

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 8

RECEIVED BY OALJ  
2012 DEC -4 PM 12:49

In the Matter of: )  
 )  
City of Polson, Montana, ) Docket No. CWA-08-2012-0035  
 )  
Respondent. )

**MOTION FOR LEAVE TO AMEND COMPLAINT**

The United States Environmental Protection Agency (EPA) requests leave to amend its complaint in this matter. The amended complaint would revise the following counts, in the manner indicated below:

Count 1 - Failure to Submit Timely Discharge Monitoring Reports to the EPA:

additional violations during July and August of 2012.

Count 9 - Exceeding 30-Day Average Effluent Limitation for Biological Oxygen

Demand (BOD<sub>5</sub>): additional violations during May and June of 2012; elimination of erroneous reference to oil and grease.

Count 10 - Exceeding 7-Day Average Effluent Limitation for BOD<sub>5</sub>: additional violation

during May of 2012.

Count 11 - Failure to Meet Percent Removal Requirement for BOD<sub>5</sub>: additional violation

during May of 2012.

Count 12 - Failure to Meet Effluent Limitation for pH: additional violation during May of 2012.

A copy of the proposed First Amended Complaint and Notice of Opportunity for Hearing is being filed with this motion.

Counsel for the Respondent has advised that the Respondent does not oppose this motion but reserves the right to contest any of the allegations in the amended complaint. The proposed amendment would not add any new parties or new counts and, therefore, should not delay this proceeding or cause any prejudice to the Respondent.

Dated this 21<sup>st</sup> day of November, 2012.

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY, REGION 8,

Complainant

Margaret J. (Peggy) Livingston  
Margaret J. (Peggy) Livingston  
Enforcement Attorney  
Office of Enforcement, Compliance  
and Environmental Justice  
U.S. EPA Region 8  
1595 Wynkoop Street  
Denver, CO 80202  
Telephone Number: (303) 312-6858  
Facsimile Number: (303) 312-7202

**CERTIFICATE OF SERVICE**

I certify that on the date noted below, I sent copies of the foregoing Motion for Leave to Amend Complaint, including the proposed First Amended Complaint and Notice of Opportunity for Hearing, and the proposed Order Granting Motion for Leave to Amend Complaint, to each of the following:

Counsel for Respondent: James Raymond  
Attorney  
407 1<sup>st</sup> Street West  
Polson, Montana 59860  
By Certified Mail, Return Receipt Requested  
No. 7009-3410-0000-2593-8429  
(one copy)

Headquarters Hearing Clerk: Sybil Anderson  
Headquarters Hearing Clerk  
Office of Administrative Law Judges  
1200 Pennsylvania Avenue, N.W.  
Mail Code 1900L  
Washington, D.C. 20460  
By Pouch Mail  
(original and two copies; second copy is for  
Presiding Officer, who is not, as yet, assigned)

Date: 11/27/2012

By: Judith M. McTernan

PROPOSED

**UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 8**

In the Matter of: )  
 )  
City of Polson, Montana, )  
 )  
Respondent. ) Docket No. CWA-08-2012-0035

**INTRODUCTION**

1. In this First Amended Complaint and Notice of Opportunity for Hearing (Amended Complaint), the United States Environmental Protection Agency (EPA) proposes to assess a civil administrative penalty against the City of Polson, Montana (Respondent).
2. This Amended Complaint is issued under the authority vested in the Administrator of the EPA by section 309(g) of the Clean Water Act (Act), 33 U.S.C. § 1319(g). The Assistant Regional Administrator, Office of Enforcement, Compliance and Environmental Justice, EPA Region 8, has been duly authorized to institute this action.
3. This proceeding is subject to the EPA's "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits," 40 C.F.R. part 22, a copy of which has been provided to the Respondent with the Complaint that was initially filed in this matter.

**GENERAL ALLEGATIONS**

4. In order to restore and maintain the integrity of the nation's waters, 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.
5. Section 402 of the Act, 33 U.S.C. § 1342, establishes a National Pollutant Discharge Elimination System (NPDES) program, under which the EPA may issue permits authorizing discharges into navigable waters, subject to specific terms and conditions.
6. The Respondent is authorized to discharge treated effluent from its wastewater treatment facility (the Facility) to the Flathead River, in accordance with the conditions of NPDES Permit No. MT-0020559 (the 2007 Permit), issued by the EPA. The 2007 Permit became effective on July 1, 2007, was administratively extended, and is still in effect.

7. From January 15, 2001, until July 1, 2007, the Respondent was authorized to discharge treated effluent from the Facility to the Flathead River in accordance with the conditions of a previous version of NPDES Permit No. MT-0020559 (the 2001 Permit), also issued by the EPA. The 2001 Permit was due to expire on June 30, 2005, and was administratively extended until the 2007 Permit was issued.
8. At all relevant times, the Respondent has been subject to the requirements of the Act and the EPA's regulations implementing the Act.
9. The Respondent is a municipality and, therefore, a "person" as that term is defined in section 502(5) of the Act, 33 U.S.C. § 1362(5), and 40 C.F.R. § 122.2.
10. The Facility is located on the Flathead Indian Reservation in northwestern Montana.
11. The Confederated Salish and Kootenai Tribes (the Tribes) do not own, manage, or control the Facility, according to a June 4, 2008, letter from James H. Steele, Jr., Chairman of the Tribal Council, to David Rise, of the Montana Office of the EPA.
12. The Flathead River is a navigable-in-fact water.
13. The Flathead River is a "navigable water" and a "water of the United States," as those terms are defined in section 502(7) of the Act, 33 U.S.C. § 1362(7), and 40 C.F.R. § 122.2, respectively.

#### Monitoring Requirements

14. The 2001 Permit required the Respondent to monitor the Facility's effluent monthly for flow, biological oxygen demand (BOD<sub>5</sub>), total suspended solids (TSS), pH, fecal coliform, ammonia, and oil and grease. The fecal coliform monitoring requirement applied only from April 1 through October 31 of each year. (Sec. I.C.2.)
15. The 2007 Permit requires the Respondent to monitor the Facility's effluent weekly for flow and BOD<sub>5</sub>. (Sec. 1.3.2.)
16. The 2007 Permit requires the Respondent to monitor the Facility's effluent monthly for TSS, E. coli, pH, and oil and grease. (Sec. 1.3.2.)
17. The 2007 Permit requires the Respondent to monitor the Facility's influent monthly for BOD<sub>5</sub>. (Sec. 1.3.2.)

#### Reporting Requirements

18. The 2001 Permit required the Respondent to submit monthly Discharge Monitoring Reports (DMRs) to the EPA. Each DMR was to have been postmarked no later than the 28<sup>th</sup> day of the month following the completed reporting period. (Sec. II.D.)
19. The 2007 Permit requires the Respondent to submit monitoring results for each month to the EPA and the Tribes. Each DMR is to be on EPA Form No. 3320-1 and is to be postmarked no later than the 28<sup>th</sup> day of the month following the completed reporting period. (Sec. 2.4.) If no

discharge occurs during the reporting period, the Respondent must report "no discharge." (Sec. 1.3.2.)

#### Effluent Limitations

20. The 2001 Permit prohibited the effluent from the Facility from exceeding 30 milligrams per liter (mg/l) of BOD<sub>5</sub>, as a 30-day average. (Sec. I.C.1.)
21. The 2001 Permit prohibited the effluent from the Facility from having a pH of less than 6.0 or greater than 9.0 standard units. (Sec. I.C.1.)
22. The 2007 Permit prohibits the effluent from the Facility from exceeding 30 mg/l of BOD<sub>5</sub>, as a 30-day average. (Sec. 1.3.1.)
23. The 2007 Permit prohibits the effluent from the Facility from exceeding 45 mg/l of BOD<sub>5</sub>, as a 45-day average. (Sec. 1.3.1.)
24. The 2007 Permit requires 85% removal of BOD<sub>5</sub> as a 30-day average. (Sec. 1.3.1.)

#### Correspondence Between the EPA and the Respondent

25. With letters dated May 9, 2007, and August 27, 2007, the EPA provided the Respondent with DMR forms to be used for submitting reports required by the 2007 Permit.
26. By letter dated August 25, 2008, after not receiving DMRs for the months of April, May, and June of 2007 or for any of the first six months of 2008, the EPA requested that the Respondent provide DMRs for each of these months.

#### Compliance Order and Subsequent Submissions

27. On September 30, 2008, the EPA issued an Administrative Order for Compliance (the Order) to the Respondent.
28. The Respondent received the Order on October 3, 2008.
29. The Order stated that the Respondent had failed to submit DMRs (a) for the months of April, May, and June of 2007, in violation of the 2001 Permit, and (b) for the first six months of 2008, in violation of the 2007 Permit.
30. The Order directed the Respondent to submit DMRs for the months of April, May, and June of 2007, and for the months of January through June of 2008, no later than 10 days after receiving the Order. (Page 8, Par. 6.) The Order also directed the Respondent to include a signed certification statement with its DMRs. (Page 9, Par. 10.)
31. On October 10, 2008, the Respondent submitted DMRs to the EPA for the months of April, May, and June of 2007 and the first six months of 2008. Although the DMRs were submitted on EPA Form No. 3320-1, they were not complete and did not include a signature on the certification statement. On October 16, 2008, the EPA returned the DMRs to the Respondent so that they could be signed and certified by an authorized representative and resubmitted.

32. On October 23, 2008, the Respondent resubmitted its DMRs to the EPA for the months of April, May, and June of 2007 and the first six months of 2008. However, the DMRs included (a) no E. coli values for April, May, and June of 2007, (b) no pH minimum or maximum values for February, March, April, and June of 2008, (c) no TSS values for February, March, and April of 2008, and (d) no reports of flow for April and June of 2008.

**COUNT 1 - Failure to Submit Timely DMRs to the EPA**

33. For each of the months of August, October, November, and December of 2007, January through June of 2008, January, May, June, July, October, November, and December of 2011, and January through August of 2012, the Respondent failed to submit DMRs to the EPA that were postmarked by the 28<sup>th</sup> day of the month following the completed reporting period, in violation of section 2.4 of the 2007 Permit.

**COUNT 2 - Failure to Submit DMRs to the Tribes**

34. The Respondent failed to submit DMRs for the months of April, May, and June of 2007 and January through June of 2008 to the Tribes, in violation of section 2.4 of the 2007 Permit.

**COUNT 3 - Failure to Monitor for Flow**

35. The Respondent failed to monitor the Facility's effluent weekly for flow during the months of February, April, and June of 2008, in violation of section 1.3.2 of the 2007 Permit.

**COUNT 4 - Failure to Monitor for BOD<sub>5</sub> in Influent**

36. The Respondent failed to monitor the Facility's influent monthly for BOD<sub>5</sub> during May and June of 2008 and December of 2011, in violation of section 1.3.2 of the 2007 Permit.

**COUNT 5 - Failure to Monitor for TSS**

37. The Respondent failed to monitor the Facility's effluent monthly for TSS during February, March, April, and July of 2008, in violation of section 1.3.2 of the 2007 Permit.

**COUNT 6 - Failure to Monitor for E. Coli**

38. The Respondent failed to monitor the Facility's effluent monthly for E. coli during October of 2008 and in December 2011, in violation of section 1.3.2 of the 2007 Permit.

**COUNT 7 - Failure to Monitor for pH**

39. The Respondent failed to monitor the Facility's effluent for pH during February, March, April, June, and July of 2008, in violation of section 1.3.2 of the 2007 Permit.

**COUNT 8 - Failure to Report BOD<sub>5</sub> Percent Removal**

40. The Respondent failed to report the percent removal of BOD<sub>5</sub> on its Discharge Monitoring Report to the EPA for the months of May and June of 2008 and December of 2011, in violation of section 2.4 of the 2007 Permit.

**COUNT 9 - Exceeding 30-Day Average Effluent Limitation for BOD<sub>5</sub>**

41. During the months of November of 2007, May, June, November, and December of 2008, February, April, and May of 2009, April, May, and June of 2010, May of 2011, and April, May, and June of 2012, the Respondent's discharge from the Facility exceeded the effluent limitation for BOD<sub>5</sub>, as a 30-day average, in violation of section 1.3.1 of the 2007 Permit and section 301(a) of the CWA, 33 U.S.C. § 1311(a).

**COUNT 10 - Exceeding 7-Day Average Effluent Limitation for BOD<sub>5</sub>**

42. During the months of June and November of 2008, April and May of 2009, April, May, and June of 2010, May and June of 2011, and April and May of 2012, the Respondent's discharge from the Facility exceeded the effluent limitation for BOD<sub>5</sub>, as a 7-day average, in violation of section 1.3.1 of the 2007 Permit and section 301(a) of the CWA, 33 U.S.C. § 1311(a).

**COUNT 11 - Failure to Meet Percent Removal Requirement for BOD<sub>5</sub>**

43. For the months of April, May, and June of 2010, April and May of 2011, and April and May of 2012, the Respondent failed to achieve an 85% reduction of BOD<sub>5</sub> as a 30-day average in the effluent from the Facility, in violation of section 1.3.1 of the 2007 Permit and section 301(a) of the CWA, 33 U.S.C. § 1311(a).

**COUNT 12 - Failure to Meet Effluent Limitation for pH**

44. During the months of April and May of 2009, June of 2010, May and June of 2011, and May of 2012, the Respondent failed to achieve a pH level of between 6.5 and 9.0 standard units in the Facility's effluent, in violation section 1.3.1 of the 2007 Permit and section 301(a) of the CWA, 33 U.S.C. § 1311(a).

**PROPOSED ADMINISTRATIVE PENALTY**

Based upon the foregoing allegations, and pursuant to its authority under section 309(g)(1) of the Act, 33 U.S.C. § 1319(g)(1), the EPA proposes to assess an administrative penalty of **\$45,000** against the Respondent.

Section 309(g)(2)(B) of the Act, 33 U.S.C. § 1319(g)(2)(B), as adjusted for inflation by 40 C.F.R. part 19, allows the EPA to assess an administrative penalty of up to \$16,000 per day for each day during which an NPDES permit violation continues, with a maximum penalty of \$177,500.

In proposing its penalty, and in accordance with section 309(g)(3) of the Act, 33 U.S.C. § 1319(g)(3), the EPA has considered the nature, circumstances, extent, and gravity of the violations, the Respondent's prior compliance history, the Respondent's degree of culpability for the cited violations, any economic benefit or savings accruing to the Respondent by virtue of the violations, the Respondent's ability to pay the proposed penalty, and other matters that justice may require, as explained below:

### Nature, Circumstances, Extent, and Gravity of Violations

The Respondent has consistently failed to monitor and/or report for numerous pollutants that its permit requires it to sample. It is crucial for permitted facilities to conduct the self-monitoring and submit the reports that are required by NPDES permits. Without these reports, the EPA's role in ensuring compliance with NPDES permits is severely hampered.

On those occasions when the Respondent has sampled its effluent, it often has exceeded its permitted discharge limits for BOD<sub>5</sub> and pH. It has exceeded its permitted limit for BOD<sub>5</sub> discharges by as much as 188%.

The Facility discharges to the Flathead River. One of the designated uses for the Flathead River, according to water quality standards adopted by the State of Montana and approved by the EPA, is to support aquatic life. However, the Flathead River does not fully support aquatic life. The Montana Department of Environmental Quality has listed a segment of the Flathead River in its Clean Water Act section 303(d) list as only partially supporting aquatic life. It is, therefore, important that discharges of pollutants such as BOD<sub>5</sub> and pH remain within their permitted limits.

### Prior Compliance History

Other than the Order, which the EPA issued in 2008, this is the first formal Clean Water Act enforcement action the EPA has taken against the Respondent.

### Degree of Culpability

The Respondent had a high degree of culpability. Even after receiving the EPA's Order, the Respondent frequently violated permit requirements for monitoring, reporting, and effluent limitations.

### Economic Benefit

The EPA's proposed penalty includes the amount of money that the EPA estimated the Respondent saved by failing to monitor, report, and control its effluent discharges as required by the 2007 Permit.

### Ability to Pay

**The EPA did not reduce the proposed penalty due to this factor, but it will consider any information the Respondent may present regarding the Respondent's ability to pay the penalty proposed in this Amended Complaint.**

### Other Matters that Justice May Require

The EPA is making no adjustments regarding these factors at this time.

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

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), the Respondent has the right to request a hearing in this matter. If the Respondent (1) contests any material fact upon which this Amended Complaint is based, (2) contends that the amount of penalty proposed in this Amended 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 twenty days after service of this Amended Complaint.

The Respondent's answer must clearly and directly admit, deny or explain each factual allegation in this Amended Complaint. The answer must also state the grounds for any defense the Respondent claims, any facts the Respondent disputes, any basis the Respondent claims for opposing the assessment of the penalty proposed above, and whether the Respondent requests a hearing on this Amended Complaint. Please see 40 C.F.R. § 22.15 for more information on what must be in the answer.

**Failure to file an answer or a request for hearing within 20 days may waive the Respondent's right to disagree with the allegations in this Amended Complaint and/or the proposed penalty. It may also result in a default judgment and assessment of the full penalty proposed in this Amended Complaint.**

An original and one copy of the Respondent's answer and each other document filed in this action must be filed with:

Tina Artemis  
Regional Hearing Clerk  
U.S. Environmental Protection Agency (8RC)  
1595 Wynkoop Street  
Denver, Colorado 80202-1129

A copy of the answer and each other document filed in this action must be mailed to:

Margaret J. (Peggy) Livingston  
Senior Enforcement Attorney  
U.S. Environmental Protection Agency (8ENF-L)  
1595 Wynkoop Street  
Denver, Colorado 80202-1129

If there is a hearing on this matter, it will be before an administrative law judge (ALJ), who will be responsible for deciding whether the EPA's proposed penalty is appropriate. The ALJ is not bound by the penalty proposed in this Amended Complaint and may assess a penalty above the proposed amount, up to the maximum amount authorized by the Act.

## **CONSULTATION WITH TRIBES**

Concurrently with the issuance of this Amended Complaint, the EPA is consulting with the Confederated Salish and Kootenai Tribes regarding assessment of this administrative penalty by furnishing that agency a copy of this Amended Complaint and inviting them to comment.

## PUBLIC NOTICE

As required by section 309(g)(4) of the Act, 33 U.S.C. § 1319(g)(4), and 40 C.F.R. § 22.45, prior to assessing an administrative penalty, the EPA will provide public notice of the proposed penalty and a reasonable opportunity for the public to comment on the matter and, if a hearing is held, to be heard and present evidence.

## QUICK RESOLUTION

The Respondent may resolve this proceeding at any time by paying the penalty amount proposed in this Amended Complaint. Such payment need not contain any response to, or admission of, the allegations in this Amended Complaint. Such payment would waive the Respondent's right to contest the allegations in this Amended Complaint and to appeal any final order resulting from this Amended Complaint.

The Respondent may elect to follow the quick resolution process described in 40 C.F.R. § 22.18. According to 40 C.F.R. § 22.18(a), if the Respondent pays the full proposed penalty within 20 days of receiving this Amended Complaint, the Respondent need not file an answer. The Respondent is encouraged to consult 40 C.F.R. § 22.18 (which, as mentioned above, is being provided with this Amended Complaint) and to contact the EPA Enforcement Attorney named under the heading "NOTICE OF OPPORTUNITY TO REQUEST A HEARING," above, either at the mailing address provided above or by at telephone at 1-800-227-8917, extension 6858, or 303-312-6858, for more information about the quick resolution process.

If made by check, the payment shall be made by remitting a cashier's or certified check, including the name and docket number of this case, referencing the Docket Number given on the first page of this Amended Complaint, and payable to "Treasurer, United States of America."

If the check is sent by first class U.S. mail, it is to be addressed to:

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

If the check is sent by Federal Express, Airborne, or other commercial carrier, it is to be addressed to:

US Bank  
1005 Convention Plaza  
Mail Station SL-MO-C2GL  
St. Louis, Missouri 63101

The payment may also be made by wire transfer or on-line via the internet, as follows:

Wire transfers: Federal Reserve Bank of New York  
ABA = 021030004, Account = 68010727  
SWIFT address = FRNYUS33  
33 Liberty Street  
New York, New York 10045  
Field Tag 4200 of the Fedwire message should read  
"D68010727 Environmental Protection Agency"

On-Line Payment: WWW.PAY.GOV  
Enter sfo 1.1 in the search field  
Open form and complete required fields.

A copy of the check or notification of wire transfer or on-line payment shall be mailed to the EPA Region 8 Regional Hearing Clerk and the Enforcement Attorney named above (at the addresses provided above) and to:

David Rise  
Environmental Protection Specialist  
U.S. Environmental Protection Agency (8MO)  
EPA Region 8, Montana Office  
10 W 15th Street, Suite 3200  
Helena, Montana 59626

A transmittal letter identifying the case title and docket number (shown on the first page of this Amended Complaint) must accompany the remittance and each of the three copies of the check or notification.

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

Neither assessment nor payment of the administrative penalty shall affect the Respondent's continuing obligation to comply with the Act, the Order, or any other federal, state, or local law.

#### **SETTLEMENT NEGOTIATIONS**

The EPA encourages informal settlement conferences. If the Respondent wishes to pursue the possibility of settling this matter, the Respondent should contact the EPA Enforcement Attorney named above (Peggy Livingston) by mail at the address provided above and/or by telephone at 1-800-227-8917, extension 6858, or 303-312-6858. **However, contacting an EPA attorney, requesting a settlement conference, or participating in settlement discussions with the EPA will NOT postpone the Respondent's 20-day deadline for filing a written answer and requesting a hearing.** The EPA and the Respondent may simultaneously discuss settlement and proceed with the administrative litigation process.

If the EPA and the Respondent agree to a settlement, they will enter into a written Consent Agreement that will be presented to the Regional Judicial Officer with a request that it be incorporated into a Final Order.

Date: \_\_\_\_\_

By: Eddie O. Sierra  
*for* Andrew M. Gaydosh  
Assistant Regional Administrator  
Office of Enforcement, Compliance and  
Environmental Justice  
U.S. Environmental Protection Agency  
Region 8  
1595 Wynkoop Street  
Denver, Colorado 80202

**CERTIFICATE OF SERVICE**

I certify that on the date noted below, I sent by copies of the foregoing First Amended Complaint and Notice of Opportunity for Hearing (Amended Complaint) to each of the following:

Counsel for Respondent:

James Raymond  
Attorney  
407 1<sup>st</sup> Street West  
Polson, Montana 59860  
Certified Return Receipt  
No. \_\_\_\_\_  
(one copy)

Headquarters Hearing Clerk:

Sybil Anderson  
Headquarters Hearing Clerk  
Office of Administrative Law Judges  
1200 Pennsylvania Avenue, N.W.  
Mail Code 1900L  
Washington, D.C. 20460  
Certified Return Receipt  
No. \_\_\_\_\_  
(original and two copies; second copy  
is for the Presiding Officer who will be assigned)

Date: \_\_\_\_\_

By: \_\_\_\_\_

**UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 8**

In the Matter of: )  
 )  
City of Polson, Montana, ) Docket No. CWA-08-2012-0035  
 )  
Respondent. )

**ORDER GRANTING MOTION FOR LEAVE TO AMEND COMPLAINT**

The United States Environmental Protection Agency (EPA), the Complainant in this action, has requested leave to amend its complaint. The respondent does not object to this motion. The motion is hereby granted.

Dated this \_\_\_\_ day of \_\_\_\_\_, 2012.

\_\_\_\_\_  
Presiding Officer

