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Phil McCreedy
Trent N. Baker
Peter F. Lacy
* Matthew A. Baldassin
Joseph R. Casillas
George H. Corn
Kyle C. Ryan
Sherine D. Fernando

Ronald B. MacDonald (1946-2002)

* Also admitted in Washington
^ Also admitted in Massachusetts

September 5, 2013

Sent via Federal Express

Sybil Anderson
Headquarters Hearing Clerk
Office of the Administrative Law Judges
U.S. Environmental Protection Agency
Ronald Reagan Building, Room M1200
1300 Pennsylvania Avenue, N.W.
Washington, DC 20004

RECEIVED BY DALJ
7/11/13 SEP 13 PM 3:04

Re: *Nelcon, Inc. – CWA-08-2012-0025*

Dear Ms. Anderson:

Enclosed please find for filing Respondent Nelcon, Inc.'s Answer to the 1st Amended Complaint with regard to the above matter.

Thank you.

Very truly yours,

DATSOPOULOS, MacDONALD & LIND, P.C.

Rebecca L. Summerville

RLS/dm

Enclosures: As stated

cc: The Honorable Susan L. Biro, Chief Administrative Law Judge ✓
Charles L. Figur, Senior Enforcement Attorney

Rebecca L. Summerville
Datsopoulos, MacDonald & Lind, P.C.
201 West Main - Central Square Bldg.
Missoula, MT 59802
Phone: (406) 728-0810
Email: rsummerville@dmlaw.com
Attorneys for Nelcon, Inc.

RECEIVED BY DALJ
2013 SEP 13 PM 3:04

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8

Docket CWA-08-2012-0025

IN THE MATTER OF:)	
)	
Nelcon, Inc.)	ANSWER TO FIRST
304 Jellison Road)	AMENDED COMPLAINT
Kalispell, MT 59903)	AND REQUEST FOR HEARING
)	
Respondent.)	
_____)	

COMES NOW Respondent Nelcon, Inc., by and through its counsel, Datsopoulos, MacDonald & Lind, P.C. and pursuant to Rule 22.15 of the Consolidated Rules of Practice Governing the Assessment of Civil Penalties and the Revocation or Suspension of Permits, Answers the First Amended Administrative Complaint as follows:

1. Answering the first paragraph, Respondent states that paragraph 1 of the Complaint is informational, contains no positive averment, and requires no admission or denial.
2. Answering paragraph 2, Respondent states that the referenced statutes and regulations speak for themselves and require no admission or denial.
3. Answering paragraph 3, Respondent states that paragraph 3 of the Complaint is informational, contains no positive averment, and requires no admission or denial.
4. Answering paragraph 4, Respondent is without sufficient knowledge or information to form a belief as to the truth of the matters asserted and therefore denies the same.
5. Answering paragraph 5, Respondent admits the allegations.

6. Answering paragraph 6, Respondent admits that it is a corporation and that 33 U.S.C.

1362(5) defines person as follows:

The term “person” means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.

7. Answering paragraph 7, with respect to the first sentence, Respondent admits that pursuant to a contract with the Blackfoot Tribe it installed a drinking water pipeline for the Owner. Respondent admits the allegations contained in the last two sentences.

8. Answering paragraph 8, Respondent notes that this paragraph is a statement of EPA’s definition of the Site for purposes of the Complaint for which no response is required.

9. Answering paragraph 9, Respondent admits that the referenced statute and regulation contain definitions of “point source.” Respondent further admits that it conducted construction activities at the Site pursuant to its contract with the Blackfoot Tribe. However, the assertion that its “construction activity” is a “point source” as defined in the Act is a legal conclusion (not a factual allegation) and therefore no response is required. To the extent that paragraph 9 is deemed to include any other factual allegations other than those admitted herein, they are denied.

10. Answering paragraph 10, to the extent that it contains factual allegations (and not a legal conclusion) Respondent is without sufficient knowledge or information to form a belief as to the truth of the matters asserted and therefore denies the same. To the extent that it contains a legal conclusion, no response is required. Respondent further states that the referenced regulation speaks for itself.

11. Answering paragraph 11, Respondent admits that the Site is within the Blackfoot Reservation and is without sufficient knowledge or information to form a belief as to the truth of the remaining matters asserted and therefore denies the same.

12. Answering paragraph 12, Respondent states that the referenced statute speaks for itself.
13. Answering paragraph 13, Respondent states that the referenced statute speaks for itself.
14. Answering paragraph 14, Respondent states that the referenced statute speaks for itself.
15. Answering paragraph 15, Respondent first notes that the term “Indian Country” is not defined. To the extent that this paragraph contains factual allegations (and not a legal conclusion) Respondent is without sufficient knowledge or information to form a belief as to the truth of the matters asserted and therefore denies the same. To the extent that it contains a legal conclusion, no response is required.
16. Answering paragraph 16, Respondent states that the referenced regulation speaks for itself.
17. Answering paragraph 17, Respondent states that the referenced regulation speaks for itself.
18. Answering paragraph 18, Respondent states that the text in the referenced Fed. Reg. citations included in this paragraph speak for themselves.
19. Answering paragraph 19, Respondent denies the allegations contained therein.
20. Respondent admits the allegations in paragraph 20.
21. Answering paragraph 21, Respondent states that the referenced regulation speaks for itself.
22. Respondent admits the allegations in paragraph 22.
23. Answering paragraph 23, Respondent states that the referenced CGP speaks for itself.

24. Answering paragraph 24, Respondent states that the referenced CGP speaks for itself.

25. Answering paragraph 25, Respondent states that the referenced CGP speaks for itself.

26. Answering paragraph 26, Respondent is without sufficient knowledge or information to form a belief as to the truth of the matters asserted and therefore denies the same.

27. Answering paragraph 27, Respondent admits that it received a letter from MDT dated May 23, 2011 confirming that Respondent had received verbal permission regarding encroachment within MDT Right of Way for pipeline work on MT Highway 49 at the Two Medicine River Bridge.

28. Respondent admits the allegations contained in paragraph 28.

29. Respondent admits the allegations contained in paragraph 29.

30. Respondent admits the allegations contained in paragraph 30.

31. Answering paragraph 31, Respondent is without sufficient knowledge or information to form a belief as to the truth of the matters asserted and therefore denies the same.

32. Answering paragraph 32, Respondent is without sufficient knowledge or information to form a belief as to the truth of the matters asserted and therefore denies the same.

33. Answering paragraph 33, Respondent is without sufficient knowledge or information to form a belief as to the truth of the matters asserted and therefore denies the same.

34. Answering paragraph 34, Respondent is without sufficient knowledge or information to form a belief as to the truth of the matters asserted and therefore denies the same.

35. Answering paragraph 35, Respondent is without sufficient knowledge or information to form a belief as to the truth of the matters asserted and therefore denies the same.

36. Answering paragraph 36, Respondent is without sufficient knowledge or information to form a belief as to the truth of the matters asserted and therefore denies the same.

37. Answering paragraph 37, Respondent is without sufficient knowledge or information to form a belief as to the truth of the matters asserted and therefore denies the same.

38. Answering paragraph 38, Respondent is without sufficient knowledge or information to form a belief as to the truth of the matters asserted and therefore denies the same.

39. Answering paragraph 39, Respondent is without sufficient knowledge or information to form a belief as to the truth of the matters asserted and therefore denies the same.

40. Answering paragraph 40, Respondent is without sufficient knowledge or information to form a belief as to the truth of the matters asserted and therefore denies the same.

41. Answering paragraph 41, Respondent is without sufficient knowledge or information to form a belief as to the truth of the matters asserted and therefore denies the same.

42. Respondent denies the allegations contained in paragraph 42.

43. Respondent denies the allegations contained in paragraph 43.

44. Respondent denies the allegations contained in paragraph 44.

45. Answering paragraph 45, Respondent states that the referenced statute speaks for itself and denies that it should be assessed a penalty of \$160,000.00.

Respondent's investigation into the facts and circumstances of the matters alleged in the Complaint is continuing and Respondent reserves the right to amend, supplement and more fully respond as its investigation continues. Subject to that reservation Respondent identifies the following additional circumstances or arguments to constitute the alleged grounds of any defense:

1. According to the terms of its contract governing work at the Site, Respondent believed that the Owner was responsible for obtaining all necessary permits for the work.

2. Respondent believed that the Owner had obtained all necessary permits for work at the Site.
3. Respondent's work was overseen by the Owner's representative and Respondent was never informed by the Owner or its representative of environmental concerns or deficiencies related to the Site or the project.
4. Based on the Owner's retention of operational control over the construction plans and day-to-day supervision and control of site activities, the Owner was also the Operator in charge of construction activity.
5. The Owner obtained a permit for the Site pursuant to Section 404 of the Clean Water Act from the Army Corp of Engineers.
6. The May 23, 2011 letter from MDT did not identify Willow Creek as part of the Site.
7. After receiving the May 23, 2011 letter from MDT, Respondent, in good faith, implemented additional erosion and sediment controls to minimize the discharge of pollutants to surface waters at the Two Medicine River portion of the Site.
8. Following its implementation of additional erosion and sediment controls at the Two Medicine River portion of the Site in May 2011, Respondent did not receive any additional communications from MDT concerning discharges.
9. Some of the "discharges" that EPA's inspector may have observed may have been from a pre-existing spring crossing ground that was not disturbed or affected by Respondent's activities at the Site, or may have been the result of actions of third parties.
10. Until it received the Complaint Respondent had not been advised that EPA had sent inspectors to the Two Medicine Rivers portion of the Site months before or that EPA believed that Respondent had responsibilities that it was not fulfilling.

11. According to the Federal Register Volume 73, Number 135, pages 40338-40343, the Scope and Availability of the 2008 CGP, a CGP was not available for new and unpermitted ongoing construction projects in Indian Country within the State of Montana. Because it was not available, EPA explained in its notice that “EPA has decided to make administrative or civil enforcement for lack of permit coverage against dischargers in the above areas a low priority because the 2008 CGP will not yet apply to those areas.”

12. Respondent is unable to pay the proposed civil penalty.

13. This is the first enforcement action that EPA has pursued against Respondent Nelcon, Inc. for non-compliance with the Act.

14. The proposed civil penalty is excessive.

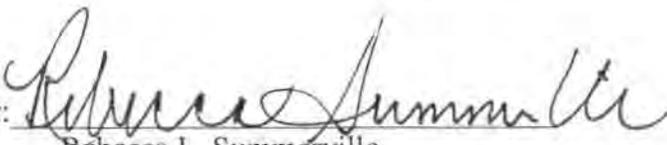
15. Within days of meeting with EPA representatives to understand matters raised by the Complaint and EPA’s view of its responsibilities, Respondent implemented additional erosion and sediment controls to minimize the discharge of pollutants to surface waters at the Site.

REQUEST FOR HEARING

Pursuant to Rule 22.15(c) of the Consolidated Rules of Practice Governing the Assessment of Civil Penalties and the revocation or Suspension of Permits, Respondent requests a hearing upon the issues.

Respectfully submitted this 5th day of September, 2013.

DATSOPOULOS, MacDONALD & LIND, P.C.

By: 
Rebecca L. Summerville

CERTIFICATE OF SERVICE

I, the undersigned, an employee of Datsopoulos, MacDonald & Lind, P.C., hereby certify that a true and correct copy of the foregoing document was emailed and sent by regular mail, postage prepaid, this 5th day of September, 2013 to the following:

Charles L. Figur *(Regular Mail and Email)*
Senior Enforcement Attorney
U.S. EPA Region 8 (ENF-L)
1595 Wynkoop Street
Denver, CO 80202-1129

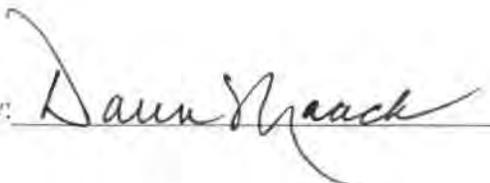
And, pursuant to the Order of Designation in this matter dated May 7, 2013, the original and one copy of the foregoing was sent via *Federal Express* to:

Sybil Anderson, Headquarters Hearing Clerk
Office of the Administrative Law Judges
U.S. Environmental Protection Agency
Ronald Reagan Building, Room M1200
1300 Pennsylvania Avenue, N.W.
Washington, DC 20004

Also, pursuant to the Prehearing Order (dated May 17, 2013) and the Amended Prehearing Order (dated August 2, 2013) in this matter, an electronic copy of the executed original of the foregoing document was emailed to the Office of the Administrative Law Judges at oyaljfilng@epa.gov, and sent by regular mail as follows:

The Honorable Susan L. Biro, Chief Administrative Law Judge
Office of Administrative Law Judge
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW
Mail Code 1900R
Washington, DC 20460

By: _____





Nelcon, Inc. CWA 08-2012-0025

Dawn Maack to: oaljfilng

09/05/2013 06:38 PM

From: Dawn Maack <dmaack@dmlaw.com>
To: oaljfilng@EPA

Judge Biro - attached please find a courtesy copy of Nelcon, Inc.'s Answer to the 1st Amended Complaint with regard to the above matter.

Thank you,

Dawn Maack, Paralegal

Datsopoulos, MacDonald & Lind, P.C.
201 W. Main Street, Suite 201 Missoula, MT 59802
Phone: 406.728.0810 | Fax: 406.543.0134

The documents included with this electronic mail transmission contain information from the law firm of Datsopoulos, MacDonald & Lind, P.C. which is confidential and/or privileged. This information is intended to be for the use of the addressee only. Note that any disclosure, printing, photocopying, distribution or use of the contents of this e-mailed information by persons other than the addressee or an agent of the addressee, is unauthorized and prohibited. If you have received this electronic mail in error, please notify us via electronic mail reply to the sender or by telephone (collect 406-728-0810) immediately.

Please consider the environment before printing this e-mail.



Answer to 1st Amended Complaint.pdf EPA Ltr 9.5.13.pdf

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2013 SEP -05 AM 9:19



Datsopoulos, MacDonald & Lind, P.C.

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September 5, 2013

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Rebecca L. Summerville

RLS/dm

Enclosures: As stated

cc: The Honorable Susan L. Biro, Chief Administrative Law Judge
Charles L. Figur, Senior Enforcement Attorney

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2013 SEP 05 11:05:19

Rebecca L. Summerville
Datsopoulos, MacDonald & Lind, P.C.
201 West Main - Central Square Bldg.
Missoula, MT 59802
Phone: (406) 728-0810
Email: rsummerville@dmlaw.com
Attorneys for Nelcon, Inc.

RECEIVED BY DAL-J
MAY 22 2012 10:19 AM

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8

Docket CWA-08-2012-0025

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3. Respondent's work was overseen by the Owner's representative and Respondent was never informed by the Owner or its representative of environmental concerns or deficiencies related to the Site or the project.

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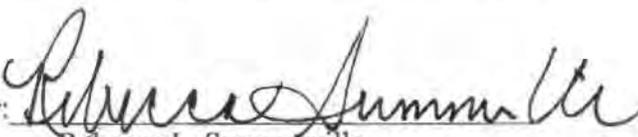
15. Within days of meeting with EPA representatives to understand matters raised by the Complaint and EPA's view of its responsibilities, Respondent implemented additional erosion and sediment controls to minimize the discharge of pollutants to surface waters at the Site.

REQUEST FOR HEARING

Pursuant to Rule 22.15(c) of the Consolidated Rules of Practice Governing the Assessment of Civil Penalties and the revocation or Suspension of Permits, Respondent requests a hearing upon the issues.

Respectfully submitted this 5th day of September, 2013.

DATSOPOULOS, MacDONALD & LIND, P.C.

By: 
Rebecca L. Summerville

CERTIFICATE OF SERVICE

I, the undersigned, an employee of Datsopoulos, MacDonald & Lind, P.C., hereby certify that a true and correct copy of the foregoing document was emailed and sent by regular mail, postage prepaid, this ~~5th~~ ^{5th} day of September, 2013 to the following:

Charles L. Figur (*Regular Mail and Email*)
Senior Enforcement Attorney
U.S. EPA Region 8 (ENF-L)
1595 Wynkoop Street
Denver, CO 80202-1129

And, pursuant to the Order of Designation in this matter dated May 7, 2013, the original and one copy of the foregoing was sent via *Federal Express* to:

Sybil Anderson, Headquarters Hearing Clerk
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U.S. Environmental Protection Agency
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The Honorable Susan L. Biro, Chief Administrative Law Judge
Office of Administrative Law Judge
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW
Mail Code 1900R
Washington, DC 20460

By: 