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BEFORE THE  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:	)	DOCKET NO. CWA-10-2005-0081
LANDSING DEVELOPMENT	)	<b>COMPLAINANT'S</b>
GROUP, LLC	)	<b>OPENING PREHEARING EXCHANGE</b>
Boise, Idaho	)	
Respondent.	)	

Pursuant to 40 C.F.R. § 22.19, and the Presiding Officer's Order of October 3, 2005, Complainant U.S Environmental Protection Agency Region 10 ("EPA") submits this Opening Prehearing Exchange. EPA respectfully reserves the right to supplement this Prehearing Exchange if necessary prior to hearing with proper notice to Respondent Landsing Development Group, LLC ("Respondent"). For purposes of this Opening Prehearing Exchange, "Site" refers to the Southfork Development construction site located at South Cole Road and Stirrup Avenue in Boise, Idaho.

**I. WITNESSES**

1. Kristine Karlson. Ms. Karlson is an Environmental Protection Specialist with EPA in the Region 10 office in Seattle, Washington. Ms. Karlson conducted the May 10, 2004 Site inspection that led to this enforcement action. She will testify regarding the Clean Water

1 Act ("CWA") violations that she observed during the Site inspection. Ms. Karlson will  
2 also testify about the environmental harm caused by Respondent's activities as well as the  
3 requirements of EPA's construction storm water regulatory program. Ms. Karlson will be  
4 called as both an expert and fact witness.

5 2. Robert Grandinetti. Mr. Grandinetti is an Environmental Engineer with EPA in the  
6 Hanford Operations Office in Richland, Washington. He is the case development officer  
7 for this case. As the case development officer, Mr. Grandinetti is familiar with facts of  
8 case and will testify to environmental harm and economic benefit. In addition, Mr.  
9 Grandinetti reviewed topographic maps of the area to trace the drainage from the Site to  
10 the New York Canal which eventually flows to the Snake River. He will testify about the  
11 conclusions he made after reviewing the topographic maps with regard to CWA  
12 jurisdiction. Mr. Grandinetti will be called as an expert and fact witness.

13 3. EPA reserves the right to call all fact witnesses named by Respondent.

14 **II. EXHIBITS**

15 For purposes of the list of documents below, "Complainant's Exhibit No." is abbreviated  
16 as "C-." The documents themselves are labeled "Complainant's Exhibit No."

17 C-1 Topographic maps tracing the drainage from the Site to the Snake River

18 C-2 Rainfall Data for the Boise Area from Jan. 2003 to Jan. 2005

19 C-3 Economic Analysis of the Final Phase II Storm Water Rule, Chapter 4, EPA Office of  
20 Wastewater Management (October 1999)

21 C-4 Storm Water Quality Handbooks, Appendix F, State of California Department of  
22 Transportation (reprinted April 2003)

23 C-5 Fact Sheet for the NPDES General Permit for Storm Water Discharges from Construction  
24 Activities (dated July 1, 2003, modified January 21, 2005)

- 1 C-6 NPDES General Permit for Storm Water Discharges from Construction Activities  
2 (effective July 1, 2003, modified January 21, 2005)
- 3 C-7 Perpetual Storm Water Drainage Easement between Landsing and the Ada County  
4 Highway District (September 17, 2003)
- 5 C-8 Public Right-of-Way Easement (Sidewalk) between Landsing and the Ada County  
6 Highway District (December 2, 2003)
- 7 C-9 Inspection Report with photographs (May 10, 2004)
- 8 C-10 Temporary License Agreement between Ada County Highway District and the Southfork  
9 Homeowners Association (May 20, 2005)
- 10 C-11 Resume of Kristine Karlson
- 11 C-12 Resume of Robert Grandinetti

12 **III. PENALTY**

13 EPA did not specify a penalty amount in the Complaint. Instead, the Complaint requests  
14 assessment of a penalty “up to ... \$40,000.” Paragraphs 4.2 to 4.8 of the Complaint set forth  
15 EPA’s rationale for pleading a penalty amount up to \$40,000. The following paragraphs  
16 elaborate on the rationale set forth in the Complaint and propose a penalty amount of \$25,000.

17 EPA has not issued a penalty policy for use by Presiding Officers in determining  
18 penalties under the CWA.<sup>1</sup> Consequently, Presiding Officers rely on the wording of the  
19 statutory penalty factors set out in Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3).  
20 Complainant’s proposed penalty amount is based on the applicable CWA Section 309(g)(3)  
21 penalty factors. These are: the nature, circumstances, extent and gravity of the violation, or  
22 violations, and, with respect to Respondent, ability to pay, any prior history of such violations,

23  
24 <sup>1</sup> The Consolidated Rules of Procedure require that the Presiding Officer, in addition to considering the applicable  
25 statutory penalty factors, “shall consider any civil penalty guidelines issued under the Act.” 40 C.F.R. § 22.27(b).  
Since EPA has not issued any specific CWA penalty policy guidelines applicable to the present action, this section is  
inapplicable.



1 the degree of culpability, economic benefit or savings (if any) resulting from the violation, and  
2 such other matters as justice may require. See *In re Larry Richner*, 10 E.A.D. 617, 633, CWA  
3 Appeal No. 01-01 (EAB July 22, 2002) (“Because there are no CWA penalty guidelines, a  
4 CWA penalty must be calculated based upon the evidence in the record and the penalty criteria  
5 set forth in CWA § 309(g)”); *In re Britton Construction*, 8 E.A.D. 261, 278 (EAB 1999) (“The  
6 statute requires EPA to take into account a number of factors in assessing penalties, such as the  
7 extent of the violations and the violator’s culpability, but it prescribes no precise formula by  
8 which these factors must be computed.” (citations omitted)).

9 The nature, circumstances, extent, and gravity of the violations in this case are moderate.  
10 In addition, Respondent is culpable. The NPDES General Permit for Storm Water Discharges  
11 from Construction Activities (“CGP”) requires operators to apply for coverage under the permit  
12 when there is a potential or actual discharge to a water of the United States. Respondent’s  
13 construction activities at the Site resulted in an actual discharge of construction storm water to  
14 the drainage ditch next to South Cole Road. The drainage ditch discharges to the New York  
15 Canal which eventually discharges into the Snake River. Respondent failed to apply for  
16 coverage under the CGP. Moreover, there was evidence at the Site of an actual discharge of  
17 storm water into the drainage ditch.

18 Respondent has no prior history of violations known to EPA at this time. Respondent,  
19 however, has enjoyed an economic benefit of approximately \$10,000 as a result of his failure to  
20 comply with the CWA. The economic benefit arises from the avoided cost of applying for  
21 coverage under the CGP, preparing a storm water pollution prevention plan for the Site, and  
22 implementing best management practices at the Site to prevent discharges to waters of the  
23 United States.

24 EPA presumes that Respondent is able to pay a penalty of \$25,000 based upon the  
25 information available at the time of the filing of the Complaint.

1 **IV. ESTIMATE REGARDING LENGTH OF HEARING**

2 Absent lengthy cross-examination, EPA estimates that it will require approximately one  
3 to one and one-half days to present its case-in-chief. The length of time required for rebuttal  
4 testimony and cross-examination of Respondent's witnesses will depend on the quantity and  
5 substance of documents and witnesses disclosed in Respondent's Opening Prehearing Exchange.

6 **V. LOCATION OF HEARING**

7 Complainant proposes Boise, Idaho for hearing location. The Site is located in Boise  
8 and court rooms are available in Boise.

9  
10 DATED: October 28, 2005



11  
12 Courtney J. Hamamoto  
13 Assistant Regional Counsel  
14 U.S. EPA Region 10

1 **CERTIFICATE OF SERVICE**

2 I certify that the foregoing "Opening Prehearing Exchange" was sent to the following  
3 persons, in the manner specified, on the date below:

4 Original plus one copy, by hand delivery:

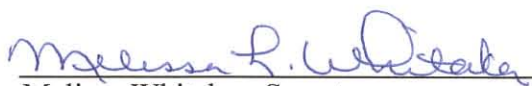
5 Carol Kennedy  
6 Regional Hearing Clerk  
7 U.S. EPA Region 10  
1200 Sixth Avenue, ORC-158  
Seattle, WA 98101

8 A true and correct copy, by U.S. Mail:

9 Judge Carl C. Charneski  
10 U.S. EPA  
Office of Administrative Law Judges  
11 Mail Code 1900L  
Ariel Rios Building  
12 1200 Pennsylvania Avenue, N.W.  
Washington, DC 20460

13 Bruce Hessing  
14 Landsing Development Group, LLC  
15 5800 South Cole Road  
Boise, ID 83709

16 DATED: October 28, 2005

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18 \_\_\_\_\_  
Melissa Whitaker, Secretary  
U.S. EPA, Region 10