPs to control erosion and sedimentation, as required pursuant to Part II.C.5 of the Permit.

69. Respondents' failure to correctly implement and maintain BMPs as required by the Permit constitutes a violation of sections 301(a), and 402(p), of the Act, 33 U.S.C. §§ 1311(a) and 1342(p), and the Permit conditions and limitations specified above, and is subject to the assessment of penalties pursuant to section 309(g) of the Act, 33 U.S.C. § 1319(g), for each day during which the violation continued.

Count 4 – Failure to Conduct and Document Inspections

70. Paragraphs 1 through 69 of this Complaint are realleged and incorporated herein by reference.

71. From approximately May 19, 2010 to November 24, 2010, Respondents failed to conduct and document inspections as required by, *inter alia*, Parts III.A.2 and IV.A.6.b of the Permit.

72. Respondents' failure to conduct and document inspections as required by the Permit constitutes a violation of sections 301(a), and 402(p), of the Act, 33 U.S.C. §§ 1311(a) and 1342(p), and the Permit conditions and limitations specified above, and is subject to the assessment of penalties pursuant to section 309(g) of the Act, 33 U.S.C. § 1319(g), for each day during which the violation continued.

Count 5 – Failure to Maintain a Copy of the Permit at the Site

73. Paragraphs 1 through 72 of this Complaint are realleged and incorporated herein by reference.

74. From approximately May 19, 2010 to November 24, 2010, Respondents failed to maintain a copy of the Permit at the Site as required by Part III.B of the Permit.

75. Respondents' failure to maintain a copy of the Permit at the Site as required by the Permit constitutes a violation of sections 301(a), and 402(p), of the Act, 33 U.S.C. §§ 1311(a) and 1342(p), and the Permit conditions and limitations specified above, and is subject to the assessment of penalties pursuant to section 309(g) of the Act, 33 U.S.C. § 1319(g) for each day during which the violation continued.

Count 6 – Failure to Amend the SWPP Plan

76. Paragraphs 1 through 75 of this Complaint are realleged and incorporated herein by reference.

77. From approximately May 19, 2010 to November 24, 2010, Respondents failed to amend the SWPP plan as required by Part II.C.7.c of the Permit.

78. Respondents' failure to amend the SWPP plan as required by the Permit constitutes a violation of sections 301(a), and 402(p), of the Act, 33 U.S.C. §§ 1311(a) and 1342(p), and the Permit conditions and limitations specified above, and is subject to the assessment of penalties pursuant to section 309(g) of the Act, 33 U.S.C. § 1319(g) for each day during which the violation continued.

VI. NOTICE OF PROPOSED ORDER ASSESSING A CIVIL PENALTY

79. Based on the foregoing allegations and pursuant to the authority of section 309(g) of the Act, 33 U.S.C. § 1319(g), EPA Region 8 hereby proposes to issue a final order to Respondents assessing a penalty in the amount of Fifty-Nine Thousand, Five Hundred Dollars (\$59,500).

80. The proposed penalty amount was determined by EPA after taking into account all factors identified in section 309(g)(3) of the Act, 33 U.S.C. § 1319(g). These factors include: the nature, circumstances, extent, and gravity of the violation or violations; Respondents' prior compliance history and degree of culpability for the cited violations; any economic benefit or savings accruing to Respondents by virtue of the violations; Respondents' ability to pay the proposed penalty; and other matters as justice may require.

81. EPA may issue a final order assessing administrative penalties thirty (30) days after Respondents' receipt of this Complaint, unless Respondents, within that time, request a hearing on

this Complaint pursuant to section VII (Notice of Opportunity to Request a Hearing) of this Complaint.

82. As mentioned above, EPA observed excessive sediment in culverts at the Site and exposed stockpiles and disturbed land. Best management practices (BMPs) that would have minimized sediment discharges were missing throughout most of the Site. Had the Respondents complied with the Permit, they would have controlled their discharges and minimized sediment discharges.

83. 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 six percent of impaired rivers, eleven percent of impaired lakes, ponds, and reservoirs, and eleven 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.

84. 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 correct the SWPP plan and BMPs until after EPA's inspection jeopardizes the integrity of EPA's and NDDH's programs to control storm water pollution.

85. EPA's storm water program has been in place since 1990. As companies with a construction background, the Respondents should have been aware of the applicable storm water requirements. The MOA between NDDH and NDDOT also makes clear NDDOT's responsibilities with respect to storm water compliance.

86. Respondents received an economic benefit from their failure to comply with the requirements of the 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); conducting and documenting inspections properly; and developing a complete SWPP plan and amending it as required.

VII. NOTICE OF OPPORTUNITY TO REQUEST A HEARING

87. As provided in section 309(g)(2)(B) of the Act, 33 U.S.C. § 1319(g)(2)(B), and 40 C.F.R. § 22.15(c), Respondents have the right to request a hearing in this matter. If Respondents (1) contest any material fact upon which the Complaint is based, (2) contend that the amount of penalty proposed in the Complaint is inappropriate, or (3) contend that it is entitled to judgment as a matter of law, they must file a written answer in accordance with 40 C.F.R. § 22.15 within thirty (30) days after service of the Complaint.

88. Respondents' answer must: (1) clearly and directly admit, deny, or explain each of the factual allegations contained in the Complaint; (2) state the circumstances or arguments which are alleged to constitute the grounds of any defense; (3) state the facts which Respondents dispute;

(4) state the basis for opposing any proposed relief; and (5) specifically request a hearing, if desired. 40 C.F.R. § 22.15(b). Failure to admit, deny, or explain any material factual allegation contained in the Complaint constitutes an admission of the allegation. 40 C.F.R. § 22.15(d).

89. Respondents' answer, an original and one copy, must be filed with:

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

A copy of Respondents' answer and all other documents filed in this action must be served on:

Sheldon H. Muller
Senior Enforcement Attorney
U.S. EPA Region 8 (8ENF-L)
1595 Wynkoop Street
Denver, CO 80202-1129

90. Please note that if Respondents request a hearing on this proposed penalty assessment, members of the public, to whom EPA is obligated to give notice of this proposed action, will have a right under § 309(g)(4)(B) of the Act, 33 U.S.C. § 1319(g)(4)(B), to be heard and to present evidence.

IF RESPONDENTS FAIL TO REQUEST A HEARING, THEY WILL WAIVE THEIR RIGHT TO CONTEST ANY OF THE ALLEGATIONS SET FORTH IN THE COMPLAINT.

IF RESPONDENTS FAIL TO FILE A WRITTEN ANSWER WITHIN THE THIRTY (30) DAY LIMIT, A DEFAULT JUDGMENT MAY BE ENTERED PURSUANT TO 40 C.F.R. § 22.17. A DEFAULT JUDGMENT MAY IMPOSE THE FULL PENALTY PROPOSED IN THE COMPLAINT.

91. Should Respondents not request a hearing, EPA will issue a final order assessing administrative penalties, and only members of the public who submit timely comments on this

proposal will have an additional thirty (30) days to petition EPA to set aside the final order and to hold a hearing thereon. EPA will grant the petition and will hold a hearing only if the petitioner's evidence is material and was not considered by EPA in the issuance of the final order assessing administrative penalties.

VIII. TERMS OF PAYMENT FOR QUICK RESOLUTION

92. If Respondents do not contest the findings and assessments set out above, this action may be resolved by paying the proposed penalty in full pursuant to 40 C.F.R. § 22.18. Please note that no such payment may be made until ten (10) days after the close of the public comment period provided for under 40 C.F.R. § 22.45. Please also note that if Respondents elects to resolve this action by paying the proposed penalty in full pursuant to 40 C.F.R. § 22.18, no Answer need be filed provided that Respondents file, within thirty (30) days after service of the Complaint, a statement agreeing to pay the proposed penalty in full. If more time is needed for payment, Respondents may file, within thirty (30) days after receipt of the Complaint, a statement agreeing to pay the penalty, and then pay the money within sixty (60) days after receipt of the Complaint. The penalty payment must be made by certified or cashier's check payable to "Treasurer, the United States of America" and remitted to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000

Payment may also be made as follows:

WIRE TRANSFERS:

Wire transfers should be directed to the Federal Reserve Bank of New York

Federal Reserve Bank of New York
ABA = 021030004
Account = 68010727
SWIFT address = FRNYUS33
33 Liberty Street
New York NY 10045
Field Tag 4200 of the Fedwire message should read " D 68010727
Environmental Protection Agency "

OVERNIGHT MAIL:

U.S. Bank
1005 Convention Plaza
Mail Station SL-MO-C2GL
St. Louis, MO 63101

Contact: Natalie Pearson
314-418-4087

ACH (also known as REX or remittance express)

Automated Clearinghouse (ACH) for receiving US currency
PNC Bank
808 17th Street, NW
Washington, DC 20074
Contact – Jesse White 301-887-6548
ABA = 051036706
Transaction Code 22 - checking
Environmental Protection Agency
Account 310006
CTX Format

ON LINE PAYMENT:

There is now an On Line Payment Option, available through the Dept. of Treasury.

This payment option can be accessed from the information below:

WWW.PAY.GOV
Enter sfo 1.1 in the search field
Open form and complete required fields.

Copies of the check (or evidence of payment by wire transfer or overnight mail) shall be sent to:

Seth Draper
U.S. EPA Region 8 (8ENF-W-NP)
1595 Wynkoop Street
Denver, CO 80202-1129

and

Sheldon H. Muller
U.S. EPA Region 8 (8ENF-L)
1595 Wynkoop Street
Denver, CO 80202-1129

A transmittal letter identifying the case title and docket number must accompany the remittance and copies of the check (or other evidence of payment).

93. Payment of the penalty in this manner shall constitute consent by Respondents to the assessment of the proposed penalty and a waiver of Respondents' right to a hearing in this matter.

94. Neither assessment nor payment of an administrative civil penalty pursuant to § 309 of the Act, 33 U.S.C. § 1319, shall affect Respondents' continuing obligation to comply with the Act or any other federal, state, or local law or regulations, and any separate compliance order issued under § 309(a) of the Act, 33 U.S.C. § 1319(a), for the violations alleged herein.

IX. SETTLEMENT CONFERENCE

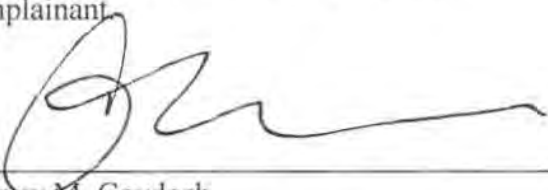
95. EPA encourages the exploration of settlement possibilities through an informal settlement conference. Please note that a request for, scheduling of, or participation in a settlement conference does not extend the period for filing an answer and request for hearing as set out above. The settlement process, however, may be pursued simultaneously with the administrative litigation process. If a settlement can be reached, its terms will be expressed in a written consent agreement signed by the parties and incorporated into a final order by the Regional Judicial

Officer. 40 C.F.R. § 22.18. To explore the possibility of settlement in this matter, contact Sheldon Muller, Senior Enforcement Attorney, at the address above. Mr. Muller can also be reached at (303) 312-6916.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, REGION 8
Complainant

Date:

Sept. 30, 2011



Andrew M. Gaydosh
Assistant Regional Administrator
Office of Enforcement, Compliance and
Environmental Justice

CERTIFICATE OF SERVICE

I certify that on the date noted below, I sent by certified mail, return receipt requested, a copy of the foregoing ADMINISTRATIVE COMPLAINT AND NOTICE OF OPPORTUNITY FOR HEARING (including Exhibit 1), and a copy of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. Part 22, to:

Francis G. Ziegler, P.E., Director
North Dakota Dept. of Transportation
608 E. Boulevard Ave.
Bismark, ND 58505

Certified Return Receipt No. 7009-3410-0000-2594-9609

I further certify that on the same date below I sent by certified mail, return receipt requested, a copy of the foregoing documents to:

Milton Gowan
Gowan Construction, Inc.
16076 Hwy 54
Oslo, MN 56744

Certified Return Receipt No. 7008-3230-0003-0730-1580

I further certify that on the same date below the original and one copy of the foregoing documents were hand-delivered to:

Tina Artemis
Regional Hearing Clerk
U.S. EPA Region 8 (8RC)
1595 Wynkoop Street
Denver, CO 80202-1129

Date: 9/30/2011

Judith M. McTernan

Exhibit 1 – NDPDES Permit No. NDR10-0000

Permit No: NDR10-0000
Effective Date: October 12, 2009
Expiration Date: September 30, 2014

AUTHORIZATION TO DISCHARGE UNDER THE
NORTH DAKOTA POLLUTANT DISCHARGE ELIMINATION SYSTEM

In compliance with Chapter 33-16-01 of the North Dakota Department of Health rules as promulgated under Chapter 61-28 (North Dakota Water Pollution Control Act) of the North Dakota Century Code,

Facilities both qualifying for and satisfying the requirements identified in Part I of the permit are authorized to discharge stormwater associated with **construction activity** to waters of the state in accordance with conditions set forth in this permit.

This permit and the authorization to discharge shall expire at midnight, September 30, 2014.

Signed this 12th day of October, 2009.



Dennis R. Fewless, Director
Division of Water Quality

BP 2009.02.05

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I. PERMIT COVERAGE AND LIMITATIONS

A. Discharges Covered

1. This permit applies to all areas within the jurisdiction of the state of North Dakota.
2. This permit applies to stormwater discharges associated with construction activity and small construction activity as defined in Title 40 of the Code of Federal Regulations (CFR), Parts 122.26(b)(14)(x) and (b)(15), respectively. The reference to construction activity in this permit includes both large construction activity and small construction activity as described below.
 - a. Large construction activity includes clearing, grading and excavation, that disturbs land of equal to or greater than five (5) acres and includes the disturbance of less than five (5) acres of total land area that is a part of a larger common plan of development or sale if the larger common plan will ultimately disturb five (5) acres or more.
 - b. Small construction activity includes clearing, grading and excavation, that disturbs land of equal to or greater than one (1) acre, and includes the disturbance of less than one (1) acre 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 that one and less than five (5) acres.
3. Stormwater discharges from support activities (e.g., concrete or asphalt batch plants, equipment staging yards, material storage areas, excavated material disposal areas, borrow areas) may be covered by this permit as part of a related construction site.
4. Certain non-stormwater discharges from facilities covered by this permit and meeting the requirements specified in Part II.A.

B. Discharges Not Covered

1. Stormwater discharges associated with industrial activity from any source other than construction activities described in Part I.A.
2. Post-construction discharges from industrial activity that originate from the site after construction activities have been completed at the site. Industrial and post-construction stormwater discharges may need to be covered by a separate stormwater permit.
3. The placement of fill into waters of the state requiring local, state, or federal authorizations (such as U.S. Army Corps of Engineers Section 404 permits).
4. This permit does not substitute for obligations under the National Environmental Policy Act (NEPA), Endangered Species Act (ESA), or National Historic Preservation Act (NHPA), it is your responsibility to ensure the project and resulting discharges comply with the respective requirements.
5. Discharges to waters for which there is a total maximum daily load (TMDL) allocation for sediment, suspended solids or turbidity are not covered unless you develop a Stormwater Pollution Prevention (SWPP) plan that is consistent with the assumptions, allocations and requirements in the approved TMDL. Information about TMDL allocations may be found at the following website:
www.ndhealth.gov/WQ/SW/Z2_TMDL/default.htm.
6. Stormwater discharges that the Department determines will cause, or have the reasonable potential to cause or contribute to violations of water quality standards.

C. Obtaining Coverage and Authorization Effective Date

1. To obtain authorization under this general permit for stormwater discharges you must submit a complete application and develop a Stormwater Pollution Prevention (SWPP) plan in accordance with Part II.C of this permit. A plan must be in place as a condition of the permit and a copy of the plan must be retained by the permittee. A copy of the plan must be submitted with the application for certain facilities as described in Part I.D.
2. Permit coverage will become effective 7 days after you submit a complete application unless otherwise notified by the Department (based on the department receipt date).
3. Upon the effective date of permit coverage you as the permit applicant are authorized to discharge stormwater from eligible activities under the terms and conditions of this permit.

D. Application (Notice of Intent) Process

1. You may use a Notice of Intent (NOI) form for Construction Activity (or a photocopy thereof) to complete your application. The NOI form (or a replacement application form) is available at the following website: www.ndhealth.gov/WQ/Storm/Construction/ConstructionHome.htm.
2. Application Content and Conditions.
 - a. The owner or the owner jointly with the operator (usually the general contractor) shall submit a completed application for this permit. The owner is responsible for compliance with all terms and conditions of this permit. The operator has day to day supervision of construction activities and is jointly responsible with the owner for compliance with the permit conditions as they pertain to the construction activities delegated to the operator.
 - b. The application (Notice of Intent) shall contain, at a minimum, the following information:
 - (1) Owner name, mailing address and phone number;
 - (2) Project contact name and phone number;
 - (3) Project/site name;
 - (4) Project/site location (street address; section, township, range; or latitude and longitude), county;
 - (5) A brief description of the construction activity;
 - (6) The anticipated start date and the anticipated completion date for the project (if known);
 - (7) The estimated total area of the site and the total area of disturbance in acres;
 - (8) Name of receiving water(s) or the name of the municipal storm sewer system and receiving water(s);
 - (9) The signature of the applicant(s), owner (and operator if co-applicants) signed in accordance with Part IV.A.6 of this permit.
 - c. A Stormwater Pollution Prevention (SWPP) plan (Part II.C) for the project must be prepared and available for review by the Department at the time of application. A partially complete plan is acceptable when it clearly identifies the item(s) to be completed, the person(s) responsible for completing the item(s) and the deadline for completing the item(s). The SWPP plan must be completed prior to the start of construction (or the applicable construction phase).

- d. You must include a copy of the SWPP plan if the project involves 50 or more acres; or the project will have a discharge point located within 2000 feet of, and flow to, a water body listed as impaired under section 303(d) of the Federal Clean Water Act due to sediment, suspended solids or turbidity. The Department's 303(d) list may be found at the following website in the most recent Integrated Report:
www.ndhealth.gov/WQ/SW/Z2_TMDL/Integrated_Reports/B_Integrated_Reports.htm.
3. For residential construction activity occurring within a common plan of development (such as a subdivision) subject to the permit requirements, coverage may be obtained by the following:
 - a. The owner of the lot(s) shall submit one application for all of the owner's construction activity within the common plan, or
 - b. The operator, such as a homebuilder who may represent one or more lot owners, shall submit one application for all of the operator's construction activity within the common plan.

In addition, a SWPP plan must be developed and implemented for the permittee's activities within a common plan of development. Additional phases of the common plan may be included under the initial application and permit coverage, provided the SWPP plan is amended to include the additional area or phases.

4. For oil and gas exploration, production, processing, and treatment operations or transmission facilities, coverage under this permit is not required for small construction activity. For oil and gas related large construction activity, permit applications may be submitted for individual project sites or for an area of operations such as well field area.

To obtain permit coverage for an area of operations, the application must include a map outlining the area or a list of counties encompassing the area. Also include a copy of the SWPP plan or similar BMP document developed for construction related activities within the coverage area. The information for individual project sites and future sites within the coverage area including those meeting the criteria in Part I.D.2.d does not need to be submitted.

5. Completed applications and any reports required by this permit shall be submitted to:

North Dakota Department of Health
Division of Water Quality
918 East Divide Avenue
Bismarck, ND 58501-1947

6. Local Authority. This permit does not preempt or supersede the authority of local agencies to prohibit, restrict, or control discharges of stormwater to storm sewer systems or other water courses within their jurisdiction.

E. Notice of Termination (NOT)

1. Permittees wishing to terminate coverage under this permit must submit a Notice of Termination (NOT) or other written request identifying the facility, reason why the permit is no longer needed and signed in accordance with Part IV.A.6 of this permit. Compliance with the conditions of this permit is required until a NOT is submitted to and accepted by the Department.

2. Permittees may only submit a NOT after one of the following conditions have been met.
 - a. Final stabilization (see Part II.E and definitions) has been achieved on all portions of the site for which the permittee is responsible.
 - b. Another operator/permittee has assumed control, in accordance with the transfer provisions (Part I.F), over all areas of the site that have not achieved final stabilization.
 - c. For residential construction only, a NOT is not required for each lot that is sold or has achieved final stabilization. Instead the permittee may modify their SWPP plan to indicate that permit coverage is no longer required for that lot. The SWPP plan should indicate the reason coverage is no longer needed and the date it was achieved. In order to terminate coverage, all lots under the control of the owner or operator must:
 - (1) Be sold to homeowners for private residential use with temporary erosion protection and down gradient perimeter controls installed. In addition, the permittee must distribute a "homeowner fact sheet" to the homeowner to inform the homeowner of the need for, and benefits of, final stabilization; or
 - (2) Achieve final stabilization (See Part II.E and definitions) on all portions of the site for which the permittee is responsible.

F. Transfer of Ownership or Control

1. When the owner or operator of a construction project changes, the new owner or operator must submit a written request for permit transfer/modification within 14 days of assuming control of the site or commencing work on-site, or of the legal transfer, sale or closing on the property; except as provided in Part I.F.2 below. Late submittals will not be rejected; however, the Department reserves the right to take enforcement for any unpermitted discharges or permit noncompliance. For stormwater discharges from construction activities where the owner or operator changes, the new owner or operator can implement the original SWPP plan created for the project or develop and implement their own SWPP plan. Permittee(s) shall ensure either directly or through coordination with other operators that their SWPP plan meets all terms and conditions of this permit and that their activities do not interfere with another party's erosion and sediment control practices.
2. A permit transfer/modification request is not required for the legal transfer, sale or closing on a property between permittees covered by this permit. Examples include the sale of a property parcel from a developer to a builder, or the transfer of an easement from a developer to a local government authority. If the new party is not covered by this permit at the time of transfer or sale, then the new owner/operator must submit a completed application/NOI within 14 days of assuming control of the site.

G. Municipal Separate Storm Sewer System (MS4) Permittees

The submittal of an application (NOI) is not required for small construction activity owned or operated by an entity with general permit coverage for Municipal Separate Storm Sewer System (MS4) discharges. The small construction activity owned or operated by the permitted MS4 is subject to the conditions outlined in this permit except for the Application Process (Part I.D).

II. STORMWATER DISCHARGE REQUIREMENTS

A. Prohibition of Non-Stormwater Discharges

The discharge of wastewater from processing operations or sanitary facilities is not authorized by this permit. The following non-stormwater discharges may be authorized if the non-stormwater sources are identified in the SWPP plan with a description of the pollution prevention measures to be implemented: fire-fighting, fire hydrant flushing, potable water line flushing, infrequent building and equipment wash down without detergents, uncontaminated foundation drains, springs, lawn watering and air conditioning condensate.

B. Releases in Excess of Reportable Quantities

This permit does not relieve the permittee of the reporting requirements of 40 CFR 110, 40 CFR 117, and 40 CFR 302. Any release of a hazardous substance, including a release in a stormwater discharge, must be reported to the agencies identified in Part IV.A.7. The discharge of hazardous substances in stormwater discharges shall be minimized in accordance with the applicable SWPP plan for the facility. Should a reportable quantity release occur, the SWPP plan shall be revised to prevent the recurrence of such a release.

C. Stormwater Pollution Prevention Plans

All permittees shall implement a Stormwater Pollution Prevention (SWPP) plan for any construction project requiring this permit until final stabilization is achieved. The SWPP plan and revisions are subject to review by the Department. The objectives of the plan are to identify potential sources of sediment or other pollution from construction activity and to ensure practices are used to reduce the contribution of pollutants from construction site runoff. Stormwater management documents developed under other regulatory programs can be included in the SWPP plan or incorporated by reference, or used in whole as a SWPP plan if it meets the requirements of this part.

The SWPP plan may identify more than one permittee and may specify the responsibilities of each permittee by task, area, and/or timing. Permittees may coordinate and prepare more than one SWPP plan to accomplish this. However, in the event there is a requirement under the SWPP plan for which responsibility is ambiguous or is not included in the SWPP plan, each permittee shall be responsible for implementation of that requirement. Each permittee is also responsible for assuring that its activities do not render another permittee's controls ineffective.

The SWPP plan must incorporate the guidelines provided in Appendix 1, to the extent practicable, and shall include the following information.

1. **Site Description.** Each plan shall provide a description of the construction site and potential pollutant sources as indicated below:
 - a. A description of the overall project and the type of construction activity;
 - b. Estimates of the total area of the site and the total area that is expected to be disturbed by excavation, grading, grubbing, or other activities during the life of the project;
 - c. A proposed timetable of activities that disturb soils for major portions of the site;
 - d. A description of the soil within the disturbed area(s);
 - e. The name of the surface water(s) and municipal storm sewer system at or near the disturbed area that may receive discharges from the project site; and

- f. A site map indicating:
 - 1) Drainage patterns including flow direction, dividing lines, and the existing and final grades
 - 2) Construction site boundaries and areas of soil disturbance;
 - 3) Location of major structural and nonstructural controls identified in the plan;
 - 4) Location of areas where stabilization practices are expected to occur;
 - 5) Surface waters, including an aerial extent of wetland acreage;
 - 6) Locations where stormwater is discharged to surface waters;
 - 7) Where included as part of the project, the site maps for off-site concrete/asphalt batch plants, equipment staging areas, borrow sites or excavated fill material disposal sites.
 - g. Projects that have a discharge point within 2000 feet of, and flow to, a water body listed as impaired under section 303(d) of the Federal Clean Water Act due to sediment, suspended solids or turbidity, must identify the water body and impairment in the plan. The Department's 303(d) list may be found at the following website under Integrated Reports:
www.ndhealth.gov/WQ/SW/Z2_TMDL/Integrated_Reports/B_Integrated_Reports.htm.
2. **Operational Controls.** The plan shall describe the Best Management Practices (BMPs) used in day to day operations on the project site that reduce the contribution of pollutants in stormwater runoff.
- a. The plan must identify a person knowledgeable and experienced in the application of erosion and sediment control BMPs who will oversee the implementation of the SWPP plan, and the installation, inspection and maintenance of the erosion and sediment control BMPs before and during construction. The owner shall develop a chain of responsibility with all operators on the site to ensure that the SWPP plan will be implemented and stay in effect until the construction project is complete, the entire site has undergone final stabilization, and a NOT has been submitted to the Department.
 - b. Good housekeeping practices to maintain a clean and orderly site. Litter, debris, chemicals and parts must be handled properly to minimize the exposure to stormwater. This includes measures to reduce and remove sediment tracked off-site by vehicles or equipment, and the generation of dust.
 - c. Preventative maintenance practices must be provided to ensure the proper operation, inspection and maintenance of stormwater control devices (e.g., oil-water separators, catch basins, and silt fences) and equipment used or stored on site.
 - d. Spill prevention and response procedures must be developed where potential spills can occur. Where appropriate, specific handling procedures, storage requirements, spill containment and cleanup procedures must be identified. Bulk storage structures for petroleum products and other chemicals shall have adequate leak and spill protection to prevent any spilled materials from entering waters of the state, storm sewer systems or draining onto adjacent properties.
 - e. Employee training informs personnel of their responsibility in implementing the practices and controls included in the plan such as spill response, good housekeeping, and sediment control practices. Employee training must be provided at least annually, as new employees are hired or as necessary to ensure compliance with the plan and the general permit.
 - f. Concrete wash water, grindings and slurry, shall not be discharged to waters of the state, storm sewer systems or allowed to drain onto adjacent properties.
 - g. Dewatering or basin draining (e.g., pumped discharges, trench/ditch cuts for drainage) related to the permitted activity must be managed with the appropriate BMPs, such that the discharge

does not adversely affect the receiving water or downstream landowners. The following conditions and considerations apply to the dewatering activities:

- 1) The dewatering is limited to stormwater and groundwater that may collect on site and those sources identified in Part II.A. A separate permit must be obtained to discharge water from other sources such as hydrostatic testing or contaminated groundwater or surface water.
 - 2) The permittee(s) must operate the discharge to minimize the release of sediment and provide adequate BMPs where necessary to minimize erosion due to the discharge. Discharges must not lead to the deposition of sediment within stormwater conveyance systems or surface waters. Discharges must not cause or potentially cause a visible plume within a surface water body.
 - 3) In addition to the inspection requirements in Part III, the dewatering activities should be inspected daily. The inspection must include the dewatering site, areas where the BMPs are being implemented and the discharge location. A record should be maintained to document the inspections of the dewatering operation and actions taken to correct any problems that may be identified.
 - 4) Local authorities may require specific BMPs for discharges affecting their storm sewer system.
3. **Erosion and Sediment Controls.** An erosion and sediment control plan shall be developed to identify the appropriate control measures and when they will be implemented during the project for each major phase of site activity (e.g., clearing, grading and building phases). The erosion and sediment control plan must conform to the guidelines provided in Appendix 1. The description and implementation of controls shall address the following minimum components:
- a. Sediment basins, or an appropriate combination of equivalent sediment controls such as smaller sediment basins, and/or sediment traps, silt fences fiber logs, vegetative buffer strips, berms, etc., are required for all down slope boundaries of the disturbance area and for those side slope boundaries as may be appropriate for site conditions.
 - b. Temporary erosion protection (such as cover crop planting or mulching) or permanent cover must be provided as outlined in Appendix 1 for the exposed soil areas where activities have been completed or temporarily ceased. These areas include graded slopes, pond embankments, ditches, berms and soil stockpiles.
 - c. All control measures must be properly selected, installed, and maintained in accordance with the manufacturer's specifications and good engineering practices. If periodic inspections or other information indicates a control has been used inappropriately, or incorrectly, the permittee must replace or modify the control for site situations. The permittee may deviate from the manufacturer's specifications and erosion and sediment control guidelines in Appendix 1 if they provide justification for the deviation and document the rationale for the deviation in the SWPP plan.
 - d. If sediment escapes from the site, off-site accumulations of sediment must be removed in a manner and at a frequency sufficient to minimize off-site impacts. The plan must be modified to prevent further sediment deposition off-site.
 - e. The stormwater controls are expected to withstand and function properly during precipitation events of up to the 2 year, 24 hour storm event. Visible erosion and/or off-site sediment deposition from such storm events should be minimal. The 2 year, 24 hour rainfall event in North Dakota ranges from about 1.9 inches in the west to 2.3 inches in the east.

- f. For projects that discharge to waters that have a TMDL allocation for sediment, suspended solids or turbidity, the plan must be consistent with the assumptions, allocations and requirements of the approved TMDL. If a TMDL specifies certain BMPs or controls to meet a wasteload allocation (WLA) applicable to the project's discharges, then the BMPs or controls must be incorporated into the plan. Information about TMDL allocations may be found at the following website: www.ndhealth.gov/WQ/SW/Z2_TMDL/default.htm.
4. **Stormwater Management.** The plan must identify permanent practices incorporated into the project to control pollutants in stormwater discharges occurring after construction operations have been completed.
 - a. Identify stormwater ponds; flow reduction by use of open vegetated swales and natural depressions; infiltration of runoff on-site; and sequential systems which combine several practices.
 - b. Identify velocity / energy dissipation devices placed at discharge locations and appropriate erosion protection for outfall channels and ditches.
 - c. Maintenance for on-site stormwater management features is the responsibility of the permittee until the NOT is submitted or the feature is accepted by the party responsible for long term maintenance.
 - d. The design, installation and use of stormwater management features must comply with applicable local, state or federal requirements.
5. **Maintenance.** All erosion and sediment control measures and other protective measures identified in the plan must be maintained in effective operating condition. The plan must indicate, as appropriate, the maintenance or clean out interval for sediment controls. If site inspections, required in Part III of this permit, identify BMPs that are not operating effectively, maintenance shall be arranged and accomplished as soon as practicable.
6. **Inspections.** The plan must provide for site inspections as outlined in Part III. The permittee shall ensure that personnel conducting site inspections are familiar with permit conditions and the proper installation and operation of control measures. The erosion and sediment control measures identified in the plan shall be observed to ensure that they are operating correctly and in serviceable condition. Inspections shall also include discharge outlets from areas used for storage of materials, permanent stormwater control measures and vehicle maintenance areas. These areas shall be inspected for evidence of, or the potential for, pollutants entering a drainage system. If necessary, the plan shall be revised based on the observations and deficiencies noted during the inspection.
7. **Plan Review and Revisions.**
 - a. The plan shall be signed in accordance with the signatory requirements, Part IV.A.6, and retained on-site for the duration of activity as outlined in Part III.B.
 - b. The permittee shall make plans available upon request to the Department, EPA, or, in the case of discharges to a municipal storm sewer system, to the operator of the municipal system.
 - c. The permittee shall amend the SWPP plan whenever there is a change in design, construction, operation, or maintenance, which has a significant effect on the potential for the discharge of pollutants to waters of the state. The plan shall also be amended if the plan is found to be ineffective in controlling pollutants present in stormwater.

D. Local Requirements

All stormwater discharges must comply with the requirements, policies, or guidelines of municipalities and other local agencies as applicable to the construction site. Any discharges to a storm sewer, ditch or other water course under the jurisdiction of a municipality must comply with any specific conditions or BMPs required by the municipality.

E. Final Stabilization

The permittee(s) must ensure final stabilization of the site. The permittee(s) should submit a NOT within 30 days after final stabilization has been achieved, or another owner/operator (permittee) has assumed control according to Part I.F for all areas of the site that have not undergone final stabilization. Final stabilization can be achieved in one of the following ways.

1. All soil disturbing activities at the site have been completed and all soils must be stabilized by a uniform perennial vegetative cover with a density of 70 percent over the entire pervious surface area, or other equivalent means necessary to prevent soil failure under erosive conditions and;
 - a. All drainage ditches, constructed to drain water from the site after construction is complete, must be stabilized to preclude erosion;
 - b. All temporary synthetic, and structural erosion prevention and sediment control BMPs (such as silt fence) must be removed as part of the site final stabilization; and
 - c. The permittee(s) must clean out all sediment from conveyances and from temporary sedimentation basins that will be used as permanent water quality management basins. Sediment must be stabilized to prevent it from being washed back into the basin, conveyances or drainage ways discharging off-site; or to surface waters. The cleanout of permanent basins must be sufficient to return the basin to design capacity.
2. For residential construction only, final stabilization has been achieved when temporary erosion protection and down gradient perimeter control for individual lots has been completed and the residence has been transferred to the homeowner. Additionally, the permittee must distribute a "homeowner fact sheet" to the homeowner to inform the homeowner of the need for, and benefits of, final stabilization. The permittee also must demonstrate that the homeowner received the fact sheet.

III. SELF MONITORING AND REPORTING

A. Inspection and Maintenance Requirements

1. Inspections shall be performed by or under the direction of the permittee at least once every 14 calendar days and within 24 hours after any storm event of greater than 0.50 inches of rain per 24-hour period during active construction. The permittee shall use a rain gauge near the site or utilize the nearest National Weather Service precipitation gauge station. Any gauge used shall be located within 5 miles of the stormwater discharge.
2. All inspections and maintenance conducted during construction must be recorded in writing and these records must be retained in accordance with Part III.B. Records of each inspection and maintenance activity shall include:

- a. Date and time of inspections;
 - b. Name of person(s) conducting inspections;
 - c. Findings of inspections, including recommendations for corrective actions;
 - d. Corrective actions taken (including dates, times, and party completing maintenance activities);
 - e. Date and amount of all rainfall events greater than 1/2 inch (0.50 inches) in 24 hours; and
 - f. Documentation that the SWPP plan has been amended when substantial changes are made to the erosion and sediment controls or other BMPs in response to inspections.
3. Completed areas that have been stabilized but do not meet the 70% perennial vegetative cover criteria for final stabilization may be inspected once per month. Inspections may be suspended for parts of the construction site that meet final stabilization. Inspections also may be suspended where earthwork has been suspended due to frozen ground conditions. The required inspections and maintenance must resume as soon as runoff occurs or the ground begins to thaw at the site.
 4. There may be times when a site inspection may not be practical at the specified time. Adverse climatic conditions, such as flooding, high winds, tornadoes, electrical storms, etc., may prohibit inspections. Should this occur, the permittee must record a description of why the inspection(s) could not be performed at the designated time.
 5. The permittee may submit an alternative inspection plan for long, narrow, linear construction projects such as pipeline or utility line inspection, and similar projects in remote areas where vehicle traffic is restricted or could compromise native vegetation or stabilization measures. A copy of the SWPP plan and proposed inspections plan shall be submitted to the Department 30 days prior to implementing an alternative inspection plan. Any alternative plan must provide for the timely recognition and repair of erosion and sediment damage.
 6. Some erosion and sediment control measures may require more frequent inspection based on location (e.g., sensitive areas or waters of the state) or as a result of recurring maintenance issues. Erosion or sediment control measures found in need of maintenance between inspections must be repaired or supplemented with appropriate measures as soon as practicable.

B. Records Location

A copy of the completed and signed Notice of Intent, coverage letter from the Department, SWPP plan, site inspection records, and this general permit shall be kept at the site of the construction activity in a field office, trailer, or shed, or in a vehicle that is on-site during normal working hours. If the site does not have a reasonable on-site location, then the documents must be retained at a readily available alternative location; preferable with the individual responsible for overseeing the implementation of the SWPP plan. If the site is inactive, then the documents may be stored at a local office.

IV. STANDARD CONDITIONS

A. COMPLIANCE RESPONSIBILITIES

1. Duty to Comply

The permittee must comply with all conditions of this permit. Any permit noncompliance constitutes a violation of the Act and is grounds for enforcement action; for permit termination, revocation and reissuance, or modification; or for denial of a permit renewal application.

2. Operation and Maintenance

The permittee shall at all times maintain in good working order and operate as efficiently as possible all treatment or control facilities or systems installed or used by the permittee to achieve compliance with the terms and conditions of this permit. If necessary to achieve compliance with the conditions of this permit, this shall include the operation and maintenance of backup or auxiliary systems.

3. Planned Changes

The Department shall be given advance notice of any planned changes at the permitted facility or of an activity which may result in permit noncompliance. Any anticipated facility expansions, production increase, or process modifications which might result in new, different, or increased discharges of pollutants shall be reported to the Department as soon as possible. Changes which may result in a facility being designated a "new source" as determined in 40 CFR 122.29(b) shall also be reported.

4. Duty to Provide Information

The permittee shall furnish to the Department, within a reasonable time, any information which the Department may request to determine whether cause exists for modifying, revoking and reissuing, or terminating this permit, or to determine compliance with this permit. The permittee shall also furnish to the Department, upon request, copies of records required to be kept by this permit. When a permittee becomes aware that it failed to submit any relevant facts or submitted incorrect information in a permit application or any report, it shall promptly submit such facts or information.

5. Records Retention

All records and information (including calibration and maintenance) required by this permit shall be kept for at least three years or longer if requested by the Department or EPA.

6. Signatory Requirements

All applications, reports or information submitted to the Department shall be signed and certified.

- a. All permit applications shall be signed by a responsible corporate officer, a general partner, or a principal executive officer or ranking elected official.
- b. All reports required by the permit and other information requested by the Department shall be signed by a person described above or by a duly authorized representative of that person. A person is a duly authorized representative only if:
 - (1) The authorization is made in writing by a person described above and submitted to the Department; and
 - (2) The authorization specifies either an individual or a position having responsibility for the overall operation of the regulated facility, such as the position of plant manager, superintendent, position of equivalent responsibility, or an individual or position having overall responsibility for environmental matters.

If an authorization under "Compliance Responsibilities-Signatory Requirements" section is no longer accurate for any reason, a new authorization satisfying the above requirements must be submitted to the Department prior to or together with any reports, information, or applications to be signed by an authorized representative.

Any person signing a document under this section shall make the following certification:

"I certify under penalty of law that I have personally examined and am familiar with the information submitted herein. Based on my inquiry of those individuals immediately responsible for obtaining the information, I believe the submitted information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information including the possibility of fine and imprisonment."

7. Noncompliance Notification

The permittee shall report any noncompliance which may seriously endanger health or the environment as soon as possible, but no later than twenty-four (24) hours from the time the permittee first became aware of the circumstances. The report shall be made to the EPA, Region VIII, Emergency Response Branch at 1.800.424.8802 and the State of North Dakota, Division of Homeland Security at 1.800.472.2121. The following occurrences of noncompliance shall be reported by telephone to the Department at 701.328.5210 by the first workday (8:00 a.m.-5:00 p.m. Central time) following the day the permittee became aware of the circumstances:

- a. Any lagoon cell overflow or any unanticipated bypass which exceeds any effluent limitation in the permit (see "Compliance Responsibilities-Bypass of Treatment Facilities" section);
- b. Any upset which exceeds any effluent limitation in the permit (see "Compliance Responsibilities-Upset Conditions" section); or
- c. Violation of any daily maximum effluent or instantaneous discharge limitation for any of the pollutants listed in the permit.

A written submission shall also be provided within five days of the time that the permittee became aware of the circumstances. The written submission shall contain:

- a. A description of the noncompliance and its cause;
- b. The period of noncompliance, including exact dates and times;
- c. The estimated time noncompliance is expected to continue if it has not been corrected; and
- d. Steps taken or planned to reduce, eliminate, and prevent recurrence of the noncompliance.

Reports shall be submitted to the address in the "Reporting and Recordkeeping Requirements-Reporting" section. The Department may waive the written report on a case by case basis if the oral report has been received within 24 hours by the Department at 701.328.5210 as identified above.

All other instances of noncompliance shall be reported no later than at the time of the next Discharge Monitoring Report submittal. The report shall include the four items listed in this subsection.

8. Bypass of Treatment Facilities

Bypass not exceeding limitations. The permittee may allow any bypass to occur which does not cause effluent limitations to be exceeded, but only if it also is for essential maintenance to assure efficient operation. These bypasses are not subject to any of the following provisions in this section.

Bypass exceeding limitations-notification requirements.

- a. Anticipated Bypass. If the permittee knows in advance of the need for a bypass, it shall submit prior notice, if possible at least ten (10) days before the date of bypass.
- b. Unanticipated Bypass. The permittee shall submit notice of an unanticipated bypass as required in the "Compliance Responsibilities-Noncompliance Notification" section.

Prohibition of Bypass. Bypass is prohibited, and the Department may take enforcement action against a permittee for bypass, unless:

- a. Bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;
- b. There were no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime. This condition is not satisfied if adequate back-up equipment should have been installed in the exercise of reasonable engineering judgment to prevent a bypass which occurred during normal periods of equipment downtime or preventive maintenance; and
- c. The permittee submitted notices as required in the "Bypass of Treatment Facilities-Anticipated Bypass" section.

The Department may approve an anticipated bypass, after considering its adverse effects, if the Department determines that it will meet the three (3) conditions listed above.

9. Upset Conditions

An upset constitutes an affirmative defense to an action brought for noncompliance with technology-based permit effluent limitations if the requirements of the following paragraph are met. No determination made during administrative review of claims that noncompliance was caused by upset, and before an action for noncompliance, is final administrative action subject to judicial review.

A permittee who wishes to establish the affirmative defense of upset shall demonstrate, through properly signed, contemporaneous operating logs, or other relevant evidence that:

- a. An upset occurred and the permittee can identify its cause(s);
- b. The permitted facility was, at the time being, properly operated;
- c. The permittee submitted notice of the upset as required under "Compliance Responsibilities-Noncompliance Notification" section; and
- d. The permittee complied with any remedial measures required under "Compliance Responsibilities-Duty to Mitigate" section.

In any enforcement proceeding, the permittee seeking to establish the occurrence of an upset has the burden of proof.

10. Duty to Mitigate

The permittee shall take all reasonable steps to minimize or prevent any discharge in violation of this permit which has a reasonable likelihood of adversely affecting human health or the environment. The permittee, at the Department's request, shall provide accelerated or additional monitoring as necessary to determine the nature and impact of any discharge.

11. Removed Materials

Collected screenings, grit, solids, sludges, or other pollutants removed in the course of treatment shall be buried or disposed of in such a manner to prevent any pollutant from entering any waters of the state or creating a health hazard. Sludge/digester supernatant and filter backwash shall not be directly blended with or enter either the final plant discharge and/or waters of the state. The permit issuing authority shall be contacted prior to the disposal of any sewage sludges. At that time, concentration limitations and/or self-monitoring requirements may be established.

12. Duty to Reapply

Any request to have this permit renewed should be made 15 days prior to its expiration date.

B. GENERAL REQUIREMENTS

1. Right of Entry

The permittee shall allow Department and EPA representatives, at reasonable times and upon the presentation of credentials if requested, to enter the permittee's premises to inspect the wastewater treatment facilities and monitoring equipment, to sample any discharges, and to have access to and copy any records required to be kept by this permit.

2. Availability of Reports

Except for data determined to be confidential under 40 CFR Part 2, all reports prepared in accordance with the terms of this permit shall be available for public inspection at the offices of the Department and EPA. As required by the Act, permit applications, permits, and effluent data shall not be considered confidential.

3. Transfers

This permit is not transferable except upon the filing of a Statement of Acceptance by the new party and subsequent Department approval. The current permit holder should inform the new controller, operator, or owner of the existence of this permit and also notify the Department of the possible change.

4. New Limitations or Prohibitions

The permittee shall comply with any effluent standards or prohibitions established under Section 306(a), Section 307(a), or Section 405 of the Act for any pollutant (toxic or conventional) present in the discharge or removed substances within the time identified in the regulations even if the permit has not yet been modified to incorporate the requirements.

5. Permit Actions

This permit may be modified, revoked and reissued, or terminated for cause. This includes the establishment of limitations or prohibitions based on changes to Water Quality Standards, the development and approval of waste load allocation plans, the development or revision to water quality management plans, changes in sewage sludge practices, or the establishment of prohibitions or more stringent limitations for toxic or conventional pollutants and/or sewage sludges. The filing of a request by the permittee for a permit modification, revocation and reissuance, or termination, or a notification of planned changes or anticipated noncompliance does not stay any permit condition.

6. Need to Halt or Reduce

It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this permit.

7. State Laws

Nothing in this permit shall be construed to preclude the institution of legal action or relieve the permittee from any responsibilities, liabilities, or penalties established pursuant to any applicable state law or regulation preserved under Section 510 of the Act.

8. Oil and Hazardous Substance Liability

Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the permittee from any responsibilities, liabilities, or penalties to which the permittee is or may be subject under Section 311 of the Act.

9. Property Rights

The issuance of this permit does not convey any property rights of any sort, nor any exclusive privileges, nor does it authorize any injury to private property or any invasion of personal rights, nor any infringement of federal, state or local laws or regulations.

10. Severability

The provisions of this permit are severable, and if any provision of this permit or the application of any provision of this permit to any circumstance is held invalid, the application of such provision to other circumstances and the remainder of this permit shall not be affected thereby.

11. General Permits

Coverage under this permit may be modified, revoked and reissued, or terminated for cause. The Department may require any operator covered by this permit to apply for and obtain an individual or alternative general permit if:

- a. The discharge is not in compliance with the conditions of the general permit
- b. Conditions or standards have changed so that the discharge no longer qualifies for a general permit
- c. Information becomes available which indicates that the permittee's discharge has a reasonable potential to contribute to an exceedance of a water quality standard

When an individual NDPDES permit is issued to an operator otherwise subject to this permit or the operator is approved for coverage under an alternative NDPDES general permit, the applicability of this permit to the operator is automatically inactivated upon the effective date of the individual permit or coverage under the alternative general permit.

V. DEFINITIONS

"303d List" or "Section 303d List" means a list of North Dakota's water quality-limited waters needing total maximum daily loads or TMDLs developed to comply with section 303d of the Clean Water Act. A copy of the latest integrated report is available on the state's web site at:

[www.ndhealth.gov/WQ/SW/Z2 TMDL/Integrated Reports/B Integrated Reports.htm](http://www.ndhealth.gov/WQ/SW/Z2_TMDL/Integrated_Reports/B_Integrated_Reports.htm).

"Act" means the Clean Water Act.

"BMP" or "Best Management Practices" means schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of waters of the state. BMPs also include treatment requirements, operating procedures and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage.

"Bypass" means the intentional diversion of waste streams from any portion of a treatment facility.

"Common Plan of Development or Sale" means 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.

"Construction Activity" means construction activity as defined in 40 CFR part 122.26(b)(14)(x) and small construction activity as defined in 40 CFR part 122.26(b)(15). This includes a disturbance to the land that results in a change in topography, existing soil cover (both vegetative and non-vegetative), or the existing soil topography that may result in accelerated stormwater runoff, leading to soil erosion and movement of sediment into surface waters or drainage systems. Examples of construction activity may include clearing, grading, filling and excavating. Construction activity includes the disturbance of less than one acre of total land area that is part of a larger common plan of development or sale if the larger common plan will ultimately disturb on (1) acre or more. Construction activity does not include routine maintenance that is performed to maintain the original line and grade, hydraulic capacity, or original purpose of the facility.

"Department" means the North Dakota Department of Health, Division of Water Quality.

"Energy Dissipation" means methods employed at pipe outlets to prevent erosion. Examples include, but are not limited to: concrete aprons, riprap, splash pads, and gabions that are designed to prevent erosion.

"Final Stabilization" means that:

1. All soil disturbing activities at the site have been completed and a uniform perennial vegetative cover with a density of 70 percent of the native cover for unpaved areas and areas not covered by permanent structures, or equivalent permanent stabilization measures (such as the use of riprap, gabions, or geotextiles) has been achieved.
2. For areas with an average annual rainfall of less than 20 inches only, all soil disturbing activities at the site have been completed and temporary erosion control measures (e.g., degradable rolled erosion control product) are selected, designed, and installed along with an appropriate seed base to provide erosion control for at least three years and achieve 70 percent vegetative coverage within three years without active maintenance.
3. For soil disturbing activities on land used for agricultural purposes, final stabilization may be accomplished by returning the disturbed land to its pre-disturbance agricultural use. Areas disturbed that were not previously used for agricultural activities, such as buffer strips immediately adjacent to waters of the state, and areas which are not being returned to their pre-disturbance agricultural use must meet the final stabilization criteria in (1) or (2) above.

"Large Construction Activity" means land disturbance of equal to or greater than 5 acres. Large construction activity also includes the disturbance of less than one acre 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 five acres.

"Normal Wetted Perimeter" means the area of a conveyance, such as a ditch, channel, or pipe that is in contact with water during flow events that are expected to occur once every year.

"Non-Stormwater Discharges" means discharges other than stormwater. The term includes both process and non-process sources. Process wastewater sources that require a separate NDPDES permit include, but are not limited to industrial processes, domestic facilities and cooling water. Non-stormwater sources that may be addressed in this permit include, but are not limited to: fire-fighting, fire hydrant flushing, potable water line flushing, infrequent building and equipment wash down without detergents, uncontaminated foundation drains, springs, lawn watering and air conditioning condensate.

"Operator" means the person (usually the general contractor) designated by the owner who has day to day operational control and/or the ability to modify project plans and specifications related to the SWPP plan. The person must be knowledgeable in those areas of the permit for which the operator is responsible and must perform those responsibilities in a workmanlike manner.

"Owner" means the person or party possessing the title of the land on which the construction activities will occur; or if the construction activity is for a lease holder, the party or individual identified as the lease holder; or the contracting government agency responsible for the construction activity.

"Permanent Cover" means final stabilization. Examples include grass, gravel, asphalt, and concrete.

"Severe Property Damage" means substantial physical damage to property, damage to treatment facilities which causes them to become inoperable, or substantial and permanent loss of natural resources which can reasonably be expected to occur in the absence of a bypass. Severe property damage does not mean economic loss caused by delays in production.

"Significant Materials" includes, but is not limited to: raw materials; fuels; materials such as solvents, detergents, and plastic pellets; finished materials such as metallic products; raw materials used in food processing or production; hazardous substances designated under Section 101(14) of CERCLA; any chemical the facility is required to report pursuant to Section 313 of Title III of SARA; fertilizers; pesticides; and waste products such as ashes, slag and sludge that have the potential to be released with stormwater discharges.

"Significant Spills" includes, but is not limited to: releases of oil or hazardous substances in excess of reportable quantities under Section 311 of the Clean Water Act (see 40 CFR 110.10 and CFR 117.21) or Section 102 of CERCLA (see 40 CFR 302.4).

"Small Construction Activity" means land disturbance of equal to or greater than one acre and less than five acres. Small construction activity also includes the disturbance of less than one acre 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 one and less than five acres

"Stabilized" means the exposed ground surface has been covered by appropriate materials such as mulch, staked sod, riprap, wood fiber blanket, or other material that prevents erosion from occurring. Grass seeding alone is not stabilization.

"Stormwater" means stormwater runoff, snow melt runoff, and surface runoff and drainage.

"Stormwater Associated with Industrial Activity" means stormwater runoff, snow melt runoff, or surface runoff and drainage from industrial activities as defined in 40 CFR 122.26(b)(14).

"Stormwater Associated with Small Construction Activity" means the discharge of stormwater from:

(i) Construction activities including clearing, grading, and excavating that result in land disturbance of equal to or greater than one acre and less than five acres. Small construction activity also includes the disturbance of less than one acre 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 one and less than five acres. Small construction activity does not include routine maintenance that is performed to maintain the original line and grade, hydraulic capacity, or original purpose of the facility.

(ii) Any other construction activity designated by EPA or the Department, based on the potential for contribution to a violation of a water quality standard or for significant contribution of pollutants to waters of the state.

"Temporary Erosion Protection" means methods employed to prevent erosion. Examples of temporary cover include; straw, wood fiber blanket, wood chips, and erosion netting.

"Upset" means an exceptional incident in which there is unintentional and temporary noncompliance with technology based permit effluent limitations because of factors beyond the reasonable control of the permittee. An upset does not include noncompliance to the extent caused by operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventive maintenance, or careless or improper operation.

"Waters of the State" means any and all surface waters that are contained in or flow in or through the state of North Dakota as defined in NDCC 61-28-02. This definition includes all water courses, even if they are usually dry.

"You" means the owner, operator or permittee as appropriate.

Appendix 1 – Erosion and Sediment Control Guidelines

Guidelines for designing, implementing and maintaining erosion and sediment controls.

A. Erosion and Sediment Control Practices

1. Temporary (or permanent) sediment basins, or equivalent control, must be provided where ten (10) or more acres of disturbed area drain to a common location prior to the runoff leaving the site or entering surface waters. The permittee is encouraged, but not required, to install temporary sediment basins where appropriate in areas with steep slopes or highly erodible soils even if less than ten (10) acres drains to one area. The basins must provide at least the following:

The basins shall be sized to provide 3,600 cubic feet of storage below the outlet pipe per acre drained to the basin. Alternative designs may be used which provide storage below the outlet for a calculated volume of runoff from a 2 year, 24 hour storm and provides not less than 1800 cubic feet of storage below the outlet pipe from each acre drained to the basin.

Basin outlets must be designed to avoid short-circuiting and the discharge of floating debris. The basin must be designed with the ability to allow complete basin drawdown (e.g., perforated riser pipe wrapped with filter fabric and covered with crushed gravel, pumps or other means) for maintenance activities. The drawdown should be designed to release the storage volume in a 24 hour or longer period. The basin must have a stabilized emergency overflow to prevent failure of pond integrity. Energy dissipation must be provided for the basin outlet.

2. Where the temporary sediment basin is not practical due to site limitations or nature of disturbance (such as developing a roadway, pipeline, or diversion) a combination of measures must be used to provide equivalent sediment control for all down slope boundaries of the construction area and for side slope boundaries as deemed appropriate by individual site conditions. Equivalent sediment controls include such things as smaller sediment basins and/or sediment traps, silt fences, and vegetative buffer strips. In determining whether installing a sediment basin is attainable, the permittee must consider public safety and may consider factors such as site soils, slope and available area on site.
3. Provide temporary erosion protection or permanent cover for the exposed soil areas where activities have been completed or temporarily ceased. For those areas with a continuous positive slope within 200 lineal feet of a surface water, temporary erosion protection or permanent cover must be applied within 21 days of completing or ceasing earth moving activities. These areas include pond embankments, ditches, berms and soil stockpiles. Temporary stockpiles without significant silt, clay or organic components (e.g., clean aggregate stockpiles, demolition concrete stockpiles, sand stockpiles) are exempt from this requirement.
4. Temporary soil stockpiles must have effective sediment controls, and cannot be placed in surface waters, including stormwater conveyances such as curb and gutter systems, or conduits and ditches.
5. The normal wetted perimeter of any temporary or permanent drainage ditch that drains water from a construction site, or diverts water around a site, must be stabilized at least 200 lineal feet from the property edge, or from the point of discharge to any surface water. Stabilization should be completed within 24 hours of connecting to a surface water.
6. Pipe outlets must be provided with temporary or permanent energy dissipation within 24 hours of connection to a surface water. Splash pads and/or downspout extensions must be provided for roof drains to prevent erosion from roof runoff.
7. In order to maintain sheet flow and minimize rills and/or gullies, there should be no unbroken slope length of greater than 75 feet for slopes with a grade of 3:1 or steeper.

8. Temporary or permanent drainage ditches and sediment basins that are designed as part of a treatment system (e.g., ditches with rock check dams) require sediment control practices only as appropriate for site conditions.
9. All storm drain inlets in the immediate vicinity of the construction site must be protected by the appropriate BMPs during construction until all sources with the potential for discharging to the inlet have been stabilized. This includes storm drain inlets which may be affected by sediment tracked onto paved surfaces by vehicles or equipment.

Inlet protection devices are a last line of control – sediment and erosion control practices must be used on site. Inlet protection devices must conform to local ordinances or regulations. In general inlet protection devices need to provide for drainage adequate to prevent excessive roadway flooding. Inlet protection may be removed for a particular inlet if a specific concern (i.e., street flooding/freezing, snow removal) has been identified and documented in the SWPP plan. In this situation, additional erosion and sediment control practices must be used to supplement for the loss of the inlet protection device to prevent sediment from entering a storm sewer system.

Maintenance and cleaning of inlet protection devices, including on-site sediment and erosion controls, must be performed in a timely manner.

10. Vegetated buffers must have a minimum width of 25 feet for every 125 feet of disturbed area which drains to the buffer. For each additional 5 feet of disturbance, an additional 1 foot of width must be added. The width of the buffer shall have a slope of 5% or less and the area draining to the buffer shall have a slope of 6% or less. Concentrated flows should be minimized throughout the buffer.

Buffers shall consist of dense grassy vegetation, 3 to 12 inches tall with uniform coverage over 90% of the buffer. Woody vegetation shall not be counted for the 90% coverage. No more than 10 % of the overall buffer may be comprised of woody vegetation.

B. Maintenance Considerations for Erosion and Sediment Controls

1. All erosion prevention and sediment control BMPs must be inspected to ensure integrity and effectiveness. All nonfunctional BMPs must be repaired, replaced, or supplemented with functional BMPs. The Permittee(s) must investigate and comply with the following inspection and maintenance requirements:

All control devices similar to silt fence or fiber rolls must be repaired, replaced, or supplemented when they become nonfunctional or the sediment reaches 1/3 of the height of the device. These repairs must be made within 24 hours of discovery, or as soon as field conditions allow access.

Temporary and permanent sedimentation basins must be drained and the sediment removed when the depth of sediment collected in the basin reaches 1/2 the storage volume. Drainage and removal must be completed within 72 hours of discovery, or as soon as field conditions allow access.

2. Surface waters, including drainage ditches and conveyance systems, must be inspected for evidence of sediment being deposited by erosion. The permittee(s) must remove all deltas and sediment deposited in surface waters, including drainage ways, catch basins, and other drainage systems, and restabilize the areas where sediment removal results in exposed soil. The removal and stabilization must take place immediately, but no more than, seven (7) days after the discovery unless precluded by legal, regulatory, or physical access constraints. The permittee shall use all reasonable efforts to obtain access. If precluded, removal and stabilization shall take place immediately, but no more than, seven (7) calendar days after obtaining access. The permittee is responsible for contacting all local, regional, state and federal authorities and receiving any applicable permits, prior to conducting any work.

3. Construction site egress locations must be inspected for evidence of sediment being tracked off-site by vehicles or equipment onto paved surfaces. Accumulations of tracked and deposited sediment must be removed from all off-site paved surfaces within 24 hours or, if applicable, within a shorter time specified by local authorities or the Department.

Vehicle tracking of sediment from the site must be minimized by BMPs. This may include having a designated egress with aggregate surfacing from the site, or by designating off-site parking. The permittee(s) is responsible for (or making the arrangements for) street sweeping and/or scraping if BMPs are not adequate to prevent sediment from being tracked onto the street from the site.

4. If sediment escapes the construction site, off-site accumulations of sediment must be removed in a manner and at a frequency sufficient to minimize off-site impacts (e.g., fugitive sediment in streets could be washed into storm sewers by the next rain and/or pose a safety hazard to users of public streets).
5. Vegetative buffers must be inspected for proper distribution of flows, sediment accumulation and signs of rill formation. If a buffer becomes silt covered, contains rills, or is otherwise rendered ineffective, other control measures shall be implemented. Eroded areas shall be repaired and stabilized.

C. Housekeeping and Standard Operating Procedures

1. Properly handle construction debris and waste materials.

Provide appropriate container(s) on site (or centrally located at several sites) for storing debris and other wastes until disposal. Litter and debris shall be picked-up regularly to reduce the chance for materials to be carried off the site by wind or water. Collected material shall be taken to the appropriate facility for disposal or recycling.

Liquid or soluble materials including oil, fuel, paint and any other hazardous substances must be properly stored, to prevent spills, leaks or other discharges. Restricted access to storage areas must be provided to prevent vandalism. Storage and disposal of hazardous waste must be in compliance with applicable regulations.

2. Concrete wash water shall not be discharged to any waters of the state, storm sewer systems or allowed to drain onto adjacent properties. Wash water disposal must be limited to a defined area of the site or to an area designated for cement washout. The area(s) must be sufficient to contain the wash water and residual cement.

U.S. EPA Small Business Resources Information Sheet

The United States Environmental Protection Agency provides an array of resources, including workshops, training sessions, hotlines, websites and guides, to help small businesses understand and comply with federal and state environmental laws. In addition to helping small businesses understand their environmental obligations and improve compliance, these resources will also help such businesses find cost-effective ways to comply through pollution prevention techniques and innovative technologies.

EPA's Small Business Websites

Small Business Environmental Homepage - www.smallbiz-enviroweb.org

Small Business Gateway - www.epa.gov/smallbusiness

EPA's Small Business Ombudsman - www.epa.gov/sbo or 1-800-368-5888

EPA's Compliance Assistance Homepage

www.epa.gov/compliance/assistance/business.html

This page is a gateway to industry and statute-specific environmental resources, from extensive web-based information to hotlines and compliance assistance specialists.

EPA's Compliance Assistance Centers

www.assistancecenters.net

EPA's Compliance Assistance Centers provide information targeted to industries with many small businesses. They were developed in partnership with industry, universities and other federal and state agencies.

Agriculture

www.epa.gov/agriculture/

Automotive Recycling

www.ecarcenter.org

Automotive Service and Repair

www.ccar-greenlink.org or 1-888-GRN-LINK

Chemical Manufacturing

www.chemalliance.org

Construction

www.cicacenter.org or 1-734-995-4911

Education

www.campuserc.org

Food Processing

www.fpeac.org

Healthcare

www.hercenter.org

Local Government

www.lgean.org

Metal Finishing

www.nmfrc.org

Paints and Coatings

www.paintcenter.org

Printed Wiring Board Manufacturing

www.pwbrc.org

Printing

www.pneac.org

Ports

www.portcompliance.org

U.S. Border Compliance and Import/Export Issues

www.bordercenter.org

Hotlines, Helplines and Clearinghouses

www.epa.gov/epahome/hotline.htm

EPA sponsors many free hotlines and clearinghouses that provide convenient assistance regarding environmental requirements. Some examples are:

Antimicrobial Information Hotline

info-antimicrobial@epa.gov or
1-703-308-6411

Clean Air Technology Center (CATC) Info-line

www.epa.gov/ttn/cate or 1-919-541-0800

Emergency Planning and Community Right-To-Know Act

www.epa.gov/superfund/resources/infocenter/epcra.htm or 1-800-424-9346

EPA Imported Vehicles and Engines Public Helpline

www.epa.gov/otaq/imports or
734-214-4100

National Pesticide Information Center

www.npic.orst.edu/ or 1-800-858-7378

National Response Center Hotline -

to report oil and hazardous substance spills
www.nrc.uscg.mil or 1-800-424-8802

Pollution Prevention Information Clearinghouse (PPIC)

www.epa.gov/opptintr/ppic or
1-202-566-0799

Safe Drinking Water Hotline

www.epa.gov/safewater/hotline/index.html or 1-800-426-4791

Stratospheric Ozone Protection Hotline

www.epa.gov/ozone or 1-800-296-1996

Toxic Substances Control Act (TSCA) Hotline

tsc hotline@epa.gov or 1-202-554-1404

Wetlands Information Helpline

www.epa.gov/owow/wetlands/wetline.html or 1-800-832-7828

State and Tribal Web-Based Resources

State Resource Locators

www.envcap.org/statetools

The Locators provide state-specific contacts, regulations and resources covering the major environmental laws.

State Small Business Environmental Assistance Programs (SBEAPs)

www.smallbiz-enviroweb.org

State SBEAPs help small businesses and assistance providers understand environmental requirements and sustainable business practices through workshops, trainings and site visits. The website is a central point for sharing resources between EPA and states.

EPA's Tribal Compliance Assistance Center

www.epa.gov/tribalcompliance/index.html

The Center provides material to Tribes on environmental stewardship and regulations that might apply to tribal government operations.

EPA's Tribal Portal

www.epa.gov/tribalportal/

The Portal helps users locate tribal-related information within EPA and other federal agencies.

EPA Compliance Incentives

EPA provides incentives for environmental compliance. By participating in compliance assistance programs or voluntarily disclosing and promptly correcting violations before an enforcement action has been initiated, businesses may be eligible for penalty waivers or reductions. EPA has two such policies that may apply to small businesses:

EPA's Small Business Compliance Policy

www.epa.gov/compliance/incentives/smallbusiness/index.html

This Policy offers small businesses special incentives to come into compliance voluntarily.

EPA's Audit Policy

www.epa.gov/compliance/incentives/auditing/auditpolicy.html

The Policy provides incentives to all businesses that voluntarily discover, promptly disclose and expeditiously correct their noncompliance.

Commenting on Federal Enforcement Actions and Compliance Activities

The Small Business Regulatory Enforcement Fairness Act (SBREFA) established a SBREFA Ombudsman and 10 Regional Fairness Boards to receive comments from small businesses about federal agency enforcement actions. If you believe that you fall within the Small Business Administration's definition of a small business (based on your North American Industry Classification System designation, number of employees or annual receipts, as defined at 13 C.F.R. 121.201; in most cases this means a business with 500 or fewer employees), and wish to comment on federal enforcement and compliance activities call the SBREFA Ombudsman's toll-free number at 1-888-REG-FAIR (1-888-734-3247), or go to their website at www.sba.gov/ombudsman.

Every small business that is the subject of an enforcement or compliance action is entitled to comment on the Agency's actions without fear of retaliation. EPA employees are prohibited from using enforcement or any other means of retaliation against any member of the regulated community in response to comments made under SBREFA.

Your Duty to Comply

If you receive compliance assistance or submit a comment to the SBREFA Ombudsman or Regional Fairness Boards, you still have the duty to comply with the law, including providing timely responses to EPA information requests, administrative or civil complaints, other enforcement actions or communications. The assistance information and comment processes do not give you any new rights or defenses in any enforcement action. These processes also do not affect EPA's obligation to protect public health or the environment under any of the environmental statutes it enforces, including the right to take emergency remedial or emergency response actions when appropriate. Those decisions will be based on the facts in each situation. The SBREFA Ombudsman and Fairness Boards do not participate in resolving EPA's enforcement actions. Also, remember that to preserve your rights, you need to comply with all rules governing the enforcement process.

EPA is disseminating this information to you without making a determination that your business or organization is a small business as defined by Section 222 of the Small Business Regulatory Enforcement Fairness Act or related provisions.

§21.13

approve or disapprove the State issued statement, in accordance with the requirements of §21.5.

(2) The Regional Administrator will periodically review State program performance. In the event of State program deficiencies the Regional Administrator will notify the State of such deficiencies.

(3) During that period that any State's program is classified as deficient, statements issued by a State shall also be sent to the Regional Administrator for review. The Regional Administrator shall notify the State, the applicant, and the SBA of any determination subsequently made, in accordance with §21.5, on any such statement.

(i) If within 60 days after notice of such deficiencies has been provided, the State has not taken corrective efforts, and if the deficiencies significantly affect the conduct of the program, the Regional Administrator, after sufficient notice has been provided to the Regional Director of SBA, shall withdraw the approval of the State program.

(ii) Any State whose program is withdrawn and whose deficiencies have been corrected may later reapply as provided in §21.12(a).

(g) Funds appropriated under section 106 of the Act may be utilized by a State agency authorized to receive such funds in conducting this program.

§21.13 Effect of certification upon authority to enforce applicable standards.

The certification by EPA or a State for SBA Loan purposes in no way constitutes a determination by EPA or the State that the facilities certified (a) will be constructed within the time specified by an applicable standard or (b) will be constructed and installed in accordance with the plans and specifications submitted in the application, will be operated and maintained properly, or will be applied to process wastes which are the same as described in the application. The certification in no way constitutes a waiver by EPA or a State of its authority to take appropriate enforcement action against the owner or operator of such facilities for violations of an applicable standard.

PART 22—CONSOLIDATED RULES OF PRACTICE GOVERNING THE ADMINISTRATIVE ASSESSMENT OF CIVIL PENALTIES AND THE REVOCATION/TERMINATION OR SUSPENSION OF PERMITS

Subpart A—General

- Sec. 22.1 Scope of this part. 22.2 Use of number and gender. 22.3 Definitions. 22.4 Powers and duties of the Environmental Appeals Board, Regional Judicial Officer and Presiding Officer; disqualification, withdrawal, and reassignment. 22.5 Filing, service, and form of all filed documents; business confidentiality claims. 22.6 Filing and service of rulings, orders and decisions. 22.7 Computation and extension of time. 22.8 Ex parte discussion of proceeding. 22.9 Examination of documents filed.

Subpart B—Parties and Appearances

- 22.10 Appearances. 22.11 Intervention and non-party briefs. 22.12 Consolidation and severance.

Subpart C—Prehearing Procedures

- 22.13 Commencement of a proceeding. 22.14 Complaint. 22.15 Answer to the complaint. 22.16 Motions. 22.17 Default. 22.18 Quick resolution; settlement; alternative dispute resolution. 22.19 Prehearing information exchange; prehearing conference; other discovery. 22.20 Accelerated decision; decision to dismiss.

Subpart D—Hearing Procedures

- 22.21 Assignment of Presiding Officer; scheduling the hearing. 22.22 Evidence. 22.23 Objections and offers of proof. 22.24 Burden of presentation; burden of persuasion; preponderance of the evidence standard. 22.25 Filing the transcript. 22.26 Proposed findings, conclusions, and order.

Subpart E—Initial Decision and Motion to Reopen a Hearing

- 22.27 Initial decision. 22.28 Motion to reopen a hearing.