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December 7, 2012

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

Re: *Nelcon, Inc. – CWA-08-2012-0025*

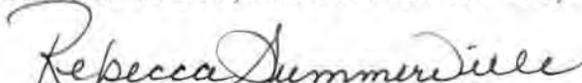
Dear Ms. Artemis:

Enclosed please find for filing Respondent Nelcon, Inc.'s Answer and Request for Hearing with regard to the above matter.

Thank you.

Very truly yours,

DATSOPOULOS, MacDONALD & LIND, P.C.


Rebecca L. Summerville

RLS/dm

Enclosures: As stated

cc: Charles L. Figur, Senior Enforcement Attorney

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FILED
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HEARING CLERK

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8

Docket CWA-08-2012-0025

IN THE MATTER OF:)

Nelcon, Inc.)
304 Jellison Road)
Kalispell, MT 59903)

Respondent.)
_____)

**ANSWER AND
REQUEST FOR HEARING**

COMES NOW Respondent Nelcon, Inc., by and through its counsel, Datsopoulos, MacDonald & Lind, P.C. and pursuant to Rule 22.15 of the Consolidated Rules of Practice Governing the Assessment of Civil Penalties and the Revocation or Suspension of Permits, Answers the Administrative Complaint as follows:

1. Answering the first paragraph Respondent states that the referenced statutes and regulations speak for themselves and require no admission or denial.
2. Answering paragraph 2, Respondent states that paragraph 2 of the Complaint is informational, contains no positive averment, and requires no admission or denial.
3. Answering paragraph 3, Respondent is without sufficient knowledge or information to form a belief as to the truth of the matters asserted and therefore denies the same.
4. Answering paragraph 4, Respondent admits the allegations.
5. Answering paragraph 5, Respondent admits that it is a corporation and that 33 U.S.C. 1362(5) defines person as follows:

The term “person” means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.

6. Answering paragraph 6, with respect to the first sentence, Respondent admits that pursuant to a contract with the Blackfeet Tribe it installed a drinking water pipeline for the Owner. Respondent admits the allegations contained in the second sentence.

7. Answering paragraph 7, Respondent notes that this paragraph is a statement of EPA’s definition of the Site for purposes of the Complaint for which no response is required.

8. Answering paragraph 8, Respondent admits that the referenced statute and regulation contain definitions of “point source.” Respondent further admits that it conducted construction activities at the Site pursuant to its contract with the Blackfeet Tribe. However, the assertion that its “construction activity” is a “point source” as defined in the Act is a legal conclusion (not a factual allegation) and therefore no response is required. To the extent that paragraph 8 is deemed to include any other factual allegations other than those admitted herein, they are denied.

9. Answering paragraph 9, to the extent that it contains factual allegations (and not a legal conclusion) Respondent is without sufficient knowledge or information to form a belief as to the truth of the matters asserted and therefore denies the same. To the extent that it contains a legal conclusion, no response is required. Respondent further states that the referenced regulation speaks for itself.

10. Answering paragraph 10, Respondent admits that the Site is within the Blackfeet Reservation and is without sufficient knowledge or information to form a belief as to the truth of the remaining matters asserted and therefore denies the same.

11. Answering paragraph 11, Respondent states that the referenced statute speaks for itself.

12. Answering paragraph 12, Respondent states that the referenced statute speaks for itself.
13. Answering paragraph 13, Respondent states that the referenced statute speaks for itself.
14. Answering paragraph 14, Respondent first notes that the term “Indian Country” is not defined. To the extent that this paragraph contains factual allegations (and not a legal conclusion) Respondent is without sufficient knowledge or information to form a belief as to the truth of the matters asserted and therefore denies the same. To the extent that it contains a legal conclusion, no response is required.
15. Answering paragraph 15, Respondent states that the referenced statute speaks for itself.
16. Answering paragraph 16, Respondent states that the referenced statute speaks for itself.
17. Answering paragraph 17, Respondent states that the text in the referenced Fed. Reg. citations included in this paragraph speak for themselves.
18. Answering paragraph 18, Respondent denies the allegations contained therein.
19. Respondent admits the allegations in paragraph 19.
20. Answering paragraph 20, Respondent states that the referenced regulation speaks for itself.
21. Respondent admits the allegations in paragraph 21.
22. Respondent admits the allegations in paragraph 22.
23. Answering paragraph 23, Respondent states that the referenced CGP speaks for itself.

24. Answering paragraph 24, Respondent states that the referenced CGP speaks for itself.

25. Answering paragraph 25, Respondent is without sufficient knowledge or information to form a belief as to the truth of the matters asserted and therefore denies the same.

26. Answering paragraph 26, Respondent admits that it received a letter from MDT dated May 23, 2011 confirming that Respondent had received verbal permission regarding encroachment within MDT Right of Way for pipeline work on MT Highway 49 at the Two Medicine River Bridge.

27. Respondent admits the allegations contained in paragraph 27.

28. Respondent admits the allegations contained in paragraph 28.

29. Respondent admits the allegations contained in paragraph 29.

30. Answering paragraph 30, Respondent is without sufficient knowledge or information to form a belief as to the truth of the matters asserted and therefore denies the same.

31. Answering paragraph 31, Respondent is without sufficient knowledge or information to form a belief as to the truth of the matters asserted and therefore denies the same.

32. Answering paragraph 32, Respondent is without sufficient knowledge or information to form a belief as to the truth of the matters asserted and therefore denies the same.

33. Answering paragraph 33, Respondent is without sufficient knowledge or information to form a belief as to the truth of the matters asserted and therefore denies the same.

34. Answering paragraph 34, Respondent is without sufficient knowledge or information to form a belief as to the truth of the matters asserted and therefore denies the same.

35. Answering paragraph 35, Respondent is without sufficient knowledge or information to form a belief as to the truth of the matters asserted and therefore denies the same.

36. Answering paragraph 36, Respondent is without sufficient knowledge or information to form a belief as to the truth of the matters asserted and therefore denies the same.

37. Answering paragraph 37, Respondent is without sufficient knowledge or information to form a belief as to the truth of the matters asserted and therefore denies the same.

38. Answering paragraph 38, Respondent is without sufficient knowledge or information to form a belief as to the truth of the matters asserted and therefore denies the same.

39. Respondent denies the allegations contained in paragraph 39.

40. Respondent denies the allegations contained in paragraph 40.

41. Answering paragraph 41, Respondent states that the referenced statute speaks for itself and denies that it should be assessed a penalty of \$160,000.00.

Respondent's investigation into the facts and circumstances of the matters alleged in the Complaint is continuing and Respondent reserves the right to amend, supplement and more fully respond as its investigation continues. Subject to that reservation Respondent identifies the following additional circumstances or arguments to constitute the alleged grounds of any defense:

1. According to the terms of its contract governing work at the Site, Respondent believed that the Owner was responsible for obtaining all necessary permits for the work.

2. Respondent believed that the Owner had obtained all necessary permits for work at the Site.

3. Respondent's work was overseen by the Owner's representative and Respondent was never informed by the Owner or its representative of environmental concerns or deficiencies related to the Site or the project.

4. After receiving the May 23, 2011 letter from MDT, Respondent implemented additional erosion and sediment controls to minimize the discharge of pollutants to surface waters at the Site.

5. Following its implementation of additional erosion and sediment controls at the Site in May 2011, Respondent did not receive any additional communications from MDT concerning discharges.

6. Some of the “discharges” that EPA’s inspector may have observed may have been from a pre-existing spring crossing ground that was not disturbed or affected by Respondent’s activities at the Site.

7. Until it received the Complaint Respondent had not been advised that EPA had sent inspectors to the Site months before or that EPA believed that Respondent had responsibilities that it was not fulfilling.

8. According to the Federal Register Volume 73, Number 135, pages 40338-40343, the Scope and Availability of the 2008 CGP, a CGP was not available for new and unpermitted ongoing construction projects in Indian Country within the State of Montana. Because it was not available, EPA explained in its notice that “EPA has decided to make administrative or civil enforcement for lack of permit coverage against dischargers in the above areas a low priority because the 2008 CGP will not yet apply to those areas.”

9. Respondent is unable to pay the proposed civil penalty.

10. The proposed civil penalty is excessive.

11. Within days of meeting with EPA representatives to understand matters raised by the Complaint and EPA’s view of its responsibilities, Respondent implemented additional erosion and sediment controls to minimize the discharge of pollutants to surface waters at the Site.

Request for Hearing

Pursuant to Rule 22.15(c) of the Consolidated Rules of Practice Governing the Assessment of Civil Penalties and the Revocation or Suspension of Permits, Respondent requests a hearing upon the issues.

Respectfully submitted this 7th day of December, 2012.

DATSOPOULOS, MacDONALD & LIND, P.C.

By: 
Rebecca L. Summerville

CERTIFICATE OF SERVICE

I, the undersigned, an employee of Datsopoulos, MacDonald & Lind, P.C., hereby certify that a true and correct copy of the foregoing document was mailed, postage prepaid, this 7th day of December, 2012, to the following:

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

