



- Construction activities began at the Site in 2006. (Amended Answer, ¶ 2, admitting ¶ 5 of Complaint.)
- The runoff and drainage from the Site are “storm water” as defined in 40 C.F.R. § 122.26(b)(13). (Amended Answer, ¶ 2, admitting ¶ 7 of Complaint.)
- Storm water contains “pollutants” as defined by section 502(6) of the Act, 33 U.S.C. § 1362(6). (Amended Answer, ¶ 2, admitting ¶ 8 of 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). (Amended Answer, ¶ 2, admitting ¶ 9 of Complaint.)
- The City of Fargo’s MS4 discharges to the Red River of the North. (Amended Answer, ¶ 2, admitting ¶ 10 of Complaint.)
- The Red River of the North is a “navigable water” as defined by section 502(7) of the Act, 33 U.S.C. § 1562(7), and part of the “waters of the United States” as defined by 40 C.F.R. § 122.2. (Amended Answer, ¶ 2, admitting ¶ 11 of Complaint.)
- The storm water discharge from the Site is the “discharge of a pollutant” as defined by section 502(12) of the Act, 33 U.S.C. § 1362(12), and 40 C.F.R. § 122.2. (Amended Answer, ¶ 2, admitting ¶ 12 of Complaint.)
- The storm water discharge from the Site is a discharge from a “point source” as that term is defined in section 502(14) of the Act, 33 U.S.C. § 1362(14), and 40 C.F.R. § 122.2. (Amended Answer, ¶ 2, admitting ¶ 13 of Complaint.)
- In order to restore and maintain the integrity of the nation’s water, section 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 section 402 of the Act, 33 U.S.C. § 1342. (Amended Answer, ¶ 2, admitting ¶ 14 of Complaint.)
- 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. (Amended Answer, ¶ 2, admitting ¶ 15 of Complaint.)
- 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. (Amended Answer, ¶ 2, admitting ¶ 16 of Complaint.)

- 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). (Amended Answer, ¶ 2, admitting ¶ 17 of Complaint.)
- 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); Sections 301(a), 308, and 402(p) of the Act, 33 U.S.C. §§ 1311(a), 1318, and 1342(p). (Amended Answer, ¶ 2, admitting ¶ 18 of Complaint.)
- Prior to beginning construction at the Site, the Respondent was required to have obtained NPDES permit authorization for its discharges of storm water from the Site. 40 C.F.R. § 122.21(c). (Amended Answer, ¶ 2, admitting ¶ 19 of Complaint.)
- 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. (Amended Answer, ¶ 2, admitting ¶ 20 of Complaint.)
- Effective October 11, 2004, the 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. Dischargers may apply for authorization to discharge under the Permit by submitting a notice of intent for coverage to the NDDH. (Amended Answer, ¶ 2, admitting ¶ 21 of Complaint.)
- 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. (Amended Answer, ¶ 2, admitting ¶ 22 of Complaint.)
- 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. One plan is broadly defined to include design, permit application, advertisement or physical demarcation indicating that land-disturbing activities may occur. (Amended Answer, ¶ 2, admitting ¶ 23 of Complaint.)

- EPA inspected the Site on September 23, 2008. (Amended Answer, ¶ 5, admitting ¶¶ 25 and 26 of Complaint, to the extent that EPA conducted a storm water inspection on September 23, 2008.)
- After the September 23, 2008, inspection, the Respondent submitted a notice of intent to the NDDH seeking authorization to discharge under the Permit. Effective September 25, 2008, the Respondent became authorized under the Permit to discharge storm water from the Site, subject to the Permit's terms and conditions applying to large construction activity. (Amended Answer, ¶ 2, admitting ¶ 27 of Complaint.)<sup>1</sup>
- Had Respondent obtained authorization to discharge storm water under the Permit prior to construction, it would have been required by the Permit to implement best management practices to reduce sediment in their discharges and prevent sediment from entering the street. (Amended Answer, ¶ 2, admitting ¶ 28 of Complaint.)
- Had Respondent obtained authorization to discharge under the Permit prior to construction, it would have been required by the Permit to complete a SWPPP prior to beginning construction at the Site. (Amended Answer, ¶ 2, admitting ¶ 29 of Complaint.)
- The Permit requires that the SWPPP for the Site include, among other things: the total area of soil disturbance, a proposed timetable of activities disturbing soils for major portions of the Site, a complete Site map, a description of good housekeeping and preventative maintenance practices, an identification of when each erosion and sediment control measure would be implemented, and a maintenance or clean-out interval for sediment controls. (Amended Answer, ¶ 2, admitting ¶ 30 of Complaint.)

**1. Witnesses, exhibits, and place of hearing**

**(A) names of the expert and other witnesses intended to be called at hearing, with a brief narrative summary of their expected testimony.**

Amy Clark: Ms. Clark is an Environmental Scientist with EPA Region 8. She will testify regarding her observations during a Site inspection on September 23, 2008, her subsequent review of a Storm Water Pollution Prevention Plan that Respondent submitted to EPA in October of 2008, her communications with the NDDH regarding its records of any Notices of Intent relating to storm water permit coverage for the Respondent, her preparation of a report of her September 23, 2008, inspection, EPA's publication of a public notice of its proposal

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<sup>1</sup>In its Notice of Intent, the Respondent named "Old Orchard, LLC" as the party seeking authorization. As mentioned above, Old Orchard, LLC has been withdrawn from this complaint, and the Respondent has agreed to assume full responsibility for the alleged violations.

to assess an administrative penalty in this matter, and EPA's solicitation of comments from the NDDH on the proposed complaint in this matter.

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.

Leonila Hanley: Ms. Hanley is an Environmental Engineer with EPA Region 8. She will testify regarding her observations during a Site inspection on September 23, 2008.

Darcy O'Connor: Ms. O'Connor is the Acting Director of the Water Enforcement Program for EPA Region 8. She will testify regarding EPA's consultation with the North Dakota Department of Health regarding the penalty complaint in this matter. At the time of that consultation, Ms. O'Connor was the team leader for the NPDES Enforcement Unit of the Water Enforcement Program.

**(B) copies of all documents and exhibits intended to be introduced into evidence.**

Note: Some of the exhibits are photographs that do not always show up clearly in photocopies or scanned versions. EPA reserves the right to request permission at the hearing to substitute original photographs or enlarged copies for the copies that are now being provided to the Regional Hearing Clerk, Administrative Law Judge, and opposing counsel.

- Complainant's Ex. 1: NDPDES (North Dakota Pollutant Discharge Elimination System) Permit No. NDR10-0000, effective October 11, 2004.
- Complainant's Ex. 2: October 20, 2008 letter from Amy Clark, NPDES Enforcement Unit, EPA Region 8, to Brooks Johnson, Old Orchard LLC, enclosing copy of report of EPA's September 23, 2008 inspection.
- Complainant's Ex. 3: City of Fargo ESC Permit, including application
- Complainant's Ex. 4: Topographic map of Site
- Complainant's Ex. 5: Precipitation data for Fargo, North Dakota from January of 2006 through October of 2008, from <http://www.fmweather.com> (last visited November 19, 2009).
- Complainant's Ex. 6: United States Department of Agriculture Web Soil Survey, from <http://websoilsurvey.nrcs.usda.gov/app/WebSoilSurvey.aspx> (last visited November 19, 2009).
- Complainant's Ex. 7: North Dakota's Standards of Quality for Waters of the State, Chapter 33-16-02.1, from

<http://www.legis.nd.gov/information/acdata/pdf/33-16-02.1.pdf>, last visited November 20, 2009. (Pages 1, 8, 23, and 24.)

- Complainant's Ex. 8: Curriculum vitae of Sandra G. Doty.
- Complainant's Ex. 9: Application (Notice of Intent) To Obtain Coverage Under NDPDES General Permit For Storm Water Discharges Associated with Construction Activity (NDR10-0000), stamped received by (NDDH) Division of Water Quality September 25, 2008, hand numbered as NDR10-2484, and signed on behalf of Meridian on October 17, 2006. Also includes NDDH's notice of coverage letter dated September 25, 2008.
- Complainant's Ex. 10: Respondent's Storm Water Pollution Prevention Plan (SWPPP), as received by EPA Region 8 on October 7, 1008, and dated September 23, 2008.
- Complainant's Ex. 11: Respondent's SWPPP, as received by EPA Region 8 on November 10, 2008, and dated November 3, 2008.
- Complainant's Ex. 12: Site/Utility Plan Map, as received by EPA Region on November 4, 2008 from the City of Fargo, and dated June 29, 2007.
- Complainant's Ex. 13: EPA's Public Notice of Proposed Penalty Assessment
- Complainant's Ex. 14: 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 November 30, 2009.

**(C) views as to appropriate place of hearing and estimated time to present case.**

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

**2. Additional Statements by EPA**

The Prehearing Order directed EPA to submit the following.

**(A) a detailed narrative statement that fully elaborates the exact factual and legal basis, and copies of all documents in support thereof, for the allegations made in paragraphs 24-26 and 31-38 of the Complaint.**

Par. 24 alleges that each apartment building at the Site is part of a common plan of development that has ultimately disturbed more than five acres. EPA bases this allegation on

- (1) Site/Utility Plan Map (Complainant's Ex. 12) that was submitted to EPA by the City of Fargo via email November 4, 2008, which shows three apartment buildings on the Site,
- (2) the City of Fargo Erosion and Sediment Control Permit application for the Site (Complainant's Ex. 3), signed by Raymond Reading, an agent of the Respondent, which indicates "7.5" as the "Site Acreage,"
- (3) the SWPPP attached to the City of Fargo Erosion and Sediment Control Permit application, which indicates "7.5" as the "Estimate of Project Size in Acres" and "Construction of 3 – 42 unit apartment buildings" as "Description of the Nature of Activity,"
- (4) the Notice of Intent to Obtain Coverage Under NDPDES General Permit For Storm Water Discharges Associated With Construction Activity, signed by an agent of the Respondent, which indicates "42 plex apartment buildings being constructed on a 7.5 acre development" as the "Brief Description of Construction Activity," and
- (5) observations of Ms. Clark and Ms. Hanley during EPA's inspection of the Site.

Par. 25 alleges that on September 23, 2008, EPA inspectors conducted a storm water inspection at the Site and at that time, the Respondent had not sought or obtained a permit authorizing storm water discharges from the Site. EPA bases these allegations on the recollections and records of Ms. Clark and Ms. Hanley and their inquiries to representatives of the Respondent and the North Dakota Department of Health.

Par. 26 alleges that during their inspection of the Site, EPA inspectors observed excessive sediment in storm drains at the Site, missing or inadequate best management practices, and no SWPPP on-site. EPA bases this allegation on personal observations by Ms. Clark and Ms. Hanley.

Par. 31 alleges that the Respondent's SWPPP received on October 7, 2008, lacked certain required elements until November 4, 2008. EPA bases this allegation on Ms. Clark's review of the SWPPPs received from the Respondent on October 7, 2008, and November 10, 2008.

Par. 32 alleges that EPA has consulted with the North Dakota Department of Health by furnishing a copy of the penalty complaint and inviting comments. EPA bases this allegation on recollections of Ms. Clark and Ms. O'Connor. EPA also provided the NDDH with copies of the complaint at the time it was filed.

Par. 33 alleges that Respondent did not apply for and obtain permit authorization for the Site until almost two years after beginning construction. EPA bases this allegation on its inquiries to Respondent and the North Dakota Department of Health.

Par. 34 alleges that the Respondent's failure to apply for authorization to discharge under an individual or general permit constitutes a violation of 40 C.F.R. §§ 122.21(c) and 122.26(c) and sections 308 and 402(p) of the Act, 33 U.S.C. §§ 1318 and 1342(p). EPA bases this allegation on the wording of the regulatory and statutory provisions and on the decisions of the EPA's Environmental Appeals Board and Chief Administrative Law Judge in In the Matter of Service Oil, Inc., Docket No. CWA-08-2005-0010, reported at 2008 EPA App. LEXIS 35 and 2007 EPA ALJ LEXIS 21, respectively.

Par. 35 alleges that from November 15, 2006, to September 25, 2008, Respondent discharged storm water from the Site to the Red River of the North via the City of Fargo's municipal separate storm water sewer, without authorization by any permit. EPA bases this allegation on the Respondent's lack of permit coverage for the Site for this time period (see the discussion of Paragraphs 25 and 33, above), the personal observations of Ms. Clark and Ms. Hanley of the facility's storm sewer system, and records of precipitation in the area.

Par. 36 alleges that Respondent's discharge without permit authorization constitutes a violation of sections 301(a) and 402(p) of the Act, 33 U.S.C. §§1311(a) and 1342(p). EPA bases this allegation on the previously discussed paragraphs of the complaint, the statutory wording, and relevant caselaw. See, e.g., Parker v. Scrap Metal Processors, Inc., 386 F.3d 993 (11<sup>th</sup> Cir. 2004), rehearing denied 2004 U.S. App. LEXIS 28628 (11<sup>th</sup> Cir. 2004), holding that discharging storm water collecting in piles of debris and running off into a tributary of a navigable-in-fact water was a prohibited discharge of pollutants.

Par. 37 alleges that from September 25, 2008, to November 4, 2008, Respondent's SWPPP failed to contain all elements required by North Dakota's general permit. EPA bases this allegation on Ms. Clark's review of the SWPPPs provided by Respondent.

Par. 38 alleges that the Respondent's failure to develop a complete SWPPP has violated North Dakota's general permit. EPA bases this allegation on the requirements in that permit relating to SWPPPs, including Part II.C.

**(B) a copy of the report(s), if any, and any and all documents, notes, photographs and/or other records related thereto, of the September 23, 2008 inspection referenced in paragraphs 25 and 26 of the Complaint.**

Please see Complainant's Exhibit 2.

**(C) a copy of Respondents' Storm Water Pollution Prevention Plan for the Site and any portion thereof referenced in paragraph 32 of the Complaint.**

Please see Complainant's Exhibit 10.

**(D) a copy of the North Dakota general NPDES permit no. NDR10-0000 referenced in paragraph 21 of the Complaint.**

Please see Complainant's Exhibit 1.

**(E) to the extent not previously provided with the Complaint, a separate Penalty Calculation Worksheet detailing exactly how the proposed penalty was calculated and copies of all documents in support thereof.**

Please see the Complaint. EPA would particularly emphasize the nature, circumstances, extent, and gravity of the violations. EPA's inspection revealed that throughout the Site, storm drains were unprotected. 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. This tribunal has noted that the Red River is a source of drinking water for Fargo residents and that EPA has identified it as being impaired by turbidity, which has affected its 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 has 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. Over two months ago, counsel for EPA informed Respondent's counsel that EPA can reduce penalties upon a showing that any respondent is unable to pay an assessed penalty. EPA's counsel also provided Respondent's counsel with the information EPA requests in order to evaluate a claim of inability to pay. However, the Respondent has not claimed that it is unable to pay the proposed penalty.

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).

**(F) a statement regarding whether the Paper Work Reduction Act of 1980 (PRA), 44 U.S.C. § 3501 *et seq.*, applies to this proceeding, whether there is a current Office of Management and Budget control number involved herein, and whether the provisions of Section 3512 of the PRA are applicable in this case.**

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>1</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.)

Count 3 involves a violation of a state-issued permit and is therefore not the type of information collection activity covered by the Paperwork Reduction Act.

Supplemental Pre-Hearing Exchange

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

Respectfully submitted,

  
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<sup>1</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:

James R. Bullis, Esq.  
Kyle C. Pender, Esq.  
Montgomery Goff & Bullis, PC  
4650 38<sup>th</sup> Avenue S., Suite 110  
Fargo, ND 58106-9199  
Certified Mail No. 7008 - 3230 - 0003 - 0730 - 5193

One copy by pouch mail to:

The Honorable Susan L. Biro  
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: 12/1/09

By: Judith M. McTernan