

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

2010 MAY -7 PM 2:56

In the Matter of:)
)
47th Street Townhomes, LLC,)
Jordahl Custom Homes, Inc.,)
and)
Master Construction Co., Inc.)
)
Respondents.)
_____)

Docket No. CWA-08-2009-0021

FILED
EPA REGION VIII
HEARING CLERK

**MEMORANDUM IN OPPOSITION OF
COMPLAINANT'S MOTION FOR
PARTIAL ACCELERATED DECISION
ON LIABILITY**

I. INTRODUCTION

This Memorandum is filed in opposition to Complainant's Motion for Partial Accelerated Decision filed by the United States Environmental Protection Agency ("EPA").

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

For the reasons set forth below, Respondents, 47th Street Townhomes, LLC and Jordahl Custom Homes, Inc., request the EPA's Motion for Partial Accelerated Decision on Liability under Count 2 of the Complaint for violating §§ 301(a) and 402(p) of the Act, 33 USC §§ 1311(a) and 1342(p) be denied.

II. STANDARD FOR GRANTING AN ACCELERATED DECISION

If no genuine issue of material facts exist and a party is entitled to judgment as a matter of law, a Presiding Officer may issue an accelerated decision in favor of that party as to any or all parts of the proceeding. See 40 CFR § 22.20(a).

An Accelerated Decision is similar to summary judgment under Rule 56(c) of the Federal Rules of Civil Procedure and therefore case law thereunder is appropriate guidance as to accelerated decision. See In the Matter of Service Oil, Inc., 2006 EPA ALJ LEXIS 6 (March 7, 2006). Under Federal Rules of Civil Procedure 56(c), the EPA must meet its burden of showing that there exists no genuine issue of material fact, by identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, showing there is no genuine issue as to any material fact and that the EPA is entitled to judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317,323 (1986).

If a Respondent disputes the elements of a claim EPA has made and raises issues of fact that are material to that claim, EPA is not entitled to judgment as a matter of law as to liability on that claim. See In the Matter of Service Oil, Inc., 2006 EPA ALJ LEXIS 6 (March 7, 2006).

III. ARGUMENT

In the Complainant's Motion for Partial Accelerated Decision on Liability and its Memorandum in Support of the Motion for Partial Accelerated Decision on Liability, the EPA claims there is no genuine issue of material fact and that its Motion should be granted because 47th Street Townhomes, LLC and Jordahl Custom Homes admit to paragraph 37 of the complaint, which reads as follows:

Respondents have discharged storm water into waters of the United States from the Site to the Red River of the North via the City of Fargo's [municipal separate storm sewer system] without authorization by any permit issued under the Act from April 28, 2008 through November 4, 2008.

In the Complainant's Memorandum in Support of Motion for Partial Accelerated Decision on Liability, the Complainant suggests that by admitting the allegation referenced above, Respondents, 47th Street Townhomes and Jordahl Custom Homes, have committed a violation of §§ 301(a) and 402(p) of the Act, 33 USC §§ 1311(a) and 1342(p), as alleged in Count 2 of the Complaint. However, under Count 2 of the Complaint in Paragraph 38, the Respondents, 47th Street Townhomes and Jordahl Custom Homes, deny that such discharge is a violation of the aforementioned code sections of the Act. In the EPA's Memorandum in Support of Motion for Partial Accelerated Decision on Liability, the EPA suggests that any discharge from the property is a violation of §§ 301(a) and 402(p) of the Act, 33 USC §§ 1311(a) and 1342(p). Additionally, since Respondent's 47th Street Townhomes and Jordahl Custom Homes filed their answer, investigation indicates no discharge has taken place. See affidavit of Richard Robert Jordahl, attached hereto as Exhibit A.

As the EPA correctly points out, to prove a violation of § 301(a) of the Act, 33 USC §§ 1311(a), the EPA must prove that a person discharged pollutants from a point source without authorization under the Clean Water Act. See Committee to Save the Mokelumne River vs. East Bay Utility District, 13 F.3d 305, 308 (9th Cir. 1993). However, to date, no prehearing information exchange or other discovery pursuant to 40 C.F.R. § 22.19, has taken place to determine whether or not any pollutants were in fact discharged from the property. (See Jordahl Affidavit).

The EPA would lead this Court to believe that by any storm water being discharged from the property in question that there has been a violation of the Act. As previously stated, no discovery has taken place to determine the amount and nature of any discharge from the property, and preliminary investigation suggest there has been no discharge of pollutants. Until such time as the parties have had an opportunity to perform their prehearing exchanges and discovery pursuant to 40 C.F.R. § 22.19, there is no way to ascertain whether or not Respondents, 47th Street Townhomes and Jordahl Custom Homes, have violated §§ 301(a) and 402(p) of the Act, 33 USC §§ 1311(a) and 1342(p).

Additionally, the fact that the Respondents, 47th Street Townhomes and Jordahl Custom Homes, denied Paragraph 38 of the Complaint which states:

Respondents' discharge without permit authorization constitutes a violation of §§ 301(a) and 402(p) of the Act, 33 USC §§ 1311(a) and 1342(p), for each day in which a discharge has occurred.

and that no discovery has taken place to determine the scope of any discharge that has occurred on the property, there exists genuine issues of material facts, and therefore the EPA is not entitled to judgment as a matter of law under 40 CFR § 22.20(a).

IV. CONCLUSION

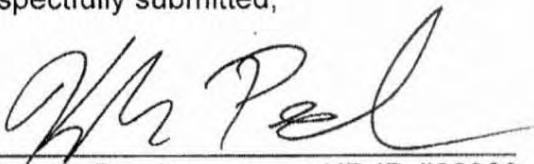
Because Respondents, 47th Street Townhomes and Jordahl Custom Homes, denied that any discharge that occurred as a result of their actions constitutes a violation under §§ 301(a) and 402(p) of the Act, 33 USC §§ 1311(a) and 1342(p), and due to the lack of discovery in this matter, it is unclear the scope of any discharge that

may or may not have occurred on the property, there exists genuine material issues of fact.

The EPA as the moving party has also failed to identify portions of the pleadings, depositions, answers to interrogatories, and admissions on file along with affidavits that show no genuine issue of material fact exist because no discovery has taken place between the parties. Therefore, as a result of these genuine material issues of fact, and the EPA's failure to meet its burden of proof under 40 C.F.R. Part 22 and Federal Rules of Civil Procedure 56(c), the Complainant's Motion for Partial Accelerated Decision on Liability should be denied.

Dated: May 7, 2010.

Respectfully submitted,

By 

Kyle G. Pender ND ID #06300

James R. Bullis ND ID #04980

Montgomery Goff & Bullis PC

PO Box 9199

Fargo ND 58106-9199

Telephone: (701) 281-8001

Attorneys for Respondents 47th Street
Townhomes, LLC and Jordahl Custom Homes,
Inc.

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

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Jordahl Custom Homes, Inc.,)
and)
Master Construction Co., Inc.)
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Respondents.)
_____)

Docket No. CWA-08-2009-0021

**AFFIDAVIT OF RICHARD ROBERT
JORDAHL**

STATE OF NORTH DAKOTA)
)ss
COUNTY OF CASS)

Your affiant, Richard Robert Jordahl, being first duly sworn on oath, states and alleges as follows:

1. I am the President of Jordahl Custom Homes, Inc.
2. I was served with the attached Request for Information pursuant to § 308 of the Clean Water Act on December 29, 2008.
3. The Request for Information made a number of allegations regarding discharge of storm water and other pollutants from the property generally known as 47th Street Townhomes located at 4696 47th Street South in Fargo, North Dakota.
4. That as part of the discovery process, I met with both my employees and my subcontractor, Raymond Reading of Agassiz Land Management, Inc.
5. That after reviewing the material provided by Mr. Reading, and representatives of Jordahl Custom Homes, Inc., as well as representatives of Master Construction Co., Inc., I have learned the following:
 - a. That while it appears a storm water permit was not obtained at the commencement of construction, Jordahl Custom Homes, Inc.

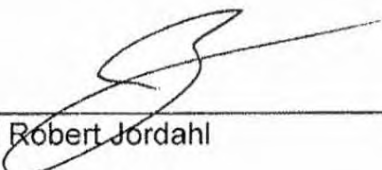
EXHIBIT A

complied with our typical best practices and made sure that adequate storm water runoff measures were in place during all relevant times.

- b. That during all relevant times, Agassiz Land Management, on behalf of Jordahl Custom Homes, maintained an activity log for the 47th Street Townhomes project consistent with our standard pollution prevention plans for similar projects and with the SWPPP provided to the North Dakota Department of Health with our permit application.
- c. That Agassiz Land Management installed, and maintained, silt fences, drain bags and other best management practices to insure that storm water and other pollutants did not leave the site.
- d. That immediately upon learning that Agassiz Land Management, Inc. had not obtained the appropriate permit, it took immediate steps to obtain a permit under the North Dakota Pollutant Discharge Elimination System (NDPDES), as required.
- e. That it appears that during all relevant times, regular inspections and storm water prevention devices were in place to prevent storm water and other pollutants from leaving the 47th Street site, and it appears no discharge of storm water or other pollutants into the City of Fargo drain system ever occurred.

FURTHER AFFIANT SAYETH NOT.

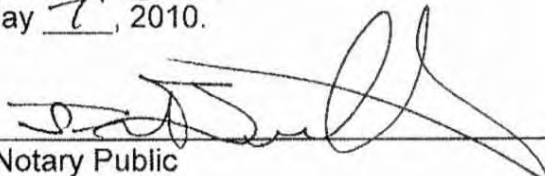
Dated: May 7, 2010.



 Richard Robert Jordahl

Subscribed and sworn to before me on May 7th, 2010.

JAMES R. BULLIS
 Notary Public
 State of North Dakota
 My Commission Expires Oct. 16, 2010



 Notary Public



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8

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

COPY

DEC 29 2008

Ref: 8ENF-W-NP

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Rob Jordahl, President
Jordahl Custom Homes, Inc.
4315 Riverwood Drive North
Fargo, ND 58102

Re: Request for Information Pursuant to
Section 308 of the Clean Water Act,
33 U.S.C. §1318, and Compliance
Inspection Report

Dear Mr. Jordahl:

The Clean Water Act (Act) gives the United States Environmental Protection Agency (EPA) the responsibility to determine compliance with the Act and regulations and permits issued under the Act, in order to protect the Nation's waters from pollution. In furtherance of that responsibility, on September 23, 2008, EPA inspected the 47th Street Townhomes at 4696 47th Street South, in Fargo, North Dakota (the Site), which is owned and/or operated by Master Construction Co., Inc. and Jordahl Custom Homes, Inc.

This letter concerns the apparent failure to comply with the Act's requirements at the Site. Section 301 of the Act, 33 U.S.C. §1311, prohibits the discharge of pollutants to waters of the United States except as in compliance with section 402 of the Act, 33 U.S.C. §1342, among CWA provisions.

This letter also includes the report for the September 23, 2008 inspection. Please note that prior to the inspection, EPA inspectors presented credentials and informed the facility of the inspection process. Following the inspection, the EPA inspectors conducted an exit interview where they discussed their observations with representatives from Jordahl Custom Homes, Inc.

As part of its investigation of these apparent violations of sections 301 and 402 of the Act, the EPA is authorized to request information pursuant to section 308 of the Act, 33 U.S.C. §1318. Please provide the information requested below for the Site as clearly and completely as

possible **within thirty (30) calendar days** of your receipt of this letter to Amy Clark (8ENF-W-NP) at the letterhead address above. Respond to each request to the fullest extent possible. If you cannot respond to a specific question, please provide an explanation as to why you can not answer. If information or documents become known to you after you send your reply, forward the newly found information as soon as possible.

The accuracy and completeness of the responses and documents required must be certified. A sample certification statement is enclosed. For a corporation, partnership, or sole proprietorship, the individual signing the certification must be a responsible corporate officer, general partner, or the proprietor, respectively.

A Small Business Regulatory Enforcement and Fairness Act (SBREFA) information sheet containing information on compliance assistance resources and tools available to small businesses, is enclosed with this letter. The inclusion of this information sheet does not necessarily mean that EPA has determined that your organization is a small business. SBREFA does not eliminate your responsibility to respond to this information request.

You may claim that EPA should treat any of the requested information as confidential. To make such a claim, you will need to follow the procedures in 40 C.F.R. part 2, subpart B (as promulgated at 41 Fed. Reg. 36902 on Sept. 1, 1976, 43 Fed. Reg. 39997 on Sept. 8, 1978, and 50 Fed. Reg. 51654 on Dec. 18, 1985). If you make a confidentiality claim, EPA will disclose the information covered by your claim only as allowed by that subpart. Whether EPA discloses the information will depend on whether EPA agrees that the information is entitled to confidential treatment. If you do not make a confidentiality claim when you submit the information to EPA, EPA may make the information available to the public without notifying you. **You are required to provide the information, even if you claim it is confidential.**

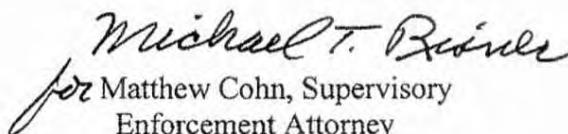
It is very important that you respond to this request for information, and your attention to this matter is greatly appreciated. Please note a complete response is mandatory. Under federal law, the failure to provide required information may result in civil penalties of up to \$32,500 per day of violation, and even harsher, criminal consequences are possible in the case of deliberate false statements. (33 U.S.C. §1319.)

Please direct any questions you may have to Amy Clark at (303) 312-7014. Questions from your attorney should be directed to Peggy Livingston, Enforcement Attorney, at (303) 312-6858. Thank you for your cooperation.

Sincerely,



Darcy O'Connor, Unit Chief
NPDES Enforcement Unit
Technical Enforcement Program
Office of Enforcement, Compliance
and Environmental Justice



for Matthew Cohn, Supervisory
Enforcement Attorney
Legal Enforcement Program
Office of Enforcement, Compliance
and Environmental Justice
and Environmental Justice

Enclosures: Information Request
Statement of Certification
SBREFA information sheet

cc: Gary Bracht, NDDH