



2008 NOV 09 08 Kari R. Reichert

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E. W. REICHERT  
HEARING CLERK

October 30, 2008

Regional Hearing Clerk  
U.S. EPA Region 8 (SRC)  
1595 Wynkoop Street  
Denver, Colorado 80202-1129

*Via facsimile to 303-312-6586  
and U.S. Certified Mail*

**Re: In the Matter of: Industrial Builders, Inc.  
Docket No. CWA-08-2008-0029**

Dear Sir or Ma'am:

Enclosed for filing in the above-reference proceeding please find:

1. Answer to Administrative Complaint and Request for Hearing (original),
2. Answer to Administrative Complaint and Request for Hearing (copy); and;
2. Certificate of Service.

Thank you for your attention to this filing.

Sincerely,

Kari R. Reichert

Enclosures

cc: Sheldon Muller (via U.S. Certified Mail only)  
Dennis Fewless, Director (via U.S. Certified Mail only)  
Paul W. Diederich (via U.S. Mail)

**UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 8**

<b>IN THE MATTER OF:</b>	)	Docket No. CWA-08-2008-0029
	)	
<b>Industrial Builders, Inc.</b>	)	<b>ANSWER TO</b>
<b>1307 County Road 17 N</b>	)	<b>ADMINISTRATIVE COMPLAINT</b>
<b>West Fargo, North Dakota 58078</b>	)	<b>AND REQUEST FOR HEARING</b>
	)	
	)	Proceedings to Assess a Civil Penalty
	)	Under Section 309(g) of the Clean Water
<b>Respondent.</b>	)	Act, 33 U.S.C. § 1319(g)
_____	)	

Respondent, for its Answer to the Administrative Complaint, states and alleges as follows:

1. Respondent denies each and every allegation in the Administrative Complaint unless hereinafter admitted, qualified, or otherwise explained.

**I. STATUTORY AUTHORITY**

2. Paragraph 1 of the Administrative Complaint is a recitation of the statutory authority of the Environmental Protection Agency and does not call for response. To the extent a response is required, the allegations of paragraph 1 are denied.

**II. STATUTORY AND REGULATORY FRAMEWORK**

3. Paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, and 19 of the Administrative Complaint are recitations of either statute or regulation, and do not call for response. To the extent a response is required, the allegations of the aforementioned paragraphs are denied.

**III. GENERAL ALLEGATIONS**

4. Respondent admits the allegations of paragraph 20

5. With respect to the allegations of paragraph 21, Respondent admits Paul W. Diederich is the president of Industrial Builders, Inc., but denies Warren B. Diederich is the registered agent of Industrial Builders, Inc. Paul W. Diederich is currently the registered agent of Industrial Builders, Inc.

6. The allegations of paragraph 22 constitute a legal assertion to which no response is required. To the extent a response is required, paragraph 22 is denied.

7. Respondent admits the allegations of paragraph 23 and paragraph 24.

8. Respondent lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of paragraphs 25, 26, 27, 28, and 29, and therefore denies them.

9. The allegations of paragraph 30 constitute a legal assertion to which no response is required. To the extent a response is required, paragraph 30 is denied.

10. Respondent lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of paragraph 31 and therefore denies them.

11. The allegations of paragraph 32 constitute a legal assertion to which no response is required. To the extent a response is required, paragraph 32 is denied.

12. Respondent lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of paragraph 33 and therefore denies them.

#### **IV. SPECIFIC ALLEGATIONS**

13. Respondent admits the allegations of paragraph 34 and paragraph 35.

14. Respondent denies the allegations of paragraph 36. Respondent denies it “deposited fill material into the Heart River below the ordinary high water mark.”

Respondent further denies its work on the Project was unauthorized or otherwise in violation of any state or federal law or regulation.

15. With respect to the allegations of paragraph 37, Respondent admits it performed work on the east bank of the Heart River to enable it to perform bridge replacement work and admits it constructed a roadway to move heavy machinery to and from the worksite. Respondent denies it deposited fill into the Heart River below the ordinary high water mark. Respondent further denies it engaged in any unauthorized discharge of fill in any wetlands or any unauthorized deposit of fill into the Heart River.

16. With respect to the allegations of paragraph 38, Respondent denies it deposited fill into the Heart River below the ordinary high water mark. Respondent admits it removed all materials used to create the roadway for transporting heavy machinery to and from the location of bridge replacement/repair work in early December 2007.

17. Respondent admits the allegations of paragraphs 39, 40, and 41.

18. With respect to the allegations of paragraph 42, Respondent admits it used earthmoving vehicles and equipment in connection with the bridge work. To the extent paragraph 42 incorporates the allegations of paragraphs 36 and 37 of the Complaint, Respondent reiterates its denials to the allegations of those paragraphs and incorporates the same herein by reference.

#### **V. VIOLATION – DISCHARGE OF POLLUTANTS WITHOUT A PERMIT**

19. Paragraph 43 realleges prior paragraphs and Respondent incorporates its responses to paragraphs 1 through 42 of the Administrative Complaint herein by reference.

20. The allegations of paragraphs 44, 45, 46, 47, and 48 constitute legal assertions to which no response is required. To the extent response is required, paragraphs 44, 45, 46, 47, and 48 are denied. To the extent paragraphs 44, 45, 46, 47, and 48 incorporate the allegations of paragraphs 36 and 37 of the Complaint, Respondent reiterates its denials of the allegations of those paragraphs and incorporates the same herein by reference.

21. Respondent denies the allegations of paragraph 49. Respondent specifically denies its work on the Project was unauthorized or in violation of federal law and/or regulation or is otherwise subject to the assessment of civil penalties.

22. Respondent denies the allegations of paragraph 50. Respondent specifically denies its work on the Project was undertaken in violation of federal law and/or regulation or is otherwise subject to the assessment of civil penalties.

#### **VI. NOTICE OF PROPOSED ORDER ASSESSING A CIVIL PENALTY**

23. Paragraph 51 of the Administrative Complaint states the proposed penalty by EPA for the alleged violations of federal law, to which no response is required. To the extent response is required, Respondent denies the allegations in paragraph 51 and specifically denies that its actions are subject to administrative penalty or that the proposed penalty is warranted under the law.

24. Paragraph 52 of the Administrative Complaint contains a recitation and/or summary of statute or regulation, or other legal assertions, to which no response is required. To the extent response is required, Respondent denies the allegations in paragraph 52.

#### **VII. NOTICE OF OPPORTUNITY TO REQUEST A HEARING**

25. Paragraphs 53 and 54 of the Administrative Complaint are recitations of either statute or regulation, and do not call for response. To the extent a response is required, the allegations of paragraphs 53 and 54 are denied.

26. Paragraph 55 of the Administrative Complaint merely states the EPA's address and does not call for response.

27. Paragraphs 56 and 57 of the Administrative Complaint recite and/or summarize statute or regulation and do not call for response. To the extent a response is required, the allegations of the paragraphs 56 and 57 are denied.

#### **VIII. TERMS OF PAYMENT FOR QUICK RESOLUTION**

28. Paragraphs 58, 59, and 60 of the Administrative Complaint recite and/or summarize statute or regulation and do not call for response. To the extent a response is required, the allegations of the paragraphs 58, 59, and 60 are denied.

#### **IX. SETTLEMENT CONFERENCE**

29. Paragraph 61 of the Administrative Complaint sets forth EPA's position as to settlement and/or recites and/or summarizes statute or regulation, and does not call for response. To the extent response is required, Respondent lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of paragraph 61, and therefore denies them.

#### **DISPUTED FACTS/BASES FOR OPPOSING PROPOSED RELIEF**

30. Respondent entered into a contract with the North Dakota Department of Transportation (NDDOT) to replace a bridge on the Heart River west of Mandan, North Dakota. Pursuant to Nationwide Permit No. 23, the Army Corps of Engineers (Corps) authorized the NDDOT to replace the bridge.

31. Respondent performed work on the bridge during the winter months of 2007 and 2008. During this time, the Heart River was largely covered in ice.

32. To enable access of its construction equipment to the bridge site, Respondent deposited a mixture of sand, dirt, and gravel onto ice-covered portions of the river to form a roadway for the transport of equipment.

33. When Respondent completed that portion of the bridge work which required access of its equipment over ice-covered portions of the river, Respondent removed the roadway, including the sand, dirt, and gravel it had deposited on the ice.

34. Removal of all materials deposited onto the ice was completed well before the ice began to melt in the spring of 2008.

35. At no time did Respondent place sand, dirt, gravel or other materials into the waters of the Heart River.

36. Respondent's work fell within the scope of the Corps' general permitting program. Pursuant to 33 C.F.R. part 330, the Corps has issued general, or "nationwide," permits "designed to regulate with little, if any, delay or paperwork certain activities having minimal impacts." 33 C.F.R. § 330.1(b). Where activities fall within the scope of a general permit, and the terms of the general permit are satisfied, an individual permit is not required. 33 C.F.R. § 323.3(a).

37. Nationwide Permit No. 23 provides a categorical exclusion to the individual permitting requirement of 33 C.F.R. § 323.3 for "[a]ctivities undertaken, assisted, authorized, regulated, funded, or financed, in whole or in part, by another Federal agency or department where that agency or department has determined...that the activity, work, or discharge is categorically excluded from environmental documentation,

because it is included within a category of actions which neither individually nor cumulatively have a significant effect on the human environment...”

38. The Corps’ North Dakota Regulatory Office authorized the NDDOT, pursuant to Department of the Army Nationwide Permit No. 23, to replace the bridge in question.

39. NDDOT contracted with Respondent to complete the bridge replacement.

40. Nationwide Permit No. 33 provides a categorical exclusion to the individual permitting requirement of 33 C.F.R. § 323.3 for “Temporary Construction, Access, and Dewatering” activities. Specifically, Nationwide Permit No. 33 provides exclusion from the permitting requirements for “[t]emporary structures, work, and discharges, including cofferdams, necessary for construction activities or access fills or dewatering of construction sites, provided that the associated primary activity is authorized by the U.S. Army Corps of Engineers...”

41. Respondent’s activities fell within the scope of Nationwide Permits No. 23 and No. 33 and, therefore, Respondent’s activities were authorized without the need for an individual permit and, thus, were not undertaken in violation of federal law and/or regulation.

42. Respondent acted in good faith at all times, and to the extent any violation of state or federal law is alleged, Respondent at no time knowingly or willfully violated the law. In fact, when notified by state and federal agencies that a permit could be required, Industrial Builders made every effort to comply with the requests of state and federal regulatory authorities.

**RESPONDENT HEREBY REQUESTS A HEARING IN THIS MATTER.**



Dated this 30<sup>th</sup> day of October, 2008.

VOGEL LAW FIRM

By  \_\_\_\_\_  
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Attorneys for Respondent

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 8

IN THE MATTER OF:	)	Docket No. CWA-08-2008-0029
	)	
Industrial Builders, Inc.	)	
1307 County Road 17 N	)	CERTIFICATE OF SERVICE
West Fargo, North Dakota 58078	)	
	)	
	)	Proceedings to Assess a Civil Penalty
Respondent.	)	Under Section 309(g) of the Clean Water
_____	)	Act, 33 U.S.C. § 1319(g)

The undersigned hereby certifies that a true and correct copy of Respondent Industrial Builder, Inc.'s **Answer to Administrative Complaint and Request for Hearing** was served this 30<sup>th</sup> day of **October, 2008**, upon the following via U.S. Certified Mail, return receipt requested to:

Sheldon Muller  
Enforcement Agency  
U.S. EPA Region 8 (8ENF-L)  
1595 Wynkoop Street  
Denver, CO 80202-1129

Dennis Fewless, Director  
North Dakota Department of Health  
Division of Water Quality  
918 East Divide Avenue, 4th Floor  
Bismarck, ND 58501-1947

Dated: October 30, 2008

  
\_\_\_\_\_  
Kari R. Reichert (ND 06006)