

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7
11201 RENNER BOULEVARD
LENEXA, KANSAS 66219

Received by
EPA Region 7
Hearing Clerk

IN THE MATTER OF)	
)	
EVERGREEN DEVELOPMENT, INC.)	Docket No. CWA-07-2022-0134
)	
AND)	ANSWER TO COMPLAINT AND
)	REQUEST FOR HEARING
)	
MARK SCHMIDT,)	
)	
RESPONDENTS.)	

COMES NOW, the Respondents, Evergreen Development, Inc., a Nebraska Corporation, and Mark Schmidt, by and through the undersigned attorneys of record, and for their Answer to the Complaint filed against them, state and allege as follows:

The Respondents generally deny all allegations of the Complaint filed by Complainant and put them to strict proof thereof. This necessarily includes denials that there have been discharges of pollutants from a point source; that the areas in question constitute navigable waters; that any portion of water has been changed with dryland or that the bottom elevation has been elevated; that Mark Schmidt is a property party to this action; and that permitting under the federal guidelines was ever required of the Respondents.

Pursuant to Section 75 of the Complaint, the Respondents do hereby directly admit, deny, or state that they have no knowledge as to the particular factual allegations of this Complaint as follows:

17. Respondents neither admit nor deny paragraph 17 as it states a legal conclusion.

18. Respondents deny that Mark Schmidt, in his individual capacity, owned, operated or otherwise controlled the residential construction Site.

19. Respondents admit that the Site is a residential development within the extra territorial zoning jurisdiction of the Village of Bennet, Nebraska.

20. Respondents deny that any tributary to the Little Nemaha River enters the Site.

21. Respondents again deny the allegation that a tributary exists and/or is affected.

22. Respondents admit that they performed development activities for a residential development and affirmatively state that they did receive state and local permits for the same.

23. Respondents deny the allegation that they “disturbed” 12.1 acres at the Site.

24. Respondents again deny the allegation that any surface water runoff enters into a tributary to the Little Nemaha River.

25. Respondents neither admit nor deny paragraph 25 which is a legal conclusion rather than a factual allegation. Respondents, however, deny both that the activity is an “industrial activity” and is a “point source.”

26. Respondents neither admit nor deny paragraph 26 which is a legal conclusion rather than a factual allegation. Respondent denies that any surface water runoff contains “pollutants.”

27. Respondents deny the allegation of a tributary, that the area has perennial flow, that the area is hydrologically connected to the Little Nemaha River, that there are any wetlands or navigable waters affected by the Site.

28. Respondents again deny that there was an industrial activity, that there are any pollutants, that there is a point source and that there are affected navigable waters.

29. Respondents neither admit nor deny paragraph 29 which is a legal conclusion rather than a factual allegation. Respondents, however, deny there was a discharge of pollutants associated with an industrial activity on Site.

30. Respondents have no knowledge as to the administrative decisions made by NDEE at this time.

31. Respondents neither admit nor deny paragraph 31 which is a legal conclusion rather than a factual allegation. See above for denials of pollution, point source, tributary, industrial activity, etc.

32. Respondents have no knowledge as to the administrative activities of NDEE and hold the Complainant to strict proof thereof.

33. Respondents have no knowledge as to the administrative decisions of NDEE and hold the Complainant to strict proof thereof.

34. Respondents have no knowledge as to the administrative decisions of NDEE and hold the Complainant to strict proof thereof.

35. Respondents have no knowledge as to the administrative decisions of NDEE or the communications they may or may not have had with the EPA and hold the Complainant to strict proof thereof.

36. Respondent admits to having conducted residential development activities on the Site in September and October of 2020 but denies that it did anything to disturb or cause damage to a tributary or wetlands. Assuming for the sake of argument the areas are alleged to be disturbed the Respondent affirmatively alleges that the areas were improved for surface water flow and retention purposes.

37. Respondents have no knowledge as to internal activities performed by the Corps personnel. Respondent does, however, deny that there is a tributary present and point to the Complainants acknowledgement that it is “unnamed”. Respondent further asserts that Complainant cannot itself determine that a violation has occurred thus the need for these administrative proceedings for such a determination.

38. Respondents have no knowledge as to the internal activities performed by the Corps personnel and hold the Complainant to strict proof thereof.

39. Respondents have no knowledge as to the communications between the Corps and the EPA and hold the Complainant to strict proof thereof.

40. Respondents acknowledge that there were individuals purporting to represent governmental authorities on Site but can't speak to their purpose or what they allege to have witnessed.

41. Respondents neither admit nor deny paragraph 41 as it's a legal conclusion rather than a factual allegation.

42. Respondents neither admit nor deny paragraph 42 as it's a legal conclusion rather than a factual allegation.

43. Respondents neither admit nor deny paragraph 43 as it's a legal conclusion rather than a factual allegation.

44. Respondents have no knowledge as to the activities of EPA officials but as stated above deny claims that there is a tributary, that it was disturbed or

damaged and that any construction activities are on-going at the Site further affecting the alleged tributary.

The Respondents do generally deny all other paragraphs of the Complaint which are almost exclusively legal conclusions rather than factual allegations. The Respondents further assert that no facts are present in the pleading which would purport to prove that the area is in fact a tributary, what specific activities are alleged to have been done within the tributary and whether that activities have caused any damage or hardship to either the tributary or the Little Nemaha River.

The Respondents further do state that they did retain professional engineering assistance from CES Engineering at 605 Broadway, Marysville, Kansas 66508, who represented to them that federal permitting was not necessary or appropriate for this project and that they did reasonably rely upon that advice to their detriment.

The Respondent further reminds the Complainant that a number of notices that were referenced in the Complaint were not received by the Respondents as was acknowledged by the EPA who indicated that notices were being sent back as undeliverable.

The Respondents further argue, arguendo, that if there is a penalty assessed that a financial hardship waiver be considered and granted to reduce the said penalty.

WHEREFORE, the Respondents respectfully request that the Complaint be dismissed as well as any additional relief which may be just and equitable.

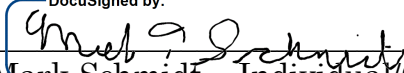
DATED THIS 20th day of January, 2023.

EVERGREEN DEVELOPMENT, LLC, and
MARK SCHMIDT, Respondents

By: 
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REQUEST FOR INFORMAL SETTLEMENT CONFERENCE

The Respondents do pursuant to Section 80 of the underlying Complaint hereby request an informal conference in order to discuss the facts of this case, the proposed penalty, and the possibility of settlement.

DocuSigned by:

Mark Schmidt – Individual/Officer

CERTIFICATE OF SERVICE

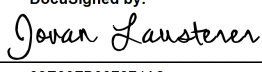
I hereby certify that a true and correct copy of the foregoing Demand for Hearing was sent by electronic service on this day to:

EPA, Region 7:
Shane McCain, Attorney
mccoin.shane@epa.gov

EPA, Region 7:
Amy Gonzales, Regional Hearing Clerk
Gonzales.amy@epa.gov
[R7 Hearing Filings@epa.gov](mailto:R7_Hearing_Filings@epa.gov)

Two Hard Copies Mailed To:

U.S. Environmental Protection Agency Region 7
Attn: Amy Gonzales, Regional Hearing Clerk
11201 Renner Boulevard
Lenexa, Kansas 66219

DocuSigned by:

03E00F8007874A2
Jovan W. Lausterer, Attorney