



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8

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

Ref: 8ENF-W-NP

DEC 31 2008

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Randy I. Westby
Registered Agent for
INREIT Properties, LLLP.
216 South Broadway, Suite 202
Minot, ND 58701-3852

Dale D. Lian
Registered Agent for
Goldmark Development Corporation
1707 Gold Dr. South
P.O. Box 3024
Fargo, ND 58108-3024

Re: Notice of Proposed Assessment of Civil
Penalty against INREIT Properties, LLLP
and Goldmark Development Corporation

Dear Mr. Westby and Mr. Lian:

Enclosed is a document entitled Penalty Complaint and Notice of Opportunity for Hearing ("Complaint"). The United States Environmental Protection Agency ("EPA") is issuing this Complaint against INREIT Properties, LLLP and Goldmark Development Corporation ("Respondents") pursuant to section 309 of the Clean Water Act ("Act"), 33 U.S.C. §1319. In the Complaint, EPA alleges that Respondents violated sections 301(a), 308, and 402(p) of the Act, 33 U.S.C. §§1311(a), 1318, and 1342(p) at the Autumn Ridge Apartments in Grand Forks, North Dakota. The Complaint proposes that a penalty of \$25,000 be assessed against the Respondents for these violations.

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

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

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

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

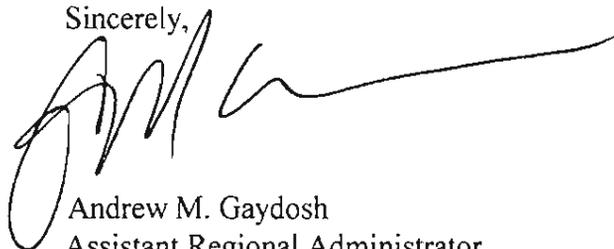
If the Respondents do not file an answer within 30 days (see 40 C.F.R. §22.15(d)), they may be found in default. A default judgment may impose the full penalty proposed in the Complaint of \$25,000.

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

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

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

Sincerely,



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

Enclosures:

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

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

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8**

2008 DEC 31 10:11:25

DEC 22 10:19 AM '08
FBI

In the Matter of:)	
)	
INREIT Properties, LLLP)	PENALTY COMPLAINT AND
and)	NOTICE OF OPPORTUNITY
Goldmark Development Corporation)	FOR HEARING
)	
)	Docket No. CWA-08-2009-0004
Respondents.)	

INTRODUCTION

This civil administrative enforcement action is authorized by Congress in section 309(g) of the Federal Water Pollution Control Act, commonly known as the Clean Water Act (the "CWA" or "Act"), 33 U.S.C. §1319(g). The rules for this proceeding are the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders and the Revocation, Termination or Suspension of Permits ("Rules of Practice")," 40 Code of Federal Regulations ("C.F.R.") part 22, a copy of which is attached as Exhibit 1.

The United States Environmental Protection Agency ("EPA") proposes to assess a civil administrative penalty against INREIT Properties, LLLP and Goldmark Development Corporation ("Respondents"), as more fully described below.

ALLEGATIONS

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

1. Respondent INREIT Properties, LLLP ("INREIT") is a North Dakota limited partnership.
2. Respondent Goldmark Development Corporation ("Goldmark") is a North Dakota corporation.
3. Each Respondent is a "person" as that term is defined in section 502(5) of the Act, 33 U.S.C. §1362(5), and 40 C.F.R. §122.2.

4. Respondent INREIT owns property at which an apartment complex known as the Autumn Ridge Apartments was constructed, at 2251, 2351, 2401, and 2451 36th Ave. S, Grand Forks, ND 58201 (the "Site"), encompassing approximately 9.8 acres.
5. Construction activities began at the Site in 2004.
6. Goldmark has had day-to-day responsibility for construction at the Site at least since 2007.
7. The runoff and drainage from the Site are "storm water" as defined in 40 C.F.R. §122.26(b)(13).
8. Storm water contains "pollutants" as defined by section 502(6) of the Act, 33 U.S.C. §1362(6).
9. Storm water, snow melt, surface drainage and runoff water have been leaving the Site and have flowed into the City of Grand Forks' municipal separate storm sewer system ("MS4").
10. The City Grand Forks' MS4 discharges by gravity flow to the Red River of the North.
11. The Red River of the North is a "navigable water" as defined by section 502(7) of the Act and part of the "waters of the United States" as defined by 40 C.F.R. §122.2.
12. The storm water discharge from the Site is the "discharge of a pollutant" as defined by section 502(12) of the Act, 33 U.S.C. §1362(12) and 40 C.F.R. §122.2.
13. The storm water discharge from the Site is a discharge from a "point source" as that term is defined in section 502(14) of the Act, 33 U.S.C. §1362(14) and 40 C.F.R. §122.2.
14. In order to restore and maintain the integrity of the nation's water, section 301(a) of the Act, 33 U.S.C. §1311(a), prohibits the discharge of any pollutant by any person into navigable waters, unless authorized by certain other provisions of the Act, including section 402 of the Act, 33 U.S.C. §1342.
15. Section 402 of the Act, 33 U.S.C. §1342, establishes a National Pollutant Discharge Elimination System ("NPDES") program, under which EPA (and states with authorization from EPA) may permit discharges of pollutants into navigable waters, subject to specific terms and conditions.
16. Section 402(p) of the Act, 33 U.S.C. §1342(p), requires that any discharge of storm water associated with an industrial activity must comply with the requirements of an NPDES permit.

17. Any discharge from construction activity that disturbs at least five acres (or that disturbs a piece of land that is less than five acres but is part of a larger common plan of development ultimately disturbing over five acres) constitutes a storm water discharge associated with industrial activity. 40 C.F.R. §122.26(b)(14)(x).
18. Any discharge from construction activity that disturbs at least one acre (or that disturbs a piece of land that is less than one acre but is part of a larger common plan of development ultimately disturbing over one acre) constitutes a storm water discharge associated with small construction activity. 40 C.F.R. §122.26(b)(15)(i).
19. Each person discharging storm water associated with industrial activity or with small construction activity must obtain NPDES permit coverage under either an individual permit or a promulgated general permit. 40 C.F.R. §122.26(c); 33 U.S.C. §§1311(a), 1318, and 1342(p).
20. Prior to beginning construction at the Site, the Respondents were required to have obtained NPDES permit coverage for their discharges of storm water from the Site. 40 C.F.R. §122.21(c).
21. 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.
22. Effective October 11, 2004, NDDH issued a general NPDES permit (Permit No. NDR10-0000, referenced as the “2004 Permit”) authorizing discharges of storm water associated with construction activities, if done in compliance with its conditions.
23. Parts I.A.2.a, I.D.2, and V of the 2004 Permit define “large construction activity” as land disturbance of equal to or greater than 5 acres. Large construction activity also includes the disturbance of less than 5 acres of total land area that is part of a larger common plan of development or sale, if the larger common plan will ultimately disturb equal to or greater than 5 acres.
24. Part V of the 2004 Permit defines “common plan of development or sale” as a contiguous area where multiple separate and distinct land disturbing activities may be taking place at different times, on different schedules, but under one proposed plan. One plan is broadly defined to include design, permit application, advertisement or physical demarcation indicating that land-disturbing activities may occur.
25. Each apartment building at the Site is part of a common plan of development that has ultimately disturbed more than 5 acres.
26. Had the Respondents applied for coverage under the 2004 Permit, they would have been required to comply with those provisions of that permit that apply to large construction activity.

27. The 2004 Permit replaced a general permit that the NDDH had previously issued (Permit No. NDR03-0000, referenced as the 1999 Permit”), which also authorized discharges of storm water associated with construction activities, if done in compliance with its conditions.
28. The Respondents have not applied for coverage under either the 1999 Permit or the 2004 Permit for their discharges from the Site.
29. The Respondents have not obtained coverage under either the 1999 Permit or the 2004 Permit for their discharges from the Site.
30. The Respondents have not applied for coverage under any individual NPDES permit for their discharges from the Site.
31. The Respondents have not obtained coverage under any individual NPDES permit for their discharges from the Site.
32. In May of 2008, EPA inspectors observed conditions at the Site from the street and nearby property. They observed excessive sediment in storm drains at the Site, missing or inadequate best management practices, and large areas of disturbed soil without stabilization measures in place.
33. At the time the EPA inspectors observed the Site, active construction was not occurring, and all apartment buildings appeared to be occupied. The area surrounding the two most recently constructed buildings (2251 and 2351 36th Ave. S) at the Site did not have temporary erosion protection provided for exposed soils where activities had been completed. Nor was the Site stabilized with any vegetative cover over at least 70 percent of the pervious surface or by any other means to prevent soil failure under erosive conditions.
34. Had Respondents obtained coverage under the 2004 Permit, they would have been required to provide temporary erosion protection for exposed soils where activities had been completed and, in order to terminate coverage under the 2004 Permit, to stabilize the area surrounding the buildings at 2251 and 2351 36th Ave. S with vegetative cover over at least 70 percent of the pervious surface or otherwise prevented soil failure under erosive conditions.
35. Pursuant to section 309(g) of the Act, 33 U.S.C. §1319(g), EPA has consulted with NDDII regarding assessment of this administrative penalty by furnishing a copy of this complaint and inviting comments.

COUNT 1

36. Respondents failed to apply for and obtain coverage either under the 1999 Permit or the 2004 Permit, or under any individual permit, for discharges from construction activities at the Site.
37. Respondents' failure to apply for and obtain coverage either under the 1999 Permit and the 2004 Permit, or under any individual permit, constitutes a violation of EPA's regulations and the Act. 40 C.F.R. §122.26(c); 33 U.S.C. §§1318 and 1342(p).

COUNT 2

38. Respondents have discharged storm water into waters of the United States from the Site to the Red River of the North via the City of Grand Forks' MS4 without authorization by any permit issued under the Act.
39. Respondents' discharge without permit authorization constitutes a violation of the Act for each day in which a discharge has occurred. 33 U.S.C. §1311(a).

PROPOSED CIVIL PENALTY

Section 309(g)(2)(B) of the Act, 33 U.S.C. §1319(g)(2)(B), as adjusted for inflation by 40 C.F.R. part 19, authorizes the EPA to assess a civil administrative penalty of up \$11,000 per day for each day during which a violation continues on or after March 15, 2004, with a maximum of \$157,500. Section 309(g)(3) of the Act requires EPA to take into account the following factors in assessing a civil administrative penalty: the nature, circumstances, extent and gravity of the violation(s) and, with respect to the violator, ability to pay, any prior history of such violations, degree of culpability, any economic benefit or savings gained from the violation, and such other factors that justice may require.

In light of the statutory factors and the specific facts of this case, EPA proposes that a penalty of \$25,000 be assessed against Respondents for the violations alleged above, as explained below:

Nature, Circumstances, Extent, and Gravity of Violations

As mentioned above, EPA observed excessive sediment in storm drains at the Site. Best management practices (BMPs) that would have minimized sediment discharges were missing. The soil around the two most recently constructed buildings at the Site had no temporary erosion protection or stabilization with vegetative cover, leaving it vulnerable to erosion. Had the Respondents obtained and complied with a storm water discharge permit, they would have controlled their discharges and minimized sediment discharges.

EPA has found that storm water discharges from construction sites can severely compromise the integrity of our nation's waters. High sediment loads can cause siltation, which EPA found in 1998 to be the largest cause of impaired water quality in rivers and the third largest cause of impaired water quality in lakes. Other pollutants can be preferentially absorbed into fine sediment, causing nutrients, especially phosphorus, metals, and organic compounds to move into aquatic ecosystems. Discharges from construction sites have been identified as a source of pollution in 6 percent of impaired rivers, 11 percent of impaired lakes, ponds, and reservoirs, and 11 percent of impaired estuaries. Sediment can fill lakes and reservoirs and clog stream channels, with effects extending far downstream of the construction site. EPA has found that erosion rates from construction sites are much greater than from almost any other land use. Suspended sediment concentrations from construction sites have been found to be many times the concentrations from already-developed urban areas. Excess sediment is associated with increased turbidity, with reduced light penetration in the water column, with long-term habitat destruction, and with increased difficulty in filtering drinking water. See 64 Fed. Reg. 68722, 68728-68731 (Dec. 8, 1999) for more information on how discharges from construction sites cause water pollution.

EPA and states with authorized NPDES programs rely on the permit program to implement the controls needed to prevent water pollution. The Respondents' failure to apply for large construction activity coverage under the Permit jeopardizes the integrity of EPA's and the NDDH's programs to control storm water pollution.

Prior Compliance History

This complaint is the first enforcement action EPA Region 8 has issued to Respondents regarding noncompliance with the storm water requirements. However, correspondence from the NDDH indicates that in 2003, at an apartment complex it was then building elsewhere in Grand Forks, Goldmark had failed to control sediment from entering a nearby water body and bike path as required by the 1999 Permit.

Degree of Culpability

INREIT owns numerous construction sites, prospective development sites, and other real estate developments in North Dakota. Goldmark has constructed apartment complexes and similar developments in North Dakota.

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

In 1990, EPA promulgated Phase I of its storm water program. (55 Fed. Reg. 47990-48091, November 16, 1990.) Phase I required NPDES permit coverage for storm water discharges from construction activity disturbing five or more acres of land, either by itself or in conjunction with other parts of a common development. (55 Fed. Reg. at 48066.) In 1999, EPA

extended this requirement to storm water discharges from construction activity disturbing between 1 and 5 acres of land. (64 Fed. Reg. 68722, 68839, December 9, 1999.)

Additionally, NDDH has conducted numerous training and outreach activities over the past several years to increase the awareness of the regulated community. The training and outreach activities since 2002 include at least 7 trainings to the Home Builder Associations on “Storm water 101” and at least 7 trainings to contractors and construction engineers on permit compliance and sediment/erosion control.

Moreover, Respondent Goldmark was actually aware of NDDH’s storm water permit requirements, having applied for permit coverage for at least two other construction sites in North Dakota. In April of 2003, Goldmark submitted a notice of intent to be covered under the 1999 Permit for another apartment complex in Grand Forks. In 2007, Goldmark submitted a notice of intent to be covered under the 2004 Permit for a townhouse complex in West Fargo.

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

Economic Benefit

Respondents received an economic benefit from their failure to obtain Permit coverage and their failure to comply with the requirements in the storm water discharge permit. They benefited by not spending the required funds to install and maintain all necessary BMPs (e.g., erosion control blanket, seeding, and storm inlet protection), to conduct inspections at the frequency required by the Permit, and to develop a complete storm water pollution prevention plan (SWPPP).

Ability to Pay

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

Other Matters that Justice may Require

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

NOTICE OF OPPORTUNITY FOR A HEARING

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

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

QUICK RESOLUTION

Respondents may resolve this proceeding at any time by paying the penalty amount proposed in this complaint. Respondents may make this payment by sending a cashier's or certified check for this amount, including the name and docket number of this case, payable to "Treasurer, United States of America," to Mellon Bank, Lockbox 360859, Pittsburgh, PA 15251-6859, and by filing a copy of the check with the Regional Hearing Clerk for EPA Region 8 at the address given above.

If the Respondents make this payment within 30 days of receiving this complaint, they need not file an answer. Such payment waives Respondents' right to contest the allegations and to appeal any final order resulting from this complaint. See section 22.18 of the Rules of Practice for more explanation of the quick resolution process.

SETTLEMENT NEGOTIATIONS

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

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

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

PUBLIC NOTICE

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

Date: Oct 15, 2008 By: Margaret J. (Peggy) Livingston
Margaret J. (Peggy) Livingston
Enforcement Attorney

Date: 12/3/08 By: 
Andrew M. Gaydosh
Assistant Regional Administrator

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

CERTIFICATE OF SERVICE

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

Randy I. Westby
Registered Agent for
INREIT Properties, LLLP
216 South Broadway, Suite 202
Minot, ND 58701-3852

Dale D. Lian
Registered Agent for
Goldmark Development Corporation
1707 Gold Dr. South
P.O. Box 3024
Fargo, ND 58108-3024

Certified Mail
Return Receipt Requested
No. _____

Certified Mail
Return Receipt Requested
No. _____

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

David Glatt
North Dakota Department of Health
918 East Divide Avenue
Bismarck, ND 58501-1947

Certified Return Receipt No. _____

The original and one copy were hand-delivered to:

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

Date: _____