

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 8

2007 OCT 29 PM 3:10

Docket No. CWA-08-2007-0020

In the Matter of:

Hunt Building Company, Ltd.,  
a Texas corporation,

Respondent.

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**ANSWER AND REQUEST FOR  
HEARING**

Respondent Hunt Building Company, Ltd. ("Respondent"), by and through the undersigned counsel, hereby files its Answer and Request For Hearing in response to the Penalty Complaint and Notice of Opportunity for Hearing (the "Complaint") and states as follows:

**INTRODUCTION, NOTICE OF OPPORTUNITY FOR HEARING, QUICK  
RESOLUTION, and SETTLEMENT NEGOTIATIONS**

1. Except as stated below, ¶¶1-7 of the Complaint contain allegations of law and administrative procedure to which no response is required.
2. To the extent that ¶2 of the Complaint contains factual allegations, Respondent is without knowledge of such allegations.
3. Except as admitted or explained below, Respondent denies the allegation contained in ¶3 of the Complaint that Respondent has violated the Act and its implementing regulations.

**GENERAL ALLEGATIONS**

4. ¶¶8-13 of the Complaint contain allegations of law to which no response is required.
5. In response to ¶14 of the Complaint, Respondent admits that it is doing business in the State of Colorado but denies that it is a Texas corporation. Respondent explains that it is a Texas limited partnership.
6. Respondent admits the allegations contained in ¶15 of the Complaint.
7. Respondent admits the allegations contained in ¶16 of the Complaint.
8. ¶17 of the Complaint contains allegations of law to which no response is required.

9. ¶18 of the Complaint contains allegations of law to which no response is required.
10. In response to ¶19 of the Complaint, Respondent denies that it owned the project but admits that it engaged in construction activities at the project alleged in said paragraph.
11. Respondent admits the allegations contained in ¶20 of the Complaint.
12. ¶21 of the Complaint contains allegations of law to which no response is required.
13. ¶22 of the Complaint contains allegations of law to which no response is required.
14. The allegations contained in ¶23 of the Complaint are not pled with particularity, and therefore Respondent is without knowledge of such allegations and, except as explained below, cannot respond further at this time.
15. Respondent is without personal knowledge of the allegations contained in ¶24 of the Complaint, but Respondent explains that said allegations appear to be consistent with provisions of Respondent's SWPPP.
16. ¶25 of the Complaint contains allegations of law to which no response is required.
17. ¶26 of the Complaint contains allegations of law to which no response is required.
18. ¶27 of the Complaint contains allegations of law to which no response is required.
19. Respondent admits the allegations contained in ¶28 of the Complaint.
20. Respondent admits the allegations contained in ¶29 of the Complaint.
21. In response to ¶30 of the Complaint, Respondent admits that City of Aurora employees entered Respondent's facility and inspected the facility on or about the dates alleged (as well as at other times).
22. The first sentence of ¶31 of the Complaint contains allegations of law to which no response is required. Respondent admits that it is covered under the EPA general construction permit as alleged in the second sentence of this paragraph.
23. Respondent is without knowledge of the allegations contained in ¶32 of the Complaint.

## COUNT 1

24. The first sentence of ¶33 of the Complaint contains a conclusion of law to which no response is required. In response to the second sentence of said paragraph, Respondent explains that the Permit requires inspections to be conducted in accordance with either of two schedules listed in the Permit: (1) at least once every 7 calendar days OR (2) at least once every

14 calendar days and within 24 hours of the end of a storm event of 0.5 inches or greater. Respondent explains that its SWPPP required inspections every seven (7) days **and** after all actual storm events (emphasis added). Respondent denies that it failed to inspect 28 times within 7 days during June 2005 through April 2007.

25. ¶34 of the Complaint contains allegations of law to which no response is required.

### **COUNT 2**

26. The allegations contained in the first sentence of ¶35 of the Complaint are not pled with particularity and therefore Respondent is without knowledge of such allegations and, except as explained below, cannot respond further at this time. Respondent admits the allegations contained in the second sentence of said paragraph.

27. ¶36 of the Complaint contains allegations of law to which no response is required, but, as explained below, Respondent believes that it developed a complete SWPPP as required by the Permit.

### **COUNT 3**

28. Respondent admits the first sentence contained in ¶37 of the Complaint. The allegations contained in the second sentence of said paragraph are not pled with particularity, and therefore Respondent is without knowledge of such allegations and, except as explained below, cannot respond further at this time.

29. ¶38 of the Complaint contains allegations of law to which no response is required.

### **PROPOSED CIVIL PENALTY**

30. ¶39 of the Complaint contains allegations of law to which no response is required.

31. In response to ¶40 of the Complaint, Respondent denies that the proposed penalty is appropriate in light of the statutory factors and the specific facts of this case. In further response to the allegations contained in said paragraph, Respondent state as follows:

#### Nature, Circumstances, Extent, and Gravity of Violations

Respondent admits that it began construction at the facility in April of 2005. Respondent admits that EPA conducted inspections of the facility on August 10, 2006 and March 19 and 22, 2007. The inspection reports from those inspections speak for themselves, and Respondent neither admits nor denies the characterization of the reports as alleged in the Complaint. Respondent admits that the inspection reports raise various compliance issues regarding the content and implementation of its SWPPP. Respondent denies that its SWPPP did not include proper identification of the responsible person, the total area of soil disturbance, or the BMPs that would be implemented. The allegation that the SWPPP did not contain an updated sequence of activities is vague and, except as explained below, Respondent therefore denies the allegation

as written. The Complaint also alleges that BMPs were not in place or not being maintained but specific instances are not pled with particularity. Therefore, Respondent is without knowledge of the specific instances upon which Complainant relies for these allegations and, except as explained below, cannot respond further at this time. Respondent explains that in response to both of the EPA inspection reports, it provided detailed responses to EPA's findings and corrective actions and identified the BMPs that were being and were to be implemented at the site. EPA did not respond to these submissions from Respondent. Respondent denies that the alleged lack of BMPs resulted in sediment loading from Respondent's project into East Toll Gate Creek or the Aurora MS4.

With respect to each of the counts set forth in the Complaint, Respondent provides the following further explanation of the nature, circumstances, extent, and gravity of the alleged violations:

*Count 1: Storm Water Inspections.* The Complaint alleges that Respondent failed to inspect 28 times within 7 days during the period from June 2005 through April 2007. Complaint, ¶33. Respondent denies this allegation; Respondent has been able to identify only 25 instances of late inspection. While certain inspections did not occur as planned, due to the press of other business, intervening weather, or other circumstances, the extent of these late inspections must be considered in relation to the total number of inspections conducted by Respondent on this project. Respondent conducted 129 storm water inspections on the project over the approximately two and a half year life of the project. The 25 instances of failure to inspect thus constitute only approximately 19% of all inspections conducted. Thus, the vast majority of inspections were made as required by the SWPPP. The May 4, 2007 EPA inspection report confirms this: "The review of the inspection reports indicated that inspections typically are conducted every 7 days; however, on one occasion an inspection was not performed for 18 days."

Of the 25 inspections, half (12/25) were only one day late; 20% (5/25) were only two days late; and 12% (3/25) were only three days late. Thus, 80% of the late inspections were conducted within three days of when they should have occurred. Moreover, of the remaining 20% of late inspections, all but one occurred on or before the 13<sup>th</sup> day. Only one of the inspections occurred more than 14 days after the previous inspection.

Under the facts of this case, it is undisputed that Respondent timely conducted SWPPP storm water inspections most of the time. Furthermore, on those occasions when an inspection was not conducted within 7 days, it nonetheless was conducted very shortly thereafter. Thus, the nature and extent of the alleged violation in this regard was occasional and minor. Respondent also notes that one of the two permissible schedules under the Permit allows inspections to be conducted on 14-day intervals (provided that ad-hoc inspections also are conducted after storm events of a certain magnitude). The existence of this 14-day interval reflects a determination that, absent a storm event, inspections at a lesser interval are not imperative in order to protect the environment. In this case, all but one of Respondent's inspections in fact occurred within a 14-day interval. In light of the fact that the regulation contains a 14-day inspection interval alternative, the fact that some of Respondent's inspections took place more than 7 days but less

than 14 days does not appear likely to have created a significant increased risk of harm to the environment, and the gravity of the alleged violation low.

*Count 2: Failure to develop a complete SWPPP.* The Complaint alleges failures to develop a complete SWPPP. One allegation is a failure to properly identify the responsible person. Complaint, ¶33. Respondent disputes this allegation. In its March 13, 2007 inspection response, Respondent provided to EPA a copy of a signature page with Mr. Jackson's signature and a date of May 10, 2006. The May 4, 2007 EPA inspection report states: "Bruce Jackson certified/signed the SWPPP on May 10, 2006 to reflect his replacement of Larry Parson." Respondent does not know why the August, 2006 inspection did not contain this same finding, but Respondent disputes that it failed to identify the responsible person.

The Complaint also alleges that the SWPPP did not contain the total area of soil disturbance. Complaint, ¶33. Respondent disputes this allegation. The EPA inspection report from the August 10, 2006 inspection shows that the SWPPP did contain this information: "Total area of site and total area to be disturbed? **Y**. 70.0 acres". (emphasis added). The report also states: "Location of materials or equipment storage on site map (on-site or off-site)? **Y**. Staging area may have extended beyond the 70 acres designated for the housing development." (emphasis added). The May 4, 2007 EPA inspection report also reflects that the SWPPP contained information concerning the total area of soil disturbance and the location of materials off-site: "Location of materials or equipment storage on site map (on-site or off-site) **Y**. The staging area extends beyond the 70 acres designated for the housing development. The staging area is not on the Buckley AFB and is covered under a separate storm water permit." (emphasis added).

The Complaint alleges that the SWPPP did not contain information concerning the BMPs being implemented and an updated sequence of activities. Complaint, ¶33. However, the SWPPP does contain information concerning the BMPs to be implemented. Furthermore, the August 10, 2006 inspection report states: "Does the SWPPP include a description of all pollution control measures (BMPs) that will be implemented to control pollutants in storm water discharges, including sequence and which operator responsible for implementation? **Y**." (emphasis added).

The August 10, 2006 inspection report states: "Is SWPPP revised when BMPs added/modified within 7 days after inspection reveals problems? **N**. **Some** BMPs (i.e. at detention pond outlets) have been modified/added but not noted in SWPPP." (emphasis added).<sup>1</sup> Therefore, Respondent believes that the nature of the violation alleged is that Respondent on occasion failed to update the SWPPP in a timely fashion regarding BMP additions/modifications. The specific instances are not pled with particularity so Respondent cannot respond more particularly concerning the nature and extent of any particular instance, but Respondent explains that it did frequently update the SWPPP regarding BMP modifications/additions. Furthermore, Respondent did keep records of BMP modifications/additions for the most part if not completely, and, even if the modifications/additions were not noted in the SWPPP, evidence of the modifications/additions was available. Accordingly, there was not an information vacuum

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<sup>1</sup> The May 4, 2007 EPA inspection report also asserts that BMPs have been modified/added but not noted in the SWPPP.

concerning BMP modifications/additions, and Respondent submits that the gravity of this violation also is low.

*Count 3: failure to implement BMPs.* The Complaint alleges that inspections showed that BMPs involving erosion and/or sediment controls on slopes and banks, silt fencing, culvert protection, inlet protection, outlet protection, vehicle track out pad, and good housekeeping were not in place or were not being maintained. Complaint, ¶37. The Complaint does not identify the specific instances at issue so Respondent cannot provide a particularized response concerning the extent of these alleged violations at this time, but Respondent did put in place and make a continuing effort to maintain BMPs in every area required by its SWPPP throughout the life of the project. Furthermore, Respondent provided detailed information to Complainant and the City of Aurora concerning the placement and maintenance of its BMPs.

The Complaint alleges that the lack of BMPs resulted in sediment loading into “the detention ponds” that discharge to East Toll Gate Creek and the Aurora MS4. Respondent disputes this allegation. As set forth in the SWPPP, Respondent maintained sediment ponds the purpose of which was to collect sediment during construction. When sufficient sediment collected in the ponds, Respondent cleaned them out. Reference to the sediment ponds as “detention ponds” is a misnomer. The SWPPP did not contemplate the creation of detention basins until final grading and stabilization of site landscape. That occurred only toward the end of the project at which time the grading changed to reflect the final planned “detention basins”. During construction, Respondent’s sediment ponds operated as intended to collect sediment, and Respondent disputes that its ponds loaded sediment into either East Toll Gate Creek or the Aurora MS4. In addition, if sediment were discharged to East Toll Gate Creek or the Aurora MS4, there were a number of other potential sources in the area at the time, including, without limitation, the numerous other construction sites in the area and the City of Aurora’s snow plowing and piling program.

Respondent engaged in a constant process of inspection and maintenance of BMPs on its site and especially during the winter weather in 2006-07, when continuous severe storms hit the project. However, there was not a construction site in the area that was able to withstand the onslaught of the heavy winter and the effect it had on BMPs. Nonetheless, Respondent focused its attention on areas that appeared to present the greatest risk of potential discharge, and EPA and Aurora inspection reports show that Respondent made progress in addressing BMP concerns noted by those agencies. Respondent submits that overall its site generally compared favorably to other construction sites in the area in regard to placement and maintenance of BMPs.

In addition, Aurora did not manage Respondent’s storm water system as a public utility. Therefore, Respondent re-designed its site as a self-contained private system with temporary sediment ponds capable of capturing a majority of storm water runoff up to a 100-year storm event. As noted above, those ponds ultimately were converted to large detention basins. Thus, inlet protections were not the only BMPs in place; the sediment ponds acted as a safety net to capture sediment-laden runoff and allow sediments to settle prior to any water runoff into outlet structures and pipes. Respondent did maintenance on the inlet BMPs, but, even if there ever were brief periods(i.e. hours) when they were not as effective as planned, the sediment ponds

provided additional protection against discharge to East Toll Gate Creek. As a result, to the best of Respondent's knowledge, sediments were not discharged to the creek.

Respondent seeded site slopes when grading was completed in the fall of 2006. If there were portions of slopes which did not germinate sufficiently through the winter, the south and west facing slopes were re-stabilized and seeded upon snow pack melting and ground thawing. During these periods, East Toll Gate Creek remained protected by excelsior logs near the base of the slopes and silt fencing set up some 50 feet from the bases of slopes. These silt fences were not overtaken by sediment runoff. Silt fences were largely replaced in the spring of 2007 after the snow melt and ground thaw had taken place. In addition, at Aurora's request, Respondent installed large check dams along the southern border to provide a further degree of redundancy to the BMPs in place in that area.

Also, vehicle tracking pads were installed throughout the site and maintained on a regular basis. Respondent has provided photographs of this. Aurora inspection reports on the project document that this BMP was in place and being utilized.

Housekeeping was maintained throughout the life of the project, and cleanup was conducted on a daily basis, usually near the end of each day. If dumpsters appeared fully loaded, it is because they were being utilized as contemplated to collect trash rather than letting it remain uncollected. In addition, Respondent made a good faith effort to balance the number of dumpsters that could be placed on site and the number of dumpsters that reasonably could be hauled per day.

#### Prior Compliance History

Respondent has no prior compliance history with EPA Region 8 in regard to applicable storm water regulations.

#### Degree of Culpability

At all times material to this Complaint, Respondent demonstrated a continuing, good faith effort to comply with applicable storm water regulations; to meet all paperwork requirements, and to put in place and maintain all applicable BMPs. At the outset of the project, Respondent engaged the services of a professional environmental consulting firm to develop a comprehensive SWPPP. The EPA inspection reports reflect that the SWPPP was prepared and available. Furthermore, throughout the life of the project, Respondent conducted weekly inspections of the site (with the few exceptions noted above) and recorded the results in the storm water management plan best management practices inspection checklists. These checklists reflect that Respondent engaged in a continuing effort to insure that BMPs were in place and, if a problem were identified, to rectify it as soon as reasonably possible.

The Complaint alleges: "During multiple inspections by EPA and City of Aurora, Respondent was provided information on compliance concerns and permit requirements. However, violations continued at the site." Respondent explains that at all times it endeavored to comply with all applicable regulations. Nonetheless, a large construction project is a complex

undertaking occurring over a long period of time. Respondent regrets any violation which occurred and is committed to attempting to avoid violations from occurring in the future at other of its projects, but Respondent submits that it is inevitable with a project of this size that some violation may be found on any given day. Therefore, it is not surprising that violations were found at Respondent's Buckley site. However, Respondent did not knowingly or intentionally fail to comply with applicable regulations or to allow any violation to continue without an effort to correct it in a timely fashion. To the contrary, the evidence reflects that Respondent responded diligently and in good faith to address violations whenever noted.

With respect to why certain violations were noted by the City of Aurora, Respondent explains that its construction project was completed in sections. As each section was completed, Respondent requested an inspection to obtain release of water meters for that section. As Aurora informed Respondent, it is Aurora's practice to re-inspect the entire site even if water meters are requested for only the completed portion of the site. As a result, some violations that Aurora previously noted were noted again even if they already were under a schedule for remediation. At all times, however, Respondent remained in contact with the City of Aurora and provided it with a schedule for completion of all violations noted, which Aurora accepted without objection.

Respondent also notes that there were numerous different inspectors involved with this site, and they were inconsistent in instructions concerning the utilization of BMPs. Respondent struggled with inconsistencies in the details of BMPs being dictated by the City as opposed to information contained in Respondent's SWPPP and the interpretations of the Buckley AFB environmental office and EPA personnel. There was confusion over who had what jurisdiction over Respondent's site and from whom Respondent was to take direction. On occasion, the City required Respondent to change details from that directed in the SWPPP. When Respondent put in place, at Buckley's suggestion, how to protect an overflow from a sediment pond, Respondent was criticized by EPA. In the face of these contradictory and confusing instructions from various governmental personnel, Respondent nonetheless did its best to place and maintain all required BMPs.

Under all of the foregoing circumstances, Respondent submits that the degree of culpability in this case is low.

#### Economic Benefit

Respondent disputes that it received an economic benefit from the failures alleged in the Complaint. With respect to its storm water inspections, these inspections were conducted by Respondent's own, salaried personnel, not by an outside inspection service. Furthermore, even though some inspections were conducted a few days late, they were in fact conducted, and Respondent did not fail to spend funds in regard to storm water inspections. With respect to its SWPPP, Respondent paid a third-party, environmental consulting firm to develop a complete SWPPP, and Respondent's own, salaried personnel were responsible for updating the SWPPP. Respondent did not achieve an economic benefit in the form of not expending funds to develop or update its SWPPP. With respect to BMPs, Respondent estimates that it spent approximately \$388,000.00 on storm water protection SWPPP and BMPs. With respect to housekeeping, Respondent estimates that it spent in excess of \$195,000.00 in labor, largely devoted to site clean

up. Respondent hauled over 1,450 loads of trash from the site over the 14-month period of vertical construction and loaded and removed an average of almost 6 each 30-yard containers per day for an estimated total cost of over \$260,000.00. Respondent expended a very significant sum of money for non-permanent features of this project, including the SWPPP and BMP compliance, and it did not achieve an economic benefit by not spending required funds to implement storm water regulations at the site.

Ability to Pay

Respondent does not contend that it is unable to pay the penalty proposed in the Complaint but does contend that the penalty is not appropriate under the circumstances.

Other Matters that Justice May Require.

Independent of BMPs and other SWPPP compliance, Respondent spent hundreds of thousands of dollars to design the site itself in such a way as to manage storm water on site and prevent significant sediment discharge to East Toll Gate Creek, the Aurora MS4, or otherwise. Respondent believes that its efforts in this regard were environmentally beneficial and should be credited against any penalty which may be assessed.

32. ¶41 of the Complaint contains allegations of law to which no response is required.

33. ¶42 of the Complaint contains allegations of law and procedure or notices to Respondent to which no response is required.

34. To the extent that any material factual allegation of the Complaint may not be expressly admitted, denied, or explained above, Respondent is without knowledge or otherwise denies said allegation.

**REQUEST FOR HEARING**

35. Respondent requests a hearing upon the issues raised by the Complaint and the Answer.

DUCKER, MONTGOMERY,  
ARONSTEIN & BESS, P.C.

Date: October 29, 2007

By: \_\_\_\_\_



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Attorneys for Respondent Hunt Building  
Company, Ltd.

CERTIFICATE OF SERVICE

I certify that on this 29th day of October, 2007, a copy of the foregoing was served by United States mail, postage prepaid, properly addressed to:

Eddie A. Sierra  
Deputy Assistant Regional Administrator  
United States Environmental Protection Agency  
Region 8, Office of Enforcement, Compliance and Environmental Justice  
1595 Wynkoop Street (ENF-L)  
Denver, CO 80202  
*Complainant*

A handwritten signature in cursive script, reading "Valerie Phelps", is written over a horizontal line.