

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR**

In the Matter of:)
) **Docket No. CWA-08-2017-0026**
Kent Hoggan, Frostwood 6 LLC, and)
David Jacobsen,)
)
Respondents.)

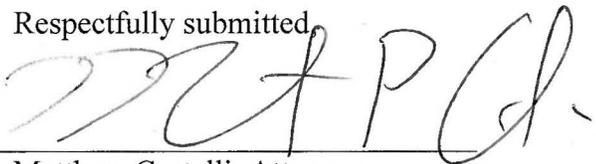
COMPLAINANT'S MOTION FOR DEFAULT

Complainant, United States Environmental Protection Agency, Region 8, by its undersigned counsel, files this MOTION FOR DEFAULT pursuant to 40 C.F.R. § 22.17. Complainant seeks a default order finding the Respondents liable for the violations alleged in the Complaint and Notice of Opportunity for Hearing filed in this matter on September 27, 2017. Complainant also seeks the assessment of a penalty the amount of \$ 196,800. This request for a default order and assessment of penalties is based on Respondents' failure to file a timely Prehearing Exchange by the date required in the Presiding Officer's Prehearing Order—September 7, 2018—and Respondents' associated waiver of their right to contest all facts alleged in the Complaint. Complainant attached a Memorandum in Support to this Motion.

Respectfully submitted,

Date: September 13, 2018

By: _____



Matthew Castelli, Attorney
(303) 312-6491, castelli.matthew@epa.gov
Mark Chalfant, Senior Attorney
(303) 312-6177, chalfant.mark@epa.gov
U.S. EPA, Region 8
1595 Wynkoop Street (8ENF-L)
Denver, CO 80202-1129

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR**

In the Matter of:)	
)	Docket No. CWA-08-2017-0026
Kent Hoggan, Frostwood 6 LLC, and)	
David Jacobsen,)	
)	
Respondents.)	

MEMORANDUM IN SUPPORT OF COMPLAINANT'S MOTION FOR DEFAULT

Table of Contents

I. INTRODUCTION.....	4
II. PROCEDURAL HISTORY.....	5
III. GOVERNING LAW.....	6
IV. DEFAULT HAS OCCURRED IN THIS MATTER.....	7
V. REQUEST FOR A CIVIL PENALTY	9
A. Clean Water Act Jurisdiction.....	10
B. Legal and Factual Basis for Complainant’s Proposed Penalty	11
1. The “Gravity Component”	12
a. Discharge without a permit	15
b. Failure to develop a complete SWPPP and SWPPP map(s).....	16
c. Failure to maintain an updated SWPPP and SWPPP map(s).....	17
d. Failure to properly complete and certify the NOI.....	17
e. Failure to complete inspection reports	18
f. Failure to maintain an updated log of corrective actions.....	18
g. Failure to ensure BMPs are properly installed and maintained	18
h. Failure to ensure persons inspecting the site are properly trained and certified.....	19
i. Failure to ensure persons with responsibilities relevant to pollution prevention understand and perform in accordance with the permit	20
j. Gravity Component Determination.....	20
2. Economic Benefit.....	21
3. Adjustment Factors	22
a. Ability to pay.....	22
b. Prior history of noncompliance.....	23
c. Culpability – degree of willfulness and/or negligence.....	23
d. Other factors as justice requires – degree of non/cooperation.....	25
VI. CONCLUSION.....	26

Table of Authorities

Cases

<i>In re B&L Plating, Inc.</i> , 11 E.A.D. 183 (EAB 2003)	7, 8
<i>In re Detroit Plastic Molding Co.</i> , 3 E.A.D. 103 (CJO 1990).....	8, 9
<i>In re House Analysis & Assocs.</i> , 4 E.A.D. 501 (EAB 1993)	8
<i>In re Pyramid Chem. Co.</i> , 2004 EPA App. LEXIS 56 (EAB 2004).....	7
<i>In re Thermal Reduction Co.</i> , 4 E.A.D. 128 (EAB 1992).....	7
<i>JHNY, Inc.</i> , 12 E.A.D. 372, 2005 EPA App. LEXIS 22 (EAB 2005)	8, 23
<i>Jiffy Builders, Inc.</i> , 8 E.A.D. 315, 319, 1999 EPA App. LEXIS 15 (EAB 1999)	7
<i>Rapanos v. United States</i> , 547 U.S. 715 (2009).....	10
<i>Rybond, Inc.</i> , 6 E.A.D. 614, 1996 EPA App. LEXIS 16 (EAB 1996)	8

Statutes

33 U.S.C. § 1251	4
33 U.S.C. § 1311.....	9
33 U.S.C. § 1319(g)(1)(A).....	5
33 U.S.C. § 1319(g)(2)(B)	9
33 U.S.C. § 1319(g)(3)	9
33 U.S.C. § 1342.....	9
33 U.S.C. § 1362(7)	9, 11

Regulations

40 C.F.R. § 122.2	9, 11
40 C.F.R. § 22.14(a)(4)(ii).....	5
40 C.F.R. § 22.15(a).....	5
40 C.F.R. § 22.17.....	4, 7
40 C.F.R. § 22.17(a).....	7, 9
40 C.F.R. § 22.17(b)	7
40 C.F.R. § 22.17(c).....	7, 26
40 C.F.R. § 22.19(a).....	7
40 C.F.R. § 22.7(c).....	5
40 C.F.R. part 122.....	4
40 C.F.R. part 22.....	4, 8

I. INTRODUCTION

This memorandum is filed in support of a motion for default and request for the assessment of civil penalties brought by Complainant, the United States Environmental Protection Agency, Region 8 (“Complainant”), in accordance with 40 C.F.R. § 22.17 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits (“Consolidated Rules”), 40 C.F.R. part 22.

This case addresses Respondents’ ownership and operation of construction activity related to the Frostwood F6 Townhomes located at 4285 Cooper Lane, Park City, Utah (“the Site”). As Complainant has described in previous filings, Mr. Kent Hoggan and Frostwood 6 LLC are both owners of the Site and Mr. Jacobsen is an operator of the Site. On August 31, 2016, United States Environmental Protection Agency (“EPA”) inspectors conducted a stormwater inspection at the Site to determine compliance with the Utah Pollutant Discharge Elimination System General Permit for Discharges from Construction Activities No. UTRC00000 (“the Permit”) and the federal stormwater regulations at 40 C.F.R. part 122. Based on the inspection, EPA identified unpermitted discharges and Permit condition violations.

EPA sent Respondents two documents, each titled *Summary of Findings and Corrective Actions and Notice of Proposed Expedited Settlement Agreement*, the first on September 28, 2016, and an updated version on November 15, 2016. On March 7, 2017, EPA filed an Administrative Order for Compliance (Docket No. CWA-08-2017-0007) directing Frostwood 6 LLC and Mr. Jacobsen to comply with the conditions of the Permit and the Clean Water Act (“the Act” or “CWA”), 33 U.S.C. § 1251 *et seq.* On April 28, 2017, a Utah Department of Environmental Quality (“UDEQ”) Inspector conducted a stormwater inspection at the Site. The

UDEQ Inspector observed that corrective actions at the Site pursuant to the EPA's August 31, 2016 inspection had not been completed, despite the EPA's two previous inspection reports and the Administrative Order for Compliance.

II. PROCEDURAL HISTORY

On September 27, 2017, Complainant filed a Complaint and Notice of Opportunity for Hearing under CWA section 309(g)(1)(A), 33 U.S.C. § 1319(g)(1)(A). OALJ Index Document #1. Complainant charged Respondents with unpermitted discharges and Permit condition violations, reserved its right to seek the maximum authorized penalty, and made no specific penalty demand. 40 C.F.R. § 22.14(a)(4)(ii). Complainant served the Complaint on Respondents, who were required to respond to the Complaint within 30 days after being served. 40 C.F.R. § 22.15(a). Respondents have an additional three days to respond a Complaint if it was served by U.S. mail, including certified mail. 40 C.F.R. § 22.7(c).

On October 2, 2017, Complainant served Frostwood 6 LLC via its registered agent, Hal Rosen, by U.S. Postal Service certified mail. CX 38. Frostwood 6 LLC failed to file an Answer prior to its November 4, 2017 deadline. Instead, Frostwood 6 LLC filed an Answer on December 15, 2017. OALJ Index Document #6.

On November 14, 2017, the Salt Lake County Sheriff's Office served the Complaint on Mr. Hoggan. CX 40. Mr. Hoggan did not file an Answer before his December 14, 2017 deadline. Instead, Mr. Hoggan filed an Answer on December 15, 2017. OALJ Index Document #6.

On November 20, 2017, the Summit County Sheriff's Office served the Complaint on Mr. Jacobsen. CX 41. Mr. Jacobsen filed an Answer prior to his December 19, 2017 deadline. OALJ Index Document #6.

The June 27, 2018 Order of Designation designated Chief Administrative Law Judge Susan L. Biro to preside over this proceeding. OALJ Index Document #17. On July 5, 2018, the Presiding Officer issued a Prehearing Order with deadlines for the parties' preliminary statements and prehearing exchanges. OALJ Index Document #18.

On July 27, 2018, Complainant complied with the Prehearing Order by filing its Status Report and Preliminary Statement. OALJ Index Documents #20, #21.

Respondents did not comply with the Prehearing Order requirement to file their Preliminary Statement by July 27, 2018. *See* OALJ Index Document #18 at 2. Instead, Respondents filed their Preliminary Statement on August 1, 2018. OALJ Index Document #23.

On August 17, 2018, Complainant complied with the Prehearing Order by filing its Initial Prehearing Exchange. OALJ Index Document #24.

Respondents did not comply with the Prehearing Order requirement to file a prehearing exchange by September 7, 2018. *See* OALJ Index. The Hearing Clerk confirmed to counsel for Complainant on September 10, 2018, and on September 13, 2018, that the OALJ had not received a prehearing exchange from Respondents. As of the date of this filing, Respondents have not served a prehearing exchange on Complainant.

III. GOVERNING LAW

Section 22.17 of the Consolidated Rules governs default and provides:

A party may be found to be in default: after motion, . . . upon failure to comply with the information exchange requirements of § 22.19(a) or an order of the Presiding Officer Default by Respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations.

40 C.F.R. § 22.17(a). A motion for default may seek resolution of all or part of the proceeding, and a movant seeking the assessment of a penalty must specify the penalty and state the legal and factual grounds for the requested relief. *Id.* at § 22.17(b).

The Consolidated Rules state that the Presiding Officer “*shall* issue a default order against the defaulting party as to any or all parts of the proceeding *unless* the record shows *good cause* why a default order should not be issued.” *Id.* § 22.17(c) (emphases added). A “good cause” determination considers the “totality of the circumstances.” *In re Pyramid Chem. Co.*, 2004 EPA App. LEXIS 56 (EAB 2004) (citing *In re Thermal Reduction Co.*, 4 E.A.D. 128, 131 (EAB 1992), and *In re B&L Plating, Inc.*, 11 E.A.D. 183, 191-92 (EAB 2003)). “If the order resolves all outstanding issues and claims in the proceeding, it shall constitute the initial decision[,]” and “[t]he relief proposed in the complaint or the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act.” 40 C.F.R. § 22.17(c).

IV. DEFAULT HAS OCCURRED IN THIS MATTER

Respondents have defaulted because they failed to comply with the prehearing information exchange requirements of § 22.19(a) by the deadline set forth in Presiding Officer’s July 5, 2018 Prehearing Order. *See* 40 C.F.R. § 22.17. Specifically, the Prehearing Order requires Respondents to file a prehearing exchange by September 7, 2018. OALJ Index Document #18 at 4. Respondents failed to file their prehearing exchange on or before September 7, 2018 and they lack good cause for this failure, as a lack of willful intent is not by itself a sufficient excuse for failure to file a required document. *Jiffy Builders, Inc.*, 8 E.A.D. 315, 319, 1999 EPA App. LEXIS 15 *15 (EAB 1999). EPA administrative tribunals considering similar failures to comply with prehearing exchange requirements regularly find default occurred and impose penalties

against the respondents. *JHNY, Inc.*, 12 E.A.D. 372, 401, 2005 EPA App. LEXIS 22 *69 (EAB 2005); *In re B&L Plating, Inc.*, 11 E.A.D. 183, 191-92 (EAB 2003); *Rybond, Inc.*, 6 E.A.D. 614, 1996 EPA App. LEXIS 16 *33-34 (EAB 1996); *In re House Analysis & Assocs.*, 4 E.A.D. 501, 505-08 (EAB 1993); *In re Detroit Plastic Molding Co.*, 3 E.A.D. 103, 107 (CJO 1990).

The totality of the circumstances shows Respondents have a history of noncompliance with other filing deadlines in this proceeding. Two of the three respondents, Frostwood 6 LLC and Mr. Hoggan, filed their Answer late. All Respondents filed their Initial Statement late. Respondents' actions, which have culminated in a failure to file any prehearing exchange at all, evidence a pattern of failures. Ensuring compliance with the requirements of 40 C.F.R. part 22 and the Presiding Officer's orders is central to ensuring the integrity of the administrative enforcement adjudication process. Because one failure to comply with prehearing exchange requirements is sufficient to find default, *JHNY, Inc.*, 2005 EPA App. LEXIS at *41, Respondents' numerous failures in this case warrant default even more strongly.

The prehearing exchange is not "a procedural nicety." *Id.* at *23. Rather, "the prehearing exchange plays a pivotal function -- ensuring identification and exchange of all evidence to be used at hearing and other related information (e.g., identification of witnesses)." *Id.* Given the "key role of the prehearing exchange to administrative practice," *id.*, it is not surprising that the Respondents' failure materially prejudices Complainant. Respondents' failure to file a prehearing exchange has deprived Complainant, and its expert witness, of the ability to identify, analyze, and respond to the evidence Respondents would use at a hearing.

The Presiding Officer's Prehearing Order explicitly addressed default and warned—in emphasized text in the original order—that "*Respondents are hereby notified that their failure to comply with the prehearing exchange requirements set forth herein may result in the entry of a*

default judgment against them.” OALJ Index Document #18 at 5. Despite this clear warning, and the requirement in 40 C.F.R. § 22.17(a), Respondents ignored the Presiding Officer’s deadline for submitting a prehearing exchange. Six days have passed since Respondents’ deadline for filing a prehearing exchange, so default is warranted. *In re Detroit Plastic Molding Co.*, 3 E.A.D. 104-05 (Upholding a default order issued when Respondent “did not file its pre-hearing exchange until six days after” the due date). Complainant accordingly moves the Presiding Officer to find that default has occurred with respect to each Respondent and issue a default order.

V. REQUEST FOR A CIVIL PENALTY

Section 309(g)(2)(B) of the Act, 33 U.S.C. § 1319(g)(2)(B), authorizes the administrative assessment of civil penalties in an amount not to exceed \$10,000 per day for each day during which the violation continues, up to a maximum total penalty of \$125,000. Pursuant to the Civil Monetary Penalty Inflation Adjustment Rule of 2018, civil administrative penalties of up to \$21,393 per day for each day during which a violation continues, up to a maximum of \$267,415, may be assessed for violations of CWA sections 301 and 402, 33 U.S.C. §§ 1311 and 1342, that occurred after November 2, 2015, where penalties are assessed on or after January 15, 2018.

In determining the amount of penalty, CWA Section 309(g)(3), 33 U.S.C. § 1319(g)(3), requires the EPA consider the factors enumerated below. The EPA has not issued a CWA-specific penalty policy to determine penalties under the CWA. Consequently, the Complainant used two EPA general enforcement policies to implement the CWA penalty criteria in this case: The Policy on Civil Penalties: EPA General Enforcement Policy #GM-21 (February 16, 1984) (GM-21) and A Framework for Statute-Specific Approaches to Penalty Assessments: EPA General Enforcement Policy #GM-22 (February 16, 1984) (GM-22). CX 1, 2.

A. Clean Water Act Jurisdiction

The EPA maintains CWA jurisdiction over discharges of snowmelt and stormwater runoff associated with small construction activity at the Site, as all tributaries and abutting wetlands that received the Site's discharges of snowmelt and stormwater runoff are permanent or relatively permanent tributaries of navigable waters and waters of the United States. *See* 40 C.F.R. § 122.2; 33 U.S.C. § 1362(7); *Rapanos v. United States*, 547 U.S. 715 (2009).

Here, discharges of stormwater and snowmelt runoff from the Site flowed into the Summit County Municipal Separate Storm Sewer System (MS4) through several inlet points of entry. Depending on the point of entry, runoff from the Site entering the MS4 flowed out of the MS4 into one of two nearby unnamed surface water tributaries of East Canyon Creek, referred to as Main Investigation Tributary 1 and Main Investigation Tributary 2 ("MIT1" and "MIT2," respectively). MIT1 and abutting wetlands are located adjacent east of the Site, across Cooper Lane. *See* CX 66. The U.S. Army Corps of Engineers (USACE) issued a preliminary jurisdictional determination that MIT1 and abutting wetlands were waters of the United States on September 9, 2009 (SPK-2009-01203-UO). CX 9.

After receiving runoff from the Site via the MS4, MIT1 and MIT2 converge near the Site. The resulting tributary flows sequentially through two ponds in the Silver Springs residential community. Upon exiting the first pond (the Upper Pond), the flow is split into two tributaries, which flow into the second pond (the Lower Pond). Two tributaries flow from the Lower Pond through additional residential developments, through the Swaner Nature Preserve, and converge at the north end of the preserve before flowing under Interstate 80. The resulting tributary flows under Interstate 80 and converges with East Canyon Creek, approximately 2.5 miles north of the Site. *See* CX 66.

East Canyon Creek, a perennial flowing surface water, flows into East Canyon Reservoir, which was issued a Navigable-In-Fact determination by the USACE on June 16, 2008 (SPK-2008-00529), and is utilized heavily for year-round water-related recreation, including swimming, fishing, boating, sailboarding, wildlife viewing, and camping. CX 5.

All the mentioned tributaries between the Site and East Canyon Reservoir exhibit perennial flow or characteristics of a “relatively permanent” tributary of a “navigable water” as defined in *Rapanos*, subsequent clarifying case law, and joint EPA and USACE guidance titled, “Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in *Rapanos v. United States & Carabell v. United States*” (“post-*Rapanos* guidance”), issued December 2, 2008. CX 6. The post-*Rapanos* guidance states the agencies will assert jurisdiction over traditionally navigable waters, wetlands adjacent to traditionally navigable waters, non-navigable tributaries of traditionally navigable waters that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally (*e.g.*, typically three months), and wetlands that directly abut such tributaries. CX 6 at 1; *see also* CX 7.

Below East Canyon Reservoir, East Canyon Creek flows out of the reservoir and eventually converges with the Weber River, which flows into the Great Salt Lake. The Great Salt Lake and its tributaries referenced above are and were at all relevant times “waters of the United States” as defined by 40 C.F.R. § 122.2 and therefore “navigable waters” as defined by section 502(7) of the CWA, 33 U.S.C. § 1362(7).

B. Legal and Factual Basis for Complainant’s Proposed Penalty

The EPA’s proposed penalty considers the statutory factors and uses GM-21 and GM-22 as a framework to determine a penalty amount based on the statutory factors. The EPA considers four of the Act’s statutory factors—the nature, circumstances, extent, and gravity of the

violations—to arrive at a “gravity component” of the penalty. The term “gravity component” is a bit of a misnomer here, as it accounts for *all four* of these statutory factors, not just gravity. In determining the “gravity component,” the EPA considered case specific facts like the actual or possible harm, the harm to the regulatory scheme, and the availability of data from other sources. Actual or possible harm includes the amount of pollutants involved, the toxicity of the pollutants, the sensitivity of the environment, the duration of the violation, and the size of the violator.

The EPA added an “economic benefit component” to the “gravity component” to determine a preliminary deterrence amount. The EPA then considered adjustments based on Respondents’ ability to pay, prior history of non-compliance, degree of culpability (willfulness and/or negligence), and other factors as justice may require, like the degree of cooperation or noncooperation. This resulted in the EPA’s total proposed penalty amount: \$196,800.

1. The “Gravity Component”

Complainant provides the following information and analysis related to the gravity component, *i.e.*, the nature, circumstances, extent, and gravity of the violations. As the EPA found in the Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges, stormwater discharges from construction sites can severely compromise the integrity of the Nation’s waters. CX 3. High sediment loads in stormwater can cause siltation, which the EPA found to be the largest cause of impaired water quality in rivers and the third largest cause of impaired water quality in lakes. Other pollutants can be preferentially absorbed into fine sediment, causing nutrients—especially phosphorus, metals, and organic compounds—to move into aquatic ecosystems. Discharges from construction sites have been identified as a source of pollution in six percent of impaired rivers; eleven percent of impaired lakes, ponds, and reservoirs; and eleven percent of impaired estuaries. Sediment can fill lakes and reservoirs and

clog stream channels, with effects extending far downstream of the discharge from a construction site. The EPA has found that erosion rates from construction sites are much greater than from almost any other land use. Suspended sediment concentrations from construction sites have been found to be many times the concentrations from already-developed urban areas. Excess sediment is associated with increased turbidity, reduced light penetration in the water column, long-term habitat destruction, and increased difficulty in filtering drinking water.

Discharges of pollutants from construction activities endanger beneficial uses of the receiving waters. East Canyon Reservoir and East Canyon Creek, fed by tributaries receiving runoff from the site, have beneficial use designations of domestic/drinking water (Class 1C), primary contact for recreation (*e.g.*, swimming), infrequent primary contact for recreation (*e.g.*, wading, fishing) (Class 2B), cold water fishery/aquatic life (Class 3A), and agricultural uses (Class 4). CX 10 at 2, 3.

Discharge violations in the Complaint were identified, in part, through the evaluation of precipitation and snowmelt data recorded at the Snyderville, Utah weather station (Weather Station ID # USC00427942), located less than a mile from the Site. *See* CX 39. The subject precipitation data was certified by the U.S. Department of Commerce, National Centers for Environmental Information, on October 24, 2017. CX 39 at 1. The EPA reviewed available data spanning from January 7, 2016, the approximate date of construction commencement, through June 15, 2017, the most recent data available to the EPA prior to filing the Complaint. As a conservative measure to ensure fairness, the EPA excluded precipitation and snowmelt data from October 2016 and portions of December 2016, February 2017, and April 2017 because certified data from the Snyderville, Utah weather station was unavailable. EPA also only considered precipitation events that occurred prior to the filing of the September 27, 2017 Complaint.

In approximating the number of discharges from the Site based on precipitation and snowmelt data, the EPA adopted a conservative threshold, assuming days with “Rain, Melted Snow, Etc.” of 0.5 inches or greater would result in discharge from the Site. This methodology aligns with the least stringent operator-conducted inspection schedule required by the Permit, which requires site inspections be conducted within 24 hours of the occurrence of a precipitation event of 0.5 inches or greater. This requirement is based on the high likelihood of runoff and flows capable of impacting Best Management Practices (“BMPs”) generated from precipitation events of 0.5 inches or greater. The EPA considers this methodology and the 0.5 inch threshold to be exceptionally conservative. Given the generally steep slopes along downgradient portions of the Site, particularly those fronting Cooper Lane, it is likely rain or melted snow of less than 0.5 inches would generate discharges of runoff containing pollutants from the Site, based on EPA inspectors’ best professional judgment, experience, and observations at this and other construction sites.

During construction activities that occurred within the initially permitted timeframe¹ (January 7, 2016 to November 18, 2016), the certified precipitation and snowmelt data shows at least six days with likely discharges from the Site caused by “Rain, Melted Snow, Etc.” of 0.5 inches or greater. *See* CX 39. During the *unpermitted* timeframe (November 18, 2016 to April 27, 2017), the certified precipitation and snowmelt data shows at least nine days with likely discharges from the Site caused by “Rain, Melted Snow, Etc.” of 0.5 inches or greater. *See* CX 39. The EPA’s August 31, 2016 inspection, the UDEQ’s April 28, 2017 inspection, and various MS4 inspection reports identified that multiple stormwater, sediment, and pollution prevention BMPs were not properly installed, maintained, or implemented during the timeframes when

¹ CX 15 listed Kent Hoggan as the Owner and CBM Leasing, L.L.C. (“CBM”) as the Operator.

these likely discharges occurred, increasing the concentration of pollutants and volume of runoff in any discharges from the Site.

Local hydrological information and MS4 inspector observations establish discharges from the Site during both the initially permitted and unpermitted timeframes. Seasonal snowmelt runoff and seeps and springs are the main sources of surface water flow contributing the perennial and intermittent streams and wetlands near the Site. CX 8 at 11. Flow from these sources is particularly strong from late winter through early summer when shallow groundwater is replenished by infiltrating snowmelt. CX 66 at 7. An MS4 representative stated he had observed the “bubble-up box,” an MS4 feature located along Cooper Lane which received runoff from the site, overflowing into MIT1 on multiple occasions, including during times of snowmelt and strong spring flow. CX 66 at 6. Additionally, during the EPA’s August 31, 2016 inspection, the Operator stated that, in the spring of 2016, during the initially permitted timeframe, several community complaints had been received pursuant to runoff and sediment deposition from the Site flowing onto the adjacent Cooper Lane. CX 18 at 8. The Operator indicated runoff from snowmelt from upgradient portions of the Site contributed to discharges from the Site. *See e.g.*, CX 18 at 8. Given that the initially permitted and unpermitted timeframes both spanned spring months of the year when snowmelt and resulting overland spring flow generally peaks, it can reasonably be interpreted that multiple discharges from the Site attributed to snowmelt and overland spring flow occurred during both the initially permitted and unpermitted timeframes.

a. Discharge without a permit

As described above, discharges likely occurred during both the initially permitted and unpermitted timeframes. In determining the penalty amount, EPA made the conservative decision to calculate penalties only for nine likely discharges during the *unpermitted* timeframe,

based on the certified data in CX 39. The discussion above of other likely discharges informed the EPA's analysis of the Permit condition violations.

Complainant considers the unpermitted discharges described above to be major violations. At their core, unpermitted discharges illegally pollute the Nation's waters. They also present major challenges to local, state, and federal programs tasked with regulating discharges under the NPDES program. These programs are responsible for developing, issuing, tracking, and enforcing permits to protect water quality. The permit tracking informs regulatory agencies and the public of potential sources of discharge, and this information is not readily available through other sources. Permit tracking also informs the agencies' and the public's monitoring of discharges and receiving water bodies.

Additionally, permits are designed to inform the discharger of site conditions and practices which must be implemented to prevent or minimize the impact from pollutants leaving a site, including required BMPs. Here, Respondents discharged without a permit on multiple occasions when sediment, stormwater, and pollution prevention BMPs were not installed, maintained, or implemented. Missing or poorly maintained BMPs likely increased the volume of runoff and amount of sediment and other pollutants in unpermitted discharges from the Site, further increasing the environmental impacts. When a discharger fails to apply for a permit, regulatory agencies lose the opportunity to protect water quality—and human health and the environment in turn— via permit conditions.

b. Failure to develop a complete SWPPP and SWPPP map(s)

The EPA considers this a minor violation. A complete Stormwater Pollution Prevention Plan ("SWPPP") is essential to both operators and regulators for planning and tracking the implementation of stormwater and sediment controls to ensure compliance with the Permit and

protection of water quality. Here, the SWPPP was mostly complete and deficiencies were minimal. While the Operator would not be able to implement the SWPPP in full compliance with the Permit, the incomplete SWPPP represented the Site in a way that the Operator would be able to implement the SWPPP in a generally effective manner. This violation extended over a long period, as it began with submittal of the NOI in November 2015, continued through the filing of the Complaint, and was resolved on May 21, 2018 with the preparation of an updated SWPPP.

c. Failure to maintain an updated SWPPP and SWPPP map(s)

The EPA considers this a minor violation. Maintenance of an updated SWPPP is intended to assist the operators and regulators in identifying and monitoring implemented BMPs to ensure their continued functionality. However, the Operator here appeared to be generally aware of Site conditions and the state of BMPs, although the site was not fully in compliance with the permit. This violation extended over a long period, as it began with construction commencement in January 2016, continued through the filing of the Complaint, and was resolved on May 21, 2018 with the preparation of an updated SWPPP.

d. Failure to properly complete and certify the NOI

The EPA considers this a moderate violation. Proper completion of the NOI ensures correct identification of the owner and operator entities involved with a project. This is essential information for regulators tasked with tracking, inspecting, and contacting permitted dischargers. Proper certification of the NOI ensures each certifying party is aware of their legal obligation to comply with the permit, including the allocation of resources required to ensure Permit compliance. Here, Respondents' failure to properly complete and certify the NOI resulted in a significant expenditure of EPA resources to appropriately identify culpable parties involved at

the site. This violation occurred for the entirety of the first year of Permit coverage, from November 18, 2015 to November 18, 2016.

e. Failure to complete inspection reports

The EPA considers this a major violation. Inspections and inspection reports are intended to assist the Operator in monitoring BMPs to ensure their continued functionality and identify areas of the Site in need of corrective action. Here, some BMPs were not properly installed or maintained, which reduced or negated the control of pollutants in runoff from the Site. This violation extended over a lengthy period, as it began with construction commencement in January 2016, continued through the filing of the Complaint, and was resolved on May 25, 2018 with EPA's receipt of the Respondents' corrective actions responding to the EPA's Administrative Order for Compliance.

f. Failure to maintain an updated log of corrective actions

The EPA considers this a major violation. Corrective actions and corrective action logs are intended to ensure pollutant controls are in place and functioning properly and to assist operators in ensuring appropriate corrective actions are implemented and completed in a timely manner to reduce adverse environmental impacts from the site. This violation extended over a long period, as it began with construction commencement in January 2016, continued through the filing of the Complaint, and was resolved on May 25, 2018 with the EPA's receipt of the Respondents' corrective actions prepared in response to the EPA's Administrative Order.

g. Failure to ensure BMPs are properly installed and maintained

The EPA considers this a major violation. Proper installation and maintenance of BMPs is the primary mechanism employed by the Permit to minimize the introduction of pollutants to stormwater and prevent pollutants from migrating offsite. Some BMPs were observed to be

effectively in place during the EPA's August 31, 2016 inspection. But important BMPs, including stabilization of exposed soil and perimeter controls, were lacking or in need of maintenance. During the EPA's August 31, 2016 inspection, the Operator also indicated several complaints had been received pursuant to sediment deposition from the site flowing onto the adjacent Cooper Lane, which indicates adequate BMPs were not installed or maintained at times prior to the inspection and that runoff containing pollutants had discharged from the Site onto the paved right-of-way, from which it would have been conveyed into surface waters via the MS4.

The Permit requires BMPs to be properly installed and maintained at all times, so the Site is prepared for any potential runoff-generating snowmelt or precipitation events. Here, precipitation and snowmelt events resulted in multiple discharges from the Site when BMPs were not properly installed or maintained, further increasing potential impacts from the discharge. This was a lengthy violation, as it began with construction commencement in January 2016, continued through the filing of the Complaint, and was resolved on May 25, 2018 with EPA's receipt of the Respondents' corrective actions addressing items identified in the EPA's March 7, 2017 Order. While Respondents claim some BMPs were improved between the EPA's August 2016 inspection and the May 2018 corrective action submittal, they have not been able to provide any supporting documentation. Also, UDEQ and MS4 inspections that occurred between the EPA's August 2016 inspection and the Respondents' May 2018 corrective action submittal identified repeat, ongoing, and additional BMP deficiencies at the Site.

h. Failure to ensure persons inspecting the site are properly trained and certified

EPA considers this a major violation. Proper training and certification is required to ensure stormwater inspectors thoroughly understand the Permit's requirements and industry

standards for recordkeeping, pollution prevention, and sediment and stormwater control. Here, the Operator's inspector, Mr. Jacobsen, exhibited some knowledge and experience relating to stormwater and sediment controls. But BMP implementation and maintenance was insufficient and required recordkeeping procedures were severely deficient, as discussed throughout this section. This violation was lengthy, as it began with construction commencement in January 2016 and continued through the filing of the Complaint. Respondents have indicated the Operator attended a stormwater inspector certification course and took a certification exam on May 22, 2018. Respondents also committed to providing a copy of the Operator's certification to the EPA upon receipt. But EPA has received no certification to date and there is no documentation of whether the Operator passed the certification exam.

i. Failure to ensure persons with responsibilities relevant to pollution prevention understand and perform in accordance with the permit

EPA considers this a major violation. Proper training of all relevant operator personnel is required to ensure construction operators thoroughly understand the Permit's requirements and industry standards for pollution prevention and sediment and stormwater control. Here, uncontained concrete washout was observed onsite, which poses significant potential environmental harm to receiving waterways due to its extremely caustic and corrosive nature. This violation began with construction commencement in January 2016 continued through September 2016, when the Operator began training persons with responsibilities relevant to pollution prevention and began managing concrete washout appropriately.

j. Gravity Component Determination

Based on the size of the Site (4.76 acres), the actual and potential harm to human health and the environment resulting from the discharges of pollutants, the importance to the regulatory

scheme of each type of violation, the fact that relevant data was not available from other sources, the number of violations, and the length of the violations, EPA calculated a gravity component of \$155,000.

2. Economic Benefit

The EPA calculated the economic benefit of Respondents' violations using the EPA computer software program, "BEN."² BEN estimates the economic benefit of delayed or avoided compliance, which is calculated as the sum of the net present value of delayed or avoided capital investment, one-time expenditures, and operating and maintenance costs. These expenses are estimated from various sources, including but not limited to, best industry practices, vendor quotes, information provided by the Respondents and other construction operators, and publicly accessible localized wage information available from the Bureau of Labor Statistics website.

Conservatively, the EPA only considered economic benefit for BMP violations occurring after the EPA's August 31, 2016 inspection, as EPA could not definitively determine the dates when these violations began. For any violations which continued beyond the filing of the September 27, 2017 Complaint, the EPA considered economic benefit accrued by the Respondents until the dates of their respective resolutions. EPA determined those dates with information such as the documentation Respondents provided in their May 25, 2018 response to the March 7, 2017 Administrative Order for Compliance.

EPA calculated the economic benefit of the delayed cost of obtaining a permit; the delayed cost of developing a complete SWPPP and SWPPP map(s); the avoided cost of maintaining an updated SWPPP and SWPPP map(s); the delayed cost of properly completing and certifying the NOI; the avoided cost of completing some inspection reports; the delayed cost

² BEN is a publicly available software, available for download here: <https://www.epa.gov/enforcement/penalty-and-financial-models>.

of completing some inspection reports; the avoided cost of maintaining some corrective action logs; the delayed cost of maintaining some corrective action logs; the avoided cost of ensuring BMPs are properly installed and maintained; the delayed cost of ensuring persons inspecting the site are properly trained and certified; and the delayed cost of ensuring persons with responsibilities relevant to pollution prevention understand and comply with the permit.

The EPA determined the economic benefit from the violations was \$9,000, which results in a preliminary deterrence amount of \$164,000 when added to the \$155,000 gravity component.

3. Adjustment Factors

The EPA analyzed the following factors to determine if they warranted adjustments to the to the preliminary deterrence amount of \$164,000.

a. Ability to pay

In a December 5, 2016 email, Mr. Hoggan alluded to potential ability to pay concerns in response to the EPA's November 15, 2016 Revised Inspection Report and Expedited Settlement Offer (ESO). CX 22. That day, the EPA requested email clarification whether the Respondents wanted to formally raise an ability to pay claim. CX 23. EPA received no response.

On December 22, 2016, in an abundance of caution, the EPA emailed ability to pay forms (Request for Financial Information from Corporations) to the Respondents and requested a phone call with the Respondents to discuss the ability to pay evaluation process and the clarify the Respondents' intent to complete the forms. CX 24. EPA received no response.

No additional ability to pay discussions took place until March 20, 2018, when the Respondents formally raised an ability to pay claim in response to the September 27, 2017 Complaint. Since then, the EPA has devoted substantial resources towards evaluating the Respondents' claims, including extensive utilization of staff financial experts and the hiring of an

expert contractor, Industrial Economics, Inc. One Respondent, Mr. Jacobsen, provided adequate financial documentation for the EPA to evaluate his claim, which the EPA has deemed legitimate. The EPA's analysis of the documentation found that Mr. Jacobsen's penalty warrants adjustment to a penalty of \$500.

Despite numerous requests from the EPA, Mr. Hoggan and Frostwood 6 LLC have not provided adequate financial documentation for the EPA to evaluate their claims. CX 48, 56, 58, 60. As these Respondents have failed to provide documentation supporting their ability to pay claims, EPA made no ability to pay adjustments for Mr. Hoggan and Frostwood 6 LLC. *See JHNY, Inc.*, 12 E.A.D. at 398-99 (“[B]y not complying with the prehearing exchange requirement to provide documentary evidence demonstrating its inability to pay the proposed penalty, [Respondent] failed to raise its ability to pay as a cognizable issue [and] . . . waived its ability to contest the Region’s penalty proposal on this basis.”).

b. Prior history of noncompliance

To the EPA's knowledge, the Respondents have no prior history of noncompliance with respect to CWA violations, so the EPA made no adjustments for this factor.

c. Culpability – degree of willfulness and/or negligence

Complainant determined that Respondents have a high degree of willfulness and/or negligence, which Complainant analyzed to determine Respondents' culpability. Regarding discharge without a permit and NOI violations, the Permit and the NOI clearly state both owners and operators must apply for coverage as permittees and are jointly responsible for ensuring UPDES compliance at the site. While the Respondents only had piecemeal coverage during the first year of Permit coverage (*i.e.*, only Mr. Hoggan and dismissed Respondent CBM Leasing

were named in the NOI), all parties were required to obtain Permit coverage and comply with all Permit conditions for the duration of the project. CX 15.

Additionally, shortly prior to expiration of the Permit's coverage, Mr. Jacobsen—the Site Operator—stated to the EPA during a phone call that he was aware the Site's coverage under the Permit would be expiring and he would be required to renew coverage prior to expiration. Yet, Permit coverage still lapsed in November 2016 due to the Respondents' failure to obtain Permit coverage. During the unpermitted timeframe, MS4 inspection reports completed and transmitted to the Respondents clearly identified the Site as unpermitted and requested the Respondents obtain Permit coverage. CX 19 at 2. However, the Site remained unpermitted for over five months until the Respondents were prompted to obtain Permit coverage in response to advance notification of the UDEQ's April 2017 inspection.

Regarding other violations, the Respondents were made aware of the Permit requirements, the Site's noncompliance, and requested corrective actions many times. During the EPA's August 31, 2016 inspection, the Operator indicated familiarity with stormwater requirements pertinent to construction sites he previously operated in other states. However, numerous findings of Permit noncompliance were identified during this inspection and communicated to the Operator during the onsite inspection closing conference. The EPA's inspection findings and requested corrective actions were also transmitted to the Respondents in inspection reports on September 28, 2016 and November 15, 2016. *See, e.g.*, CX 18. The EPA also outlined violations and requested corrective actions in the March 7, 2017 Administrative Order, with which the Respondents did not comply. CX 26, 27.

The UDEQ's April 28, 2017 inspection of the Site documented several repeat or ongoing violations previously identified by the EPA, as well as several additional violations. CX 28. The

UDEQ discussed the Site's noncompliance with the Operator during the inspection and transmitted the inspection findings and requested corrective actions to the Respondents in an inspection report on June 2, 2017. Many MS4 inspections conducted in this timeframe identified findings of noncompliance that were outlined in inspection reports given to the Respondents.

Finally, the UDEQ and the EPA maintain numerous free and publicly accessible construction stormwater resources on their websites, including permitting and enforcement contacts; BMP fact sheets; BMP databases; templates for SWPPPs, inspection reports, and corrective action logs; and numerous other technical and compliance assistance resources which were readily accessible to the Respondents.

Based on the Respondents' high degree of culpability, demonstrated via their willfulness and/or negligence, the EPA added 10% the preliminary deterrence amount. This raised the penalty from \$164,000 to \$180,400.

d. Other factors as justice requires – degree of non/cooperation

Respondents have exhibited a high degree of noncooperation towards the EPA, the UDEQ, and the MS4. After the EPA's August 2016 inspection, the Respondents did not respond to the initial or revised inspection reports with evidence that requested corrective actions had been completed. Respondents also failed to renew Permit coverage for the Site, despite acknowledging to the EPA that they were aware of the requirement to do so. During this unpermitted timeframe, Respondents did not comply with respond to the EPA's March 7, 2017 Administrative Order for Compliance, until they submitted an incomplete response over a year later. And after the UDEQ's inspection, Respondents did not respond to the UDEQ's inspection report with evidence that requested corrective actions had been completed.

Respondents' noncooperation significantly delayed returning the Site to compliance. Thus, EPA added 10% to the preliminary deterrence amount, which results in a \$196,800 total proposed penalty.

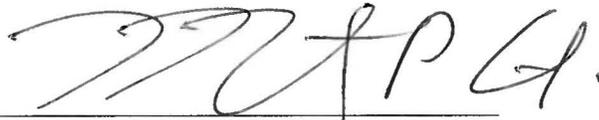
VI. CONCLUSION

For the reasons detailed in this Memorandum, Complainant respectfully requests that the Presiding Officer issue a default order: that Respondents admit all facts alleged in the complaint and a waive their right to contest such factual allegations; that David Jacobsen is liable to pay a civil penalty of \$500; and that Mr. Hoggan and Frostwood 6 LLC are jointly and severally liable to pay the remainder of the civil penalty: \$ 196,300. These penalty amounts are consistent with the record of the proceeding and with the Act. Accordingly, the Consolidated Rules authorize the Presiding Officer to order Complainant's requested relief. 40 C.F.R. § 22.17(c).

Respectfully Submitted,

Date: September 13, 2018

By:



Matthew Castelli, Attorney

(303) 312-6491, castelli.matthew@epa.gov

Mark Chalfant, Senior Attorney

(303) 312-6177, chalfant.mark@epa.gov

U.S. EPA, Region 8

1595 Wynkoop Street (8ENF-L)

Denver, CO 80202-1129

CERTIFICATE OF SERVICE

I certify that the foregoing Complainant's Motion for Default and attached Memorandum in Support in In the Matter of Kent Hoggan, Frostwood 6 LLC, and David Jacobsen, Respondents, Docket No. CWA-08-2017-0026, dated September 13, 2018, was sent this day in the following manner to the addressees listed below:

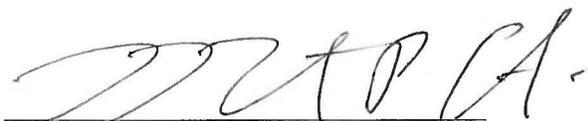
Copy by OALJ E-Filing System to:

Headquarters Hearing Clerk Mary Angeles
U.S. Environmental Protection Agency
Office of Administrative Law Judges
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Presiding Officer The Honorable Susan L. Biro
U.S. Environmental Protection Agency
Office of Administrative Law Judges
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Copy by email to:

Attorney for Respondents David W. Steffensen, Esq.
Law Office of David W. Steffensen, P.C.
4873 South State Street
Salt Lake City, UT 84107
Email: dave.dwslaw@me.com



Matthew Castelli, Attorney
U.S. Environmental Protection Agency, Region 8
Legal Enforcement Program
1595 Wynkoop Street
Denver, CO 80202
Tel.: 303-312-6491
Email: castelli.matthew@epa.gov

Dated: September 13, 2018