



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 8

1595 Wynkoop Street
DENVER, CO 80202-1129
Phone 800-227-8917
<http://www.epa.gov/region08>

SEP 30 2008

Ref: 8ENF-W

CERTIFIED MAIL #7007 2560 0002 6445 1757
RETURN RECEIPT REQUESTED

Warren B. Diederich, Registered Agent
Industrial Builders, Inc.
P.O. Box 406
Fargo, ND 58107

Re: Notice of Proposed Assessment of
Class I Civil Penalty
Docket No. CWA-08-2008-0029

Dear Mr. Diederich:

Enclosed is a document entitled Administrative Complaint and Notice of Opportunity for Hearing ("Complaint"). The United States Environmental Protection Agency ("EPA") is issuing this Complaint against Industrial Builders, Inc., ("Respondent") pursuant to section 309 of the Clean Water Act (the "Act"), 33 U.S.C. § 1319. In the Complaint, EPA alleges that the Respondent violated section 301 of the Act, 33 U.S.C. § 1311, by discharging, without authorization, dredged and/or fill material into the Heart River and its adjacent wetlands in Morton County, North Dakota. The Complaint proposes that a penalty of \$22,000 be assessed for these violations.

The Respondent has the right to a hearing to, among other things, contest the factual allegations in the Complaint. We have enclosed a copy of 40 C.F.R. Part 22, which identifies the procedures EPA follows in Class I penalty assessments. Please note the requirements for an answer to the Complaint in 40 C.F.R. § 22.15(b).

If the Respondent wishes to contest the allegations in the Complaint or the penalty proposed in the Complaint, it must file an answer within thirty (30) days of receipt of the enclosed Complaint to the EPA Region 8 Hearing Clerk at the following address:

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



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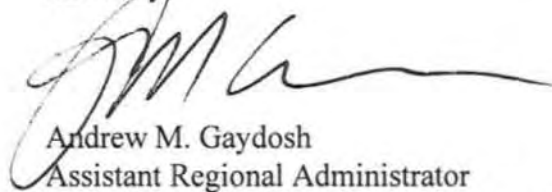
If the Respondent does not file an answer by the applicable deadline, it may be found in default. 40 C.F.R. § 22.17(a). A default judgment may impose the full penalty proposed in the Complaint. 40 C.F.R. § 22.17(b).

EPA has agreed to notify small businesses of their right to comment on regulatory enforcement activities at the time of an Agency enforcement activity pursuant to the Small Business Regulatory Enforcement and Fairness Act (SBREFA). SBREFA does not eliminate your responsibility to comply with the CWA or this Complaint, nor does it create any new rights or defenses under law. We have enclosed a SBREFA information sheet containing further information on compliance assistance resources and tools available to small businesses. Also enclosed is a Securities and Exchange Commission (SEC) Disclosure Notice.

EPA encourages settlement of these proceedings at any time prior to a formal hearing if the settlement is consistent with the provisions and objectives of the Act and applicable regulations [See 40 C.F.R. § 22.18]. If a mutually satisfactory settlement can be reached, it will be formalized in a Consent Agreement. Upon final approval of the Consent Agreement by the Regional Judicial Officer, the settling Respondent will be bound by the terms of the Consent Agreement and will waive its right to a hearing on, and judicial appeal of, the agreed upon civil penalty. Respondent has the right to be represented by an attorney at any stage of the proceedings, including any informal discussions with EPA, but this is not required.

Please note that arranging for a settlement meeting does not relieve the Respondent of the need to file a timely answer to EPA's Complaint. If the Respondent wishes to discuss settlement of this matter, the most knowledgeable person on my staff for legal issues is Sheldon Muller, Enforcement Attorney, who can be reached at 303-312-6916. The most knowledgeable person on my staff for technical issues is Monica Heimdal, Section 404 Enforcement Officer, who can be reached at 303-312-6359. We urge your prompt attention to this matter.

Sincerely,



Andrew M. Gaydosh
Assistant Regional Administrator
Office of Enforcement, Compliance and
Environmental Justice

Enclosures:

1. Administrative Complaint
2. Certificate of Service
3. Consolidated Rules of Practice (40 C.F.R. Part 22)
4. SBREFA Information Sheet
5. SEC Disclosure Notice

cc: Tina Artemis, EPA, Regional Hearing Clerk
Daniel E. Cimarosti, U.S. Army Corps of Engineers
David L. LaGrone, U.S. Army Corps of Engineers
Francis G. Ziegler, North Dakota Department of Transportation

3. Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant by any person except as in compliance with, *inter alia*, section 404 of the Act, 33 U.S.C. § 1344.

4. Section 404 of the Act, 33 U.S.C. § 1344, authorizes the Secretary of the Army, acting through the Chief of Engineers of the United States Army Corps of Engineers (“Corps”), to issue permits, after notice and opportunity for public hearings, for the discharge of dredged or fill material into navigable waters, which are defined in the Act as waters of the United States.

5. 33 C.F.R. § 323.3(a) specifies that, unless exempted pursuant to 33 C.F.R. § 323.4, a permit issued by the Corps is required for the discharge of dredged or fill material into waters of the United States.

6. The terms “discharge of a pollutant” and “discharge of pollutants” are defined in section 502(12) of the Act to each mean, in pertinent part, “any addition of any pollutant to navigable waters from any point source” 33 U.S.C. § 1362(12).

7. Section 502(6) of the Act defines “pollutant” as “dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.” 33 U.S.C. § 1362(6).

8. “Fill material” is defined in 33 C.F.R. § 323.2(e)(1) as “material placed in waters of the United States where the material has the effect of: (i) Replacing any portion of a water of the United States with dry land; or (ii) Changing the bottom elevation of any portion of a water of the United States.” 33 C.F.R. § 323.2(e)(2) sets forth examples of fill material which include “rock, sand, soil, clay, plastics, construction debris, wood chips”

9. “Dredged material” is defined in 33 C.F.R. § 323.2(c) as “material that is excavated or dredged from waters of the United States.”

10. “Discharge of fill material” is defined, in pertinent part, in 33 C.F.R. § 323.2(f) as “the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: placement of fill that is necessary for the construction of any structure or infrastructure in a water of the United States; the building of any structure, infrastructure, or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, or other uses; causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments; beach nourishment; levees; . . .”

11. “Discharge of dredged material” is defined, in pertinent part, in 33 C.F.R. § 323.2(d) as “any addition of dredged material into, including any redeposit of dredged material other than incidental fallback within, the waters of the United States. The term includes, but is not limited to, . . . [t]he addition of dredged material to a specified discharge site located in waters of the United States . . . and [a]ny addition, including redeposit other than incidental fallback, of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation.”

12. “Point source” is defined, in pertinent part, in section 502(14) of the Act as any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14).

13. “Navigable waters” is defined in section 502(7) of the Act as “waters of the United States, including the territorial seas.” 33 U.S.C. § 1362(7).

14. “Waters of the United States,” as defined in 33 C.F.R. § 328.3(a), includes, *inter alia*: (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce; (2) All interstate waters including interstate wetlands . . . ; [and] (7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section.”

15. “Ordinary high water mark” is defined in 33 C.F.R. § 328.3(e) as “that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.”

16. “Wetlands” is defined in 33 C.F.R. § 328.3(b) as “those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.”

17. “Adjacent” is defined in 33 C.F.R. § 328.3(c) as “bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are ‘adjacent wetlands.’”

18. “Person” is defined in section 502(5) of the Act as “an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.” 33 U.S.C. § 1362(5).

19. Section 309(g)(2)(A) of the Act, 33 U.S.C. § 1319(g)(2)(A), and 40 C.F.R. Part 19 authorize, for violations which occur after March 15, 2004, the assessment of a Class I civil penalty of up to \$11,000 per violation of section 301 of the Act, 33 U.S.C. § 1311, up to a maximum total penalty of \$32,500.

III. GENERAL ALLEGATIONS

20. Respondent Industrial Builders, Inc., is and was at all times relevant to the Complaint a North Dakota corporation having a registered office address of 1307 County Road 17 N, West Fargo, North Dakota 58078.

21. The president and registered agent of Industrial Builders, Inc., are, respectively, Paul W. Diederich and Warren B. Diederich.

22. Respondent is and was at all times relevant to the Complaint a “person” within the meaning of section 502(5) of the Act, 33 U.S.C. § 1362(5).

23. On or about July 5, 2007, the U.S. Army Corps of Engineers’ (“Corps”) North Dakota Regulatory Office authorized the North Dakota Department of Transportation (“NDDOT”), pursuant to Department of the Army Nationwide Permit No. 23, to replace the Heart River Bridge west of Mandan on Main Street, located in Section 28, Township 139 North, Range 81 West, Morton County, North Dakota (the “Project”).

24. The NDDOT awarded a contract to Respondent for the Project.

25. The Heart River is currently used, or was used in the past, or may be susceptible to use in interstate or foreign commerce.

26. The Heart River is navigable-in-fact.

27. The Heart River flows into the Missouri River, an interstate water that is currently used, or was used in the past, or may be susceptible to use in interstate or foreign commerce.

28. The Missouri River is navigable-in-fact.

29. The Heart River has a significant nexus to the Missouri River.

30. The Heart River is a “water of the United States” within the meaning of 33 C.F.R. § 328.3(a).

31. Wetlands located along the banks of the Heart River at the location of the Project provide, among other benefits, flood attenuation, shoreline protection, water quality protection, and wildlife habitat.

32. The wetlands located along the banks of the Heart River at the location of the Project are adjacent to and abut the Heart River and therefore are “waters of the United States” within the meaning of 33 C.F.R. § 328.3(a)(7).

33. Pursuant to Section 309(g)(1) of the Act, 33 U.S.C. § 1319(g)(1), EPA has consulted with the North Dakota Department of Health, Division of Water Quality, regarding assessment of this administrative penalty by furnishing a copy of this Complaint and inviting comments on behalf of the State of North Dakota.

IV. SPECIFIC ALLEGATIONS

34. The Project specified the construction of a bridge support in the bed of the Heart River. In order to construct the bridge support, a temporary cofferdam had to be built.

35. Respondent’s original plan for construction of the cofferdam and bridge support specified access to those Project components from the western shore of the Heart River.

36. On or about December 12, 2007, Respondent, without authorization from the Corps or any other regulatory agency, deposited fill material into the Heart River below the ordinary high water mark (“OHWM”) on the west bank of the river in order to move sheet piling in place for the cofferdam.

37. On or about December 12, 2007, after Respondent encountered difficulty obtaining access for equipment along the west bank of the Heart River, Respondent, without authorization from the Corps or any other regulatory agency, leveled the east bank of the Heart River and then discharged fill beginning in the wetlands adjacent to and abutting the Heart River and continuing from the east bank approximately two-thirds of the way across the Heart River, below the OHWM. The fill formed a continuous roadway which Respondent used to move heavy machinery into the Heart River in order to work on the cofferdam.

38. The fill that was discharged as described in Paragraph 37 of this Complaint was not removed until on or about December 13, 2007, after it was discovered by the NDDOT and an inspection was conducted by the Corps.

39. On or about January 29, 2008, Respondent submitted a permit application to the Corps, requesting authorization to place wooden swamp pads along the east shoreline of the Heart River to allow access to the south side of Pier 2 of the Project. The permit application specified that Respondent would also place filter fabric, riprap, and seed on both banks of the Heart River when weather permits.

40. On February 1, 2008, the Corps authorized, pursuant to Nationwide Permit No. 33, the work requested by Respondent. The authorization specified, *inter alia*, that the work

pad must be removed in its entirety prior to the break-up of the Heart River or on or before February 29, 2008, whichever came first.

41. On February 25, 2008, Respondent requested that the authorization granted by the Corps on February 1, 2008, be extended to March 3, 2008. The Corps granted the requested extension that same date.

42. The activities described in paragraphs 36-37 of this Complaint were performed using common earthmoving vehicles and equipment, all of which were operated by Respondent and/or by one or more individuals on behalf of Respondent.

V. VIOLATION - DISCHARGE OF POLLUTANTS WITHOUT A PERMIT

43. Paragraphs 1 through 42 are realleged and incorporated herein by reference.

44. The discharged materials described in paragraphs 36-37 of this Complaint are, and were at all times relevant to the Complaint, “fill material” within the meaning of 33 C.F.R. § 323.2(e) and/or “dredged material” within the meaning of 33 C.F.R. § 323.2(c).

45. The discharged materials described in paragraphs 36-37 of this Complaint are, and were at all times relevant to the Complaint, “pollutants” within the meaning of section 502(6) of the Act, 33 U.S.C. § 1362(6).

46. The vehicles and equipment described in paragraph 42 of this Complaint are, and were at all times relevant to the Complaint, each a “point source” within the meaning of section 502(14) of the Act, 33 U.S.C. § 1362(14).

47. The Heart River and its adjacent and abutting wetlands are, and were at all times relevant to the Complaint, “waters of the United States” within the meaning of 33 C.F.R.

§ 328.3(a) and therefore “navigable waters” within the meaning of section 502(7) of the Act, 33 U.S.C. § 1362(7).

48. Each instance of the placement of dredged and/or fill material into the Heart River and its adjacent and abutting wetlands constitutes the “discharge of fill material” within the meaning of 33 C.F.R. § 323.2(f), and/or the “discharge of dredged material” within the meaning of 33 C.F.R. § 323.2(d), and constitutes the “discharge of a pollutant” or “discharge of pollutants” within the meaning of section 502(12) of the Act, 33 U.S.C. § 1362(12).

49. The discharges of pollutants from a point source by Respondent into waters of the United States described in paragraphs 36-37 of this Complaint, undertaken without the required permit or other authorization issued by the Corps pursuant to section 404 of the Act, 33 U.S.C. § 1344, constitute violations of sections 301 and 404 of the Act, 33 U.S.C. §§ 1311 and 1344, and are subject to the assessment of penalties pursuant to section 309(g) of the Act, 33 U.S.C. § 1319(g).

50. Each unauthorized discharge described in paragraphs 36-37 of this Complaint constitutes a separate violation of sections 301 and 404 of the Act, 33 U.S.C. §§ 1311 and 1344, and is subject to a separate penalty pursuant to section 309(g)(2)(A) of the Act, 33 U.S.C. § 1319(g)(2)(A).

VI. NOTICE OF PROPOSED ORDER ASSESSING A CIVIL PENALTY

51. Based on the foregoing allegations and pursuant to the authority of section 309(g) of the Act, 33 U.S.C. § 1319(g), EPA Region 8 hereby proposes to issue a Final Order Assessing Administrative Penalties to Respondent assessing a penalty in the amount of Twenty-Two Thousand Dollars (\$22,000).

52. The proposed penalty amount was determined by EPA after taking into account all factors identified in section 309(g)(3) of the Act, 33 U.S.C. § 1319(g). These factors include: the nature, circumstances, extent, and gravity of the violation or violations; Respondent's prior compliance history and degree of culpability for the cited violations; any economic benefit or savings accruing to Respondent by virtue of the violations; Respondent's ability to pay the proposed penalty, and other matters as justice may require. EPA may issue the Final Order Assessing Administrative Penalties thirty (30) days after Respondent's receipt of this Complaint, unless Respondent, within that time, requests a hearing on this Complaint pursuant to section VII (Notice of Opportunity to Request a Hearing) of this Complaint.

VII. NOTICE OF OPPORTUNITY TO REQUEST A HEARING

53. As provided in section 309(g)(2)(B) of the Act, 33 U.S.C. § 1319(g)(2)(B), and 40 C.F.R. § 22.15(c), Respondent has the right to request a hearing in this matter. If Respondent (1) contests any material fact upon which the Complaint is based, (2) contends that the amount of penalty proposed in the Complaint is inappropriate, or (3) contends that it is entitled to judgment as a matter of law, it must file a written answer in accordance with 40 C.F.R. § 22.15 within thirty (30) days after service of the Complaint.

54. Respondent's answer must: (1) clearly and directly admit, deny, or explain each of the factual allegations contained in the Complaint; (2) state the circumstances or arguments which are alleged to constitute the grounds of any defense; (3) state the facts which Respondent disputes; (4) state the basis for opposing any proposed relief; and (5) specifically request a hearing, if desired. 40 C.F.R. § 22.15(b). Failure to admit, deny, or explain any material factual

allegation contained in the Complaint constitutes an admission of the allegation.

40 C.F.R. § 22.15(d).

55. Respondent's answer, an original and one copy, must be filed with:

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

A copy of Respondent's answer and all other documents filed in this action must be served on:

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

56. Be aware that should Respondent request a hearing on this proposed penalty assessment, members of the public, to whom EPA is obligated to give notice of this proposed action, will have a right under section 309(g)(4)(B) of the Act, 33 U.S.C. § 1319(g)(4)(B), to be heard and to present evidence.

IF RESPONDENT FAILS TO REQUEST A HEARING, IT WILL WAIVE ITS RIGHT TO CONTEST ANY OF THE ALLEGATIONS SET FORTH IN THE COMPLAINT.

IF RESPONDENT FAILS TO FILE A WRITTEN ANSWER WITHIN THE THIRTY (30) DAY LIMIT, A DEFAULT JUDGMENT MAY BE ENTERED PURSUANT TO 40 C.F.R. § 22.17. A DEFAULT JUDGMENT MAY IMPOSE THE FULL PENALTY PROPOSED IN THE COMPLAINT.

57. Should Respondent not request a hearing, EPA will issue a Final Order Assessing Administrative Penalties, and only members of the public who submit timely comments on this proposal will have an additional thirty (30) days to petition EPA to set aside the Final Order Assessing Administrative Penalties and to hold a hearing thereon. EPA will grant the petition and will hold a hearing only if the petitioner's evidence is material and was not considered by EPA in the issuance of the Final Order Assessing Administrative Penalties.

VIII. TERMS OF PAYMENT FOR QUICK RESOLUTION

58. If Respondent does not contest the findings and assessments set out above, this action may be resolved by paying the proposed penalty in full pursuant to 40 C.F.R. § 22.18. If such payment is made within ten (10) days after the close of the public comment period provided for under 40 C.F.R. § 22.45, no Answer need be filed. If more time is needed for payment, Respondent may file, within thirty (30) days after receipt of the Complaint, a statement agreeing to pay the penalty, and then pay the money within sixty (60) days after receipt of the Complaint. The penalty payment must be made by certified or cashier's check payable to "Treasurer, the United States of America" and remitted to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000

Copies of the check shall be sent to:

Monica Heimdal
U.S. EPA Region 8 (8ENF-W)
1595 Wynkoop Street
Denver, CO 80202-1129

and

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

A transmittal letter identifying the case title and docket number must accompany the remittance and copies of the check.

59. Payment of the penalty in this manner shall constitute consent by Respondent to the assessment of the proposed penalty and a waiver of Respondent's right to a hearing in this matter.

60. Neither assessment nor payment of an administrative civil penalty pursuant to section 309 of the Act, 33 U.S.C. § 1319, shall affect Respondent's continuing obligation to comply with the Act or any other federal, state, or local law or regulations, and any separate compliance order issued under section 309(a) of the Act, 33 U.S.C. § 1319(a), for the violations alleged herein.

IX. SETTLEMENT CONFERENCE

61. EPA encourages the exploration of settlement possibilities through an informal settlement conference. Please note that a request for, scheduling of, or participation in a settlement conference does not extend the period for filing an answer and request for hearing as set out above. The settlement process, however, may be pursued simultaneously with the administrative litigation process. If a settlement can be reached, its terms will be expressed in a written consent agreement signed by the parties and incorporated into a final order by the Regional Judicial Officer. 40 C.F.R. § 22.18. To explore the possibility of settlement in this

matter, contact Sheldon Muller, Enforcement Attorney, at the address above. Mr. Muller can also be reached at (303) 312-6916.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, REGION 8
Complainant.

Date:

9/30/08



Andrew M. Gaydosh
Assistant Regional Administrator
Office of Enforcement, Compliance and
Environmental Justice

CERTIFICATE OF SERVICE

I certify that on the date noted below, I sent by certified mail, return receipt requested, a copy of the foregoing ADMINISTRATIVE COMPLAINT AND NOTICE OF OPPORTUNITY FOR HEARING, and a copy of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits, 40 C.F.R. Part 22, to:

Warren B. Diederich
Industrial Builders, Inc.
1307 County Road 17 N
West Fargo, North Dakota 58078

Certified Return Receipt No. 7007 2560 0002 6445 1757

I further certify that on the same date below I sent by certified mail, return receipt requested, a copy of this document to:

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

Certified Return Receipt No. 7007 2560 0002 6445 1771

I further certify that on the same date below the original and one copy were hand-delivered to:

Tina Artemis
Regional Hearing Clerk
U.S. EPA Region 8 (8RC)
1595 Wynkoop Street
Denver, CO 80202-1129

Date: 9/30/08

Judith M. McTernan