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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 8

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EPA REGION VIII  
HEARING CLERK

In the Matter of:

Valley Realty, Inc.

Respondent.

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Docket No. CWA-08-2009-0023

EPA'S PREHEARING EXCHANGE

The Complainant United States Environmental Protection Agency (EPA) submits the following as its initial prehearing exchange, in response to the Prehearing Order issued by the Hon. William B. Moran, Administrative Law Judge on January 27, 2010.

EPA has alleged that Valley Realty, Inc. (Valley Realty or Respondent) violated storm water control requirements during the construction of the Calico Prairie Apartments in Fargo, North Dakota. The EPA's complaint alleges two counts: (1) failing to apply for a storm water discharge permit prior to beginning construction, and (2) discharging storm water and concrete wash water without authorization by a permit. (Complaint, ¶¶ 29-32.)

Valley Realty has admitted the following:

- Respondent is a North Dakota corporation. (Answer, ¶ 2, admitting ¶ 1 of the Complaint.)
- Respondent owns property on which two apartment buildings in a complex known as the Calico Prairie Apartments have been constructed, at 4422 and 4450 30<sup>th</sup> Avenue South, Fargo, ND 58102 (the Site). (Answer, ¶ 2, admitting ¶ 3 of the Complaint.)
- The Site includes approximately 4.4 acres. (Answer, ¶ 2, admitting ¶ 4 of the Complaint.)<sup>1</sup>
- Construction activities began at the Site in April of 2008. (Answer, ¶ 2, admitting ¶ 5 of the Complaint.)

<sup>1</sup> The Respondent has not admitted that the Site is part of a larger plan of development encompassing more than five acres.

- Respondent has had day-to-day responsibility for construction at the Site. (Answer, ¶ 2, admitting ¶ 6 of the Complaint.)
- Storm water, snow melt, surface drainage and runoff water have been leaving the Site and have flowed into the City of Fargo's municipal separate storm sewer system (MS4). (Answer, ¶ 2, admitting ¶ 9 of the Complaint.)
- The City of Fargo's MS4 discharges to the Red River of the North. (Answer, ¶ 2, admitting ¶ 10 of the Complaint.)
- On September 23, 2008, EPA inspectors conducted a storm water inspection at the Site. At the time of the inspection, Respondent had not sought or obtained authorization from the North Dakota Department of Health (NDDH) to discharge storm water from the Site under either a general permit that the NDDH issued effective October 11, 2004, authorizing discharges of storm water associated with construction activities (the Permit) or any individual North Dakota National Pollutant Discharge Elimination System individual storm water discharge permit. (Answer, ¶ 6, addressing ¶ 25 of the Complaint and agreeing that Respondent "did not have a storm water discharge permit.")
- To date, Respondent has not submitted a notice of intent to the NDDH seeking authorization to discharge storm water from the Site under the Permit. (Answer, ¶ 8, admitting ¶ 27 of Complaint.)

The Prehearing Order directed EPA to submit the following:

1. Lists of Witnesses and Exhibits.

The witnesses EPA intends to call are:

Amy Clark: Ms. Clark is an Environmental Scientist with EPA Region 8. She will testify regarding her observations during an inspection of the Site on September 23, 2008, and the report that she wrote concerning that inspection.

Sandra G. Doty: Ms. Doty, an expert witness employed by Science Applications International Corporation, will testify concerning discharges from the Site to the Red River of the North.

Elizabeth Fagen. Ms. Fagen is an Environmental Engineer with EPA Region 8. She will testify about her review of the inspection report and the Respondent's answer to EPA's information request, as well as discussions with Respondent.

Dallas Grossman. Mr. Grossman is an Environmental Engineer with the NDDH. He will testify regarding his observations during an inspection of the Site on September 23, 2008. He

will also testify concerning efforts that the State of North Dakota has made to inform the regulated community in Fargo of storm water permit requirements.

Leonila Hanley: Ms. Hanley is a Public Health Service officer detailed to EPA Region 8. She will testify regarding her observations during a Site inspection on September 23, 2008. She will also testify concerning efforts that EPA Region 8 has made to inform the regulated community in Fargo of storm water permit requirements.

Steve Sly. Mr. Sly is a Storm Water Technician with the City of Fargo. He will testify regarding photographs of the Site he provided to EPA Region 8. He will also testify regarding the City of Fargo's MS4.

The exhibits EPA intends to introduce into evidence are:

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| Complainant's Ex. 1: | NDPDES (North Dakota Pollutant Discharge Elimination System) Permit No. NDR10-0000, effective October 11, 2004.  |
| Complainant's Ex. 2: | City of Fargo ESC Permit # 80227, dated July 17, 2008, including application and copy of Chapter 37 of the City of Fargo Municipal Code, entitled "Storm Water Management."  |
| Complainant's Ex. 3: | December 29, 2008 letter from EPA Region 8 to Jim Knutson, Vice President, Valley Realty, Inc., regarding "Request for Information Pursuant to Section 308 of the Clean Water Act, 33 U.S.C. § 1318, and Compliance Inspection Report." <sup>2</sup>                     |
| Complainant's Ex. 4: | February 16, 2009 letter from Jim Knutson, Vice President, Valley Realty, Inc., to EPA Region 8, responding to the EPA's December 29, 2008 request for information.  |
| Complainant's Ex. 5: | Precipitation data for Fargo, North Dakota, from <a href="http://www.crh.noaa.gov">http://www.crh.noaa.gov</a> (last visited March 10, 2010).  |
| Complainant's Ex. 6: | Notice of Coverage Under Construction Storm Water General Permit NDR10-1581 for Valley City Apartment, with Application (Notice of Intent) to Obtain Coverage Under NDPDES General Permit for Storm Water Discharges Associated with Construction Activity (NDR10-0000). |
| Complainant's Ex. 7  | North Dakota's Standards of Quality for Waters of the State, Chapter 33-16-02.1, from  |

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<sup>2</sup> Note: EPA's Compliance Inspection Report erroneously indicates that some of the pictures were taken on October 15, 2008. This is a computer error. All of the photographs with the Compliance Inspection Report were taken by Leonila Hanley during an inspection on September 23, 2008.

<http://www.legis.nd.gov/information/acdata/pdf/33-16-02.1.pdf>, last visited March 10, 2010. (Pages 1, 8, 23, and 24.)

- Complainant's Ex. 8: Curriculum vitae of Sandra G. Doty.
- Complainant's Ex. 9: Site map.
- Complainant's Ex. 10: Photographs of the Site.
- Complainant's Ex. 11: Portion of Minnesota's draft 2010 list of impaired waterbodies, showing Red River of the North listed as impaired. <http://www.pca.state.mn.us/publications/wq-iw3-15.xls>, last visited March 10, 2010.
- Complainant's Ex. 12: Portion of Minnesota's final 2008 list of impaired waterbodies, showing Red River of the North listed as impaired. <http://www.pca.state.mn.us/publications/wq-iw3-15.xls>, last visited March 10, 2010.
- Complainant's Ex. 13: Fargo Water Treatment Plant 2008 Water Quality Report. From <http://www.ci.fargo.nd.us>, last visited March 19, 2010.
- Complainant's Ex. 14: List by the United States Army Corps of Engineers, St. Paul District, of "Navigable Waters of the United States (Jurisdictional Waterways under Section 10 of the Rivers and Harbors Act, showing that the Red River of the North is navigable. From [http://www.mvp.usace.army.mil/docs/regulatory/mn\\_nav\\_waters.pdf](http://www.mvp.usace.army.mil/docs/regulatory/mn_nav_waters.pdf), last visited March 19, 2010.
- Complainant's Ex. 15: Estimate of Pollutant Discharges from the Calico Apartments Construction Site in Fargo, North Dakota, prepared by Science Applications International Corporation, March 22, 2010.
- Complainant's Ex. 16: EPA's Public Notice of Proposed Administrative Penalty Assessment and Opportunity to Comment on CWA Complaint.
- Complainant's Ex. 17: Email from Darcy O'Connor, EPA Region 8, to Gary Bracht, NDDH, dated July 24, 2009.

## 2. Penalty

Please see the Complaint. EPA would particularly emphasize the nature, circumstances, extent, and gravity of the violations. EPA's inspection revealed that the site had unprotected storm drains and that large amounts of sediment were being tracked off-Site.

As documented in the preamble to EPA's storm water regulations (see, e.g., 64 Fed. Reg. 68722, 68728-68731 (Dec. 8, 1999)), excess sediment and turbidity can cause numerous water quality problems. The Red River is a source of drinking water for Fargo residents. EPA has identified the Red River as being impaired by turbidity, which has affected the river's aquatic consumption, aquatic life, and recreation. (See 2007 EPA ALJ LEXIS 21,\*162.) Thus, it is particularly important to control discharges of sediment and other pollutants associated with storm water into the Red River watershed.

Another crucial factor is that EPA and the State of North Dakota have made repeated efforts to educate the construction community in the Fargo area about storm water permit requirements. EPA representatives have visited the Fargo area and, among other things, have provided training and outreach programs regarding storm water controls and permit requirements. EPA has also publicized storm water enforcement actions in the Fargo area, with the goal of furthering public awareness of the pertinent regulatory requirements. Nonetheless, the Respondent failed to obtain permit coverage or implement even basic storm water controls at the Site.

EPA was unaware of any prior violations by this Respondent and therefore did not increase or decrease the penalty for this factor. Nor did EPA increase or decrease the penalty amount based on inability to pay.

EPA has not developed a penalty policy for Administrative Law Judges to use in assessing penalties under the CWA. Instead, EPA takes the position that Administrative Law Judges are to rely on the wording of the statutory penalty factors set out in section 309(g). See In re Larry Richner/Nancy Sheepbouwer & Richway Farms, 2002 EPA App. LEXIS 13, CWA Appeal No. 01-01, slip op. at 23 (EAB July 22, 2002), stating, "Because there are no CWA penalty guidelines, a CWA penalty must be calculated based upon the evidence in the record and the penalty criteria set forth in CWA § 309(g)." See also In re Pepperell Assoc., 2000 EPA App. LEXIS 14, CWA Appeal Nos. 99-1 & 99-2, slip op. at 36 n.22 (EAB, May 10, 2000), petition for review denied on all points, Pepperell Assoc. v. EPA, 246 F.3d 15 (1<sup>st</sup> Cir. 2001).

### 3. Paperwork Reduction Act

Count 2, *i.e.*, discharging pollutants without a permit, in violation of §§ 301(a) and 402(p) of the Act, does not involve any collection of information. Moreover, it is a requirement directly imposed by statute. Statutory requirements are not subject to the defense of 44 U.S.C. § 3512. See, e.g., United States of America v. Ionia Management S.A., 498 F.Supp.2d 477, 488 (D.Conn. 2007).

To the extent that Count 1, *i.e.*, failing to apply for a permit, in violation of §§ 308 and 402(p) of the Act and 40 C.F.R. § 122.21(c) and 122.26(c), involves the collection of information, EPA has submitted the information collection requirements in Phase I of the storm water regulations to the Office of Management and Budget (OMB). The information collection requirements were assigned OMB control number 2040-0086. (See 55 Fed. Reg. 47990, 48061

(November 16, 1990). The same control number is also listed in 40 C.F.R. § 9.1.<sup>3</sup> Subsequently, ICR and OMB control numbers for various NPDES requirements, including 40 C.F.R. §§ 122.21 and 122.26, into ICR number 0229.19 and OMB control number 2004-0004. (See 74 FR 17479, April 15, 2009.)


4. Hearing Location & Duration

EPA agrees to hold the hearing in Fargo, North Dakota. EPA estimates its *prima facie* case can be presented in one day.

Supplemental Pre-Hearing Exchange

EPA reserves the right to request permission to supplement this prehearing exchange with any information that may subsequently become available to EPA.

Respectfully submitted,

  
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<sup>3</sup> The Phase I storm water regulations required operators of large construction sites to apply for NPDES storm water discharge permits. (See 55 Fed. Reg. 47990, 48062 *et seq.*) Later, when EPA promulgated the Phase II storm water regulations, extending the permit requirement to construction sites of less than five acres, the OMB approved the information collection requirements in that rule. Those requirements were assigned OMB control number 2040-0211.



Certificate of Service

I certify that the foregoing Prehearing Exchange, with all exhibits, was sent or delivered, as indicated below, to each of the following:

Original and one copy hand delivered to:

Tina Artemis  
Regional Hearing Clerk  
US EPA, Region 8  
1595 Wynkoop St.  
Denver, CO 80202

One copy mailed by certified mail, return receipt requested to:

Tami L. Norgard, Esq.  
Vogel Law Firm  
218 NP Avenue  
Fargo, ND 58107-1389  
Certified Mail No. 7008 3230 0003 0730 4239

One copy by pouch mail to:

The Honorable William B. Moran  
Chief Administrative Law Judge  
Office of Administrative Law Judges  
U.S. Environmental Protection Agency  
Mail Code 1900L  
1200 Pennsylvania Ave., N.W.  
Washington, D.C. 20460

Date: 3/29/10 By: Judith M. Mc Ternan