



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

JUL 31 2009

**CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**

George Gaukler  
Registered Agent for  
Valley Realty, Inc.  
1330 W. Main St.  
Valley City, ND 58072-3644

Re: Notice of Proposed Assessment of Civil  
Penalty against Valley Realty, Inc.,

Dear Mr. Gaukler:

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 Valley Realty, Inc. (Valley Realty) pursuant to §309 of the Clean Water Act (Act), 33 U.S.C. §1319. In the Complaint, EPA alleges that Valley Realty violated §§301(a), 308, and 402(p) of the Act, 33 U.S.C. §§1311(a), 1318, and 1342(p), at the Calico Prairie Apartments site in Fargo, North Dakota. The Complaint proposes that a penalty of \$30,000 be assessed against Valley Realty for these violations.

Valley Realty has 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 Valley Realty wishes to contest the allegations in the Complaint or the penalty proposed in the Complaint, it 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 Valley Realty does not file an answer within 30 days (see 40 C.F.R. §22.15(d)), it may be found in default. A default judgment may impose the full penalty proposed in the Complaint of \$30,000.

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 Valley Realty and EPA. Upon final approval of the consent agreement by the Regional Judicial Officer for EPA Region 8, Valley Realty will be bound by the terms of the consent agreement and will waive its right to a hearing on, and judicial appeal of, the agreed upon civil penalty. Valley Realty has the right to be represented by an attorney at any stage of the proceedings, including any informal discussions with EPA.


If Valley Realty 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 the responsibility to comply with the Act or to respond to this Complaint.

For responses to 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 Liz Fagen, Environmental Engineer, at (303) 312-6095, or Peggy Livingston, Enforcement Attorney, at (303) 312-6858.

Please note that arranging for a settlement meeting does not relieve Valley Realty of the need to file a timely answer to EPA's Complaint.

We urge your prompt attention to this matter.

Sincerely,



*EAS* Eddie A. Sierra  
Acting 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  
Jim Knutson, Vice President, Valley Realty, Inc.  
David Glatt, North Dakota Department of Health

CERTIFICATE OF SERVICE

I certify that on the date noted below, I sent a copies of the foregoing PENALTY COMPLAINT AND NOTICE OF OPPORTUNITY FOR HEARING (Complaint) to:

George Gaukler  
Registered Agent for  
Valley Realty, Inc.  
1330 W. Main St.  
Valley City, ND 58072-3644

Certified Mail, Return Receipt Requested  
No. \_\_\_\_\_  
(One copy, with a copy 40 C.F.R. part 22)

and

Jim Knutson, Vice President  
Valley Realty, Inc.  
P.O. Box 446  
Valley City, ND 58072

Certified Mail, Return Receipt Requested  
No. \_\_\_\_\_  
(One copy, without 40 C.F.R. part 22)

and

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

Certified Mail, Return Receipt Requested,  
No. \_\_\_\_\_  
(One copy, without 40 C.F.R. part 22)

and

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

By hand delivery  
(original and one copy,  
without 40 C.F.R. part 22)

Date: 7/31/09

Judith M. McTernan

2009 JUL 31 PM 4:55

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 8

In the Matter of:	)	
	)	
Valley Realty, Inc.,	)	PENALTY COMPLAINT AND
	)	NOTICE OF OPPORTUNITY
	)	FOR HEARING
	)	
	)	Docket No. CWA-08-2009-0023
Respondent.	)	

**INTRODUCTION**

This civil administrative enforcement action is authorized by Congress in §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, 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 Valley Realty, Inc. (Respondent), 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 Valley Realty, Inc. (Valley Realty) is a North Dakota corporation.
2. Respondent is a "person" as that term is defined in §502(5) of the Act, 33 U.S.C. §1362(5), and 40 C.F.R. §122.2.
3. 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).

4. The Site includes approximately 4.4 acres.
5. Construction activities began at the Site in April of 2008.
6. Respondent has day-to-day responsibility for construction at the Site.
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 §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 Fargo’s municipal separate storm sewer system (MS4).
10. The City of Fargo’s MS4 discharges to the Red River of the North.
11. The Red River of the North is a “navigable water” as defined by §502(7) of the Act, 33 U.S.C. §1562(7), and a “water of the United States” as defined by 40 C.F.R. §122.2.
12. The storm water discharge from the Site is a “discharge of a pollutant” as defined by §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 §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 waters, §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 §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), establishes a program under which NPDES permits may be issued to authorize discharges of storm water associated with industrial activities.
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. Each person discharging storm water associated with industrial activity must seek and obtain authorization to do so under either an individual NPDES permit or a promulgated NPDES general permit. 40 C.F.R. §122.26(c); §§301(a), 308, and 402(p) of the Act, 33 U.S.C. §§1311(a), 1318, and 1342(p).
19. 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. A permit issued by the NDDH under its EPA-approved NPDES program is known as an NDPDES permit.
20. Effective October 11, 2004, NDDH issued a general permit (NDPDES Permit No. NDR10-0000, referenced as the Permit) authorizing discharges of storm water associated with construction activities, if done in compliance with its terms and conditions. A discharger may apply for authorization to discharge under the Permit by submitting a notice of intent for coverage to the NDDH.
21. Parts I.A.2.a, I.D.2, and V of the 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.
22. Part V of the 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. The definition adds that “[o]ne plan is broadly defined to include design, permit application, advertisement or physical demarcation indicating that land-disturbing activities may occur.”
23. The Site is part of a common plan of development known as Calico Prairie Addition that has disturbed at least 5 acres. The Calico Prairie Addition encompasses at least 52 acres.
24. Prior to beginning construction at the Site, Respondent was required to have obtained NPDES permit authorization for discharges of storm water from the Site. Had Respondent obtained coverage under the Permit, its permit application would have been due at least 7 days before construction began, according to Part I.C of the Permit.
25. 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 NDDH to discharge storm water from the Site under either the Permit or any individual NDPDES storm water discharge permit.
26. During the September 23, 2008, inspection, EPA inspectors observed excessive sediment in storm drains at the Site, sediment tracking into a nearby street, concrete wash water

discharging to a storm water inlet, missing or inadequate best management practices (BMPs), and no storm water pollution prevention plan (SWPPP) on-site.

27. To date, Respondent has not submitted a notice of intent to NDDH seeking authorization to discharge at the Site under the Permit.
28. Had Respondent obtained authorization to discharge storm water under the Permit prior to construction, it would have been required by the Permit to develop a SWPPP prior to beginning construction at the Site. The SWPPP was to have described BMPs to control pollutants in storm water runoff. The SWPPP was also to have provided for Respondent to conduct inspections at the Site for monitoring the condition of storm water discharge outlets and effectiveness of BMPs.

### **COUNT 1**

29. Respondent failed to apply for authorization to discharge under either the Permit or under any individual storm water discharge permit prior to beginning construction at the Site.
30. Respondent's failure to apply for authorization to discharge under either the Permit or under any individual storm water discharge permit constitutes a violation of 40 C.F.R. §§122.21(c) and 122.26(c), and §§308 and 402(p) of the Act, 33 U.S.C. §§1318 and 1342(p) for each day beginning 7 days before starting construction to the present.

### **COUNT 2**

31. Respondent has discharged storm water and concrete wash water into waters of the United States from the Site to the Red River of the North via the City of Fargo's MS4 without authorization by any permit issued under the Act, from April 2008 to March 2009.
32. Respondent's discharge without permit authorization constitutes a violation of §§301(a) and 402(p) of the Act, 33 U.S.C. §§1311(a) and 1342(p), for each day in which a discharge has occurred.

### **PROPOSED CIVIL PENALTY**

Section 309(g)(2)(A) of the Act, 33 U.S.C. §1319(g)(2)(A), authorizes the EPA to assess a civil administrative penalty for any violation of various provisions of the Act, including but not limited to §§301 and 308 of the Act, 33 U.S.C. §§1311 and 1318, and for any violation of a condition or limitation of a permit issued under §402 of the Act, 33 U.S.C. §1342. The amount of the penalty that EPA can assess is up to \$11,000 per day for each day during which a violation continues from March 16, 2004, through January 12, 2009, and up to \$16,000 per day for each day after January 12, 2009, during which a violation continues. For violations from March 16,

2004, through January 12, 2009, the maximum total penalty is \$157,500. For violations after January 12, 2009, the maximum is \$177,500. These amounts have been adjusted for inflation by 40 C.F.R. part 19.

Section 309(g)(3) of the Act, 33 U.S.C. §1319(g)(3), 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 \$30,000 be assessed against Respondent 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, sediment tracking in the streets leading out from the Site, and the discharge of concrete wash water to a storm drain. BMPs that would have minimized sediment and concrete wash water discharges were missing throughout most of the Site. Had Respondent obtained and complied with a storm water discharge permit, it would have controlled its 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 discharge from 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 permits to implement the controls needed to prevent water pollution. Respondent's failure to seek permit authorization jeopardizes the integrity of EPA's and NDDH's programs to control storm water pollution.



### Prior Compliance History

This complaint is the first enforcement action EPA Region 8 has issued to Respondent regarding noncompliance with the storm water requirements.

### Degree of Culpability

Respondent has operated multiple construction sites in the Fargo, North Dakota, area.

EPA's storm water program has been in place since 1990. As a company with a construction background, Respondent 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 authorization 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 regulated community's awareness of storm water control requirements. 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.

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

### Economic Benefit

Respondent received an economic benefit from its failure to obtain Permit authorization and its failure to comply with the requirements in the storm water discharge permit. It benefited by not spending the required funds to install and maintain all necessary BMPs (e.g., storm inlet protection, concrete washout area, straw waddles, street cleaning), to conduct site inspections, and to develop a complete SWPPP.

### Ability to Pay

**EPA did not reduce the proposed penalty due to this factor, but will consider any information Respondent may present regarding Respondent's 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**

Respondent has the right to a public hearing before an EPA judicial officer to dispute any allegation EPA has made in this complaint and/or the appropriateness of the penalty EPA has proposed. If Respondent requests a hearing in its 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 its right to a hearing, Respondent 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. It must also state the grounds for any defense, the facts Respondent disputes, and whether it requests a public hearing. Please see 40 C.F.R. §22.15 for more information on what must be in the answer. **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**

Respondent may resolve this proceeding at any time by paying the penalty amount proposed in this complaint. Respondent 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 the U.S. Environmental Protection Agency, Fines and Penalties, Cincinnati Finance Center, P.O. Box 979077, St. Louis, MO, 63197-9000, and by filing a copy of the check with the Regional Hearing Clerk for EPA Region 8 at the address given above. If Respondent makes this payment within 30 days of receiving this complaint, it need not file an answer. Such payment waives Respondent's right to contest the allegations and to appeal any final order resulting from this complaint. See 40 C.F.R. §22.18 for more explanation of the quick resolution process.

### **SETTLEMENT NEGOTIATIONS**

EPA encourages informal settlement conferences. If Respondent wishes to pursue the possibility of settling this matter, or has any other questions, Respondent (or, if it is represented by counsel, its 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, Respondent should contact Peggy Livingston, Enforcement Attorney, by telephoning 303-312-6858, or by writing to the following address:

Peggy Livingston, 8ENF-L  
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 §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.

Dated: 7/31/09.

By: Sharon L Kercher  
for Eddie A. Sierra  
Acting Assistant Regional Administrator

By: David Ralli for MSL  
Margaret J. (Peggy) Livingston  
Enforcement Attorney

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 a copies of the foregoing PENALTY COMPLAINT AND NOTICE OF OPPORTUNITY FOR HEARING (Complaint) to:

George Gaukler  
Registered Agent for  
Valley Realty, Inc.  
1330 W. Main St.  
Valley City, ND 58072-3644

Certified Mail, Return Receipt Requested  
No. 7008-1830-0000-5157-1611  
(One copy, with a copy 40 C.F.R. part 22)

and

Jim Knutson, Vice President  
Valley Realty, Inc.  
P.O. Box 446  
Valley City, ND 58072

Certified Mail, Return Receipt Requested  
No. 7008-1830-0000-5157-1635  
(One copy, without 40 C.F.R. part 22)

and

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

Certified Mail, Return Receipt Requested,  
No. 7008-1830-0000-5157-1628  
(One copy, without 40 C.F.R. part 22)

and

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

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Date:

7/31/09

Judith M. McTiernan