

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

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

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**COMPLAINANT’S INITIAL PREHEARING EXCHANGE**

Complainant, the United States Environmental Protection Agency (EPA or the Agency), respectfully submits Complainant’s Initial Prehearing Exchange pursuant to Rule 22.19(a) of the Consolidated Rules of Practice, 40 C.F.R. § 22.19(a), and the Prehearing Order of Presiding Officer Susan L. Biro, dated July 5, 2018.

**I. FACT AND EXPERT WITNESSES AND BRIEF NARRATIVE SUMMARY OF EXPECTED TESTIMONY**

Complainant may call any or all of the following witnesses at a hearing of the above-captioned matter. Complainant notes that some of the testimony below may be rendered unnecessary by stipulations or by rulings on dispositive motions. It is Complainant’s intent to promote judicial efficiency by resolving factual matters through stipulations or dispositive motions where possible.

Witnesses

Akash Johnson, U.S. EPA, Region 8, Office of Enforcement, Compliance and Environmental Justice. Mr. Johnson is a Clean Water Act Inspector and Case Development Officer in the Clean Water Act Technical Enforcement Program within the Office of Enforcement, Compliance and Environmental Justice, and serves as the lead

Inspector and Case Development Officer for the EPA's enforcement action against the Respondents. Mr. Johnson is expected to testify as a fact witness regarding the U.S. EPA's August 31, 2016 storm water compliance evaluation inspection of the Frostwood Townhomes project located in Park City, Utah, pursuant to UPDES Construction Storm Water Permit No. UTR373147, as well as EPA's August 9-10, 2018 reconnaissance inspection. He is also expected to testify regarding storm water runoff from the site, the discharge of contaminated storm water into waters of the United States, MS4 conveyances, and surface waters near the Site. Additionally, Mr. Johnson is expected to testify as an expert witness as to the calculation of the EPA's proposed civil penalty in this matter, based on the facts of this case and the application of U.S. EPA General Enforcement Policy #GM-21, dated February 16, 1984, and U.S. EPA General Enforcement Policy #GM-22, dated February 16, 1984. A copy of Mr. Johnson's curriculum vitae is attached as CX 43.

Emilio Llamozas, U.S. EPA, Office of Enforcement, Compliance and Environmental Justice. Mr. Llamozas is a Clean Water Act Inspector in the Clean Water Act Technical Enforcement Program within the Office of Enforcement, Compliance and Environmental Justice, and serves as an Inspector for the EPA's enforcement action against the Respondents. Mr. Llamozas is expected to testify regarding U.S. EPA's August 31, 2016 storm water inspection of the Frostwood Townhomes project located in Park City, Utah, pursuant to UPDES Construction Storm Water Permit No. UTR373147. He is also expected to testify regarding storm water runoff from the site.

Kyle Monez, Summit County. Mr. Monez is an engineer technician with the Summit County Department of Public Works. Mr. Monez is expected to testify regarding

site visits and inspections. He is also expected to testify concerning Municipal Separate Storm Sewer System (MS4) conveyances and surface waters near the Site, and his knowledge of the area including storm water run-off from the Site. Additionally, he is expected to testify regarding communications with Respondents about permit requirements.

Jeanne Riley, Utah Department of Environmental Quality, Division of Water Quality. Ms. Riley is the program manager for the Division of Water Quality’s Storm Water Section and also serves as an inspector for the program. Ms. Riley is expected to testify regarding the State of Utah’s April 28, 2017 storm water inspection of the Frostwood Townhomes project located in Park City, Utah. She is also expected to testify concerning the State’s processing of Respondents Frostwood 6 LLC and David Jacobsen Construction’s filing of the 2017 Notice of Intent.

Ann Czerwonka, Special Consultant, Industrial Economics. Ms. Czerwonka holds a Bachelor of Arts with academic honors in Mathematics with an Economics Complement from Wellesley College and a Master of Business Administration with concentrations in Finance, Quantitative Methods and Organizational Behavior from the Tuck School of Business at Dartmouth College. Ms. Czerwonka is expected to testify as an expert witness regarding Respondents’ ability to pay claim and supporting documentation. A copy of Ms. Czerwonka’s curriculum vitae is attached as CX 42.

II. EXHIBITS COMPLAINT INTENDS TO INTRODUCE INTO EVIDENCE AT HEARING

Complainant intends to introduce at hearing the exhibits listed and numbered below:

Complainant’s Exhibit No.	Document	Number of Pages

<b>1984</b>		
1.	U.S. EPA General Enforcement Policy #GM-21, dated February 16, 1984	40
2.	U.S. EPA General Enforcement Policy #GM-22, dated February 16, 1984	31
<b>1999</b>		
3.	U.S. EPA Final Rule – 40 C.F.R. Parts 9, 122, 123 and 124: National Pollutant Discharge Elimination System - Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges (64 Fed. Reg. 68722), dated December 8, 1999	130
<b>2005</b>		
4.	U.S. EPA Notice of Final Action and Response to Comment – Calculation of the Economic Benefit of Noncompliance in EPA’s Civil Penalty Enforcement Cases (70 Fed. Reg. 50326), dated August 26, 2005	20
<b>2008</b>		
5.	Navigable-In-Fact Determination for East Canyon Reservoir (ID SPK-2008-00529), U.S. Army Corps of Engineers, dated June 16, 2008	2
6.	Joint U.S. EPA-USACE Memorandum Regarding Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in Rapanos v. United States & Carabell v. United States, dated December 2, 2008	13
7.	Joint U.S. EPA-USACE Questions and Answers Regarding the Revised Rapanos & Carabell Guidance, dated December 2, 2008	3
<b>2009</b>		
8.	Wetland Delineation Technical Report, Canyons Golf Course, 400 Canyons Resort Drive, Park City, Utah, dated August 2009	68
9.	USACE Letter regarding Request for Preliminary Jurisdictional Determination for The Canyons Golf Course Project, dated September 9, 2009	8
<b>2010</b>		
10.	East Canyon Reservoir and East Canyon Creek TMDLs, dated May 2010	304
<b>2014</b>		
11.	State of Utah, Department of Environmental Quality, Division of Water Quality, Utah Pollutant Discharge Elimination System, General Permit for Discharges from Construction Activities, UPDES Permit No. UTRC00000, dated June 18, 2014	118

12.	Operating Agreement of Frostwood 6 LLC, dated August 4, 2014	16
<b>2015</b>		
13.	Stormwater Pollution Prevention Plan for Frostwood Parcel F6 Townhomes, Park City, Utah, dated March 17, 2015	62
14.	Frostwood F6 Townhomes Drawings Submitted to Summit County on October 21, 2015	17
15.	Notice of Intent for Storm Water Discharges Associated with Construction Activity Under the UPDES General Permit No. UTR373147 for November 18, 2015-November 18, 2016, dated November 18, 2015 (Kent Hoggan; CBM Leasing)	3
<b>2016</b>		
16.	Utah Department of Environmental Quality / Summit County SWPPP Compliance Inspection Form, completed by Summit County MS4 Inspector Chad Wright, dated May 31, 2016	4
17.	Jurisdictional Determination for Wetlands Near Unnamed Tributary of Lost Creek, USACE, dated August 8, 2016	8
18.	U.S. EPA Water Compliance Inspection Report, dated September 27, 2016 (Inspection ID # 201608 UTR373147)	46
19.	Utah Department of Environmental Quality / Summit County SWPPP Compliance Inspection Form, completed by Summit County MS4 Inspector Kyle Monez, dated October 31, 2016	4
20.	Utah Department of Environmental Quality / Summit County SWPPP Compliance Inspection Form, completed by Summit County MS4 Inspector Kyle Monez, dated November 16, 2016	4
21.	Utah Department of Environmental Quality / Summit County SWPPP Compliance Inspection Form, completed by Summit County MS4 Inspector Craig Pearson, dated December 2, 2016	3
22.	Email from Kent Hoggan to Lauren Hammond, Esq. Raising Ability to Pay Claim, dated December 5, 2016 7:43AM	2
23.	Email from Lauren Hammond, Esq. to Kent Hoggan et al. regarding Ability to Pay Claim Documentation, dated December 5, 2016 9:40AM	3
24.	Email from Lauren Hammond, Esq. to Kent Hoggan et al. Transmitting Ability to Pay Forms, dated December 22, 2016 2:23PM	13
<b>2017</b>		
25.	Email from Lauren Hammond, Esq. to Kent Hogan Inquiring about Submission of Ability to Pay Forms with Attachment, dated January 5, 2017 11:45AM	13
26.	U.S. EPA Administrative Order for Compliance in the Matter of Frostwood 6 LLC and David Jacobsen Construction, Respondents, Docket No. CWA-08-2017-0007, dated March 7, 2017	23

27.	Domestic Return Receipt dated March 14, 2017, for U.S. EPA Administrative Order for Compliance in the Matter of Frostwood 6 LLC and David Jacobsen Construction, Respondents, Docket No. CWA-08-2017-0007	1
28.	Utah Department of Environmental Quality / Summit County SWPPP Compliance Inspection Form, completed by Summit County MS4 Inspector Kyle Monez, dated April 26, 2017	4
29.	Notice of Intent for Storm Water Discharges Associated with Construction Activity Under the UPDES General Permit No. UTR373147 for November 18, 2015-November 18, 2018, dated April 28, 2017 (Frostwood 6 LLC; David Jacobsen Construction)	3
30.	Utah Department of Environmental Quality, Division of Water Quality Cover Letter Transmitting SWPPP Compliance Inspection Form and Photographs for April 28, 2017 State Inspection, dated June 2, 2017	8
31.	Utah Department of Environmental Quality / Summit County SWPPP Compliance Inspection Form, completed by Summit County MS4 Inspector Kyle Monez, dated September 8, 2017	4
32.	Utah Department of Environmental Quality / Summit County SWPPP Compliance Inspection Form, completed by Summit County MS4 Inspector Kyle Monez, dated September 19, 2017	3
33.	U.S. EPA Notice of Administrative Complaint Docket No. CWA-08-2017-0026 to Erica Gaddis, Director, Utah Department of Environmental Quality, Water Quality Division, dated September 27, 2017	20
34.	U.S. EPA Transmittal of Administrative Complaint Docket No. CWA-08-2017-0026 to David Jacobsen, dated September 27, 2017	2
35.	U.S. EPA Transmittal of Administrative Complaint Docket No. CWA-08-2017-0026 to Hal Rosen for Frostwood 6 LLC, dated September 27, 2017	2
36.	U.S. EPA Transmittal of Administrative Complaint Docket No. CWA-08-2017-0026 to Kent Hoggan, dated September 27, 2017	2
37.	Domestic Return Receipt Card for Notice of U.S. EPA Administrative Complaint Docket No. CWA-08-2017-0026 to Erica Gaddis, Director, Utah Department of Environmental Quality, Water Quality Division, dated September 28, 2017	1
38.	Domestic Return Receipt Card for U.S. EPA Administrative Complaint Docket No. CWA-08-2017-0026, Served on Frostwood 6 LLC, signed October 2, 2017 (Certified Mail #7008-3230-0725-9966)	1
39.	U.S. Department of Commerce Meteorological Records – Record of Climatological Observations for Synderville, UT US (USC00427942) Station for the Period, January 1, 2016-June 30, 2017, certified October 24, 2017	26

40.	Affidavit of Service for Respondent Kent Hoggan, State of Utah Salt Lake County Sheriff's Office, dated November 15, 2017	1
41.	Affidavit of Service for Respondent David Marcel Jacobsen, State of Utah Summit County Sheriff's Office, dated November 27, 2017	1
<b>2018</b>		
42.	Curriculum Vitae for U.S. EPA Expert Ann Czerwonka, Special Consultant, Industrial Economics, Incorporated	4
43.	Curriculum Vitae for U.S. EPA Expert and Fact Witness Akash C. Johnson	3
44.	U.S. EPA Civil Monetary Penalty Inflation Adjustment Rule (40 C.F.R. Part 19), dated January 10, 2018	5
45.	Utah Department of Environmental Quality / Summit County SWPPP Compliance Inspection Form, completed by Summit County MS4 Inspector Chad Wright, dated February 9, 2018	4
46.	Utah Department of Environmental Quality / Summit County SWPPP Compliance Inspection Form, completed by Summit County MS4 Inspector Kyle Monez, dated March 23, 2018	3
47.	Email from Lauren Hammond, Esq. to David Steffensen, Esq. regarding Ability to Pay Check In, dated May 15, 2018 10:02AM	1
48.	Email from Lauren Hammond, Esq. to David Steffensen, Esq. regarding Completeness Review with Attachment, dated May 17, 2018 12:36PM	4
49.	SWPPP Preparer Correction Memorandum, dated May 21, 2018	1
50.	Updated Stormwater Pollution Prevention Plan for Frostwood Parcel F6 Townhomes, Park City, Utah, dated May 21, 2018	66
51.	Email from David W. Steffensen, Esq. to Lauren Hammond, Esq. regarding Corrective Actions Taken in Response to U.S. EPA Administrative Order for Compliance in the Matter of Frostwood 6 LLC and David Jacobsen Construction, Respondents, Docket No. CWA-08-2017-0007 (March 7, 2017), dated May 25, 2018 2:24PM (Transmitting Exhibits A-D)	102
52.	Email from David W. Steffensen, Esq. to Lauren Hammond, Esq. regarding Corrective Actions Taken in Response to U.S. EPA Administrative Order for Compliance in the Matter of Frostwood 6 LLC and David Jacobsen Construction, Respondents, Docket No. CWA-08-2017-0007 (March 7, 2017), dated May 25, 2018 2:29PM (Re-Transmitting Exhibit C Logs (SWPPP Inspection Logs #1, #2, #3 and #4)	91
53.	Email from David W. Steffensen, Esq. to Lauren Hammond, Esq. regarding Corrective Actions Taken in Response to U.S. EPA Administrative Order for Compliance in the Matter of Frostwood 6 LLC and David Jacobsen Construction, Respondents, Docket No. CWA-08-2017-0007 (March 7, 2017), dated May 25, 2018	107

	2:29PM (Re-Transmitting Exhibit C Logs (SWPPP Inspection Logs #5, #6 and #7)	
54.	Email from David W. Steffensen, Esq. to Lauren Hammond, Esq. regarding Corrective Actions Taken in Response to U.S. EPA Administrative Order for Compliance in the Matter of Frostwood 6 LLC and David Jacobsen Construction, Respondents, Docket No. CWA-08-2017-0007 (March 7, 2017), dated May 25, 2018 2:57PM (Transmitting Exhibit E Omitted from May 25, 2018 2:24PM Email)	1
55.	Email from Lauren Hammond, Esq. to David W. Steffensen, Esq. regarding Mr. Hoggan's Ability to Pay Claim, dated June 19, 2018 2:53PM	1
56.	Email from Lauren Hammond, Esq. to David W. Steffensen, Esq. regarding Substantiation of Mr. Hoggan's Ability to Pay Claim with Attachments, dated June 22, 2018 1:42PM	9
57.	U.S. EPA Public Notice: Opportunity to Comment on the Proposed Administrative Penalty Assessment against Kent Hogan, Frostwood 6 LLC, and David Jacobsen for Alleged Violations of the Clean Water Act, dated July 11, 2018	3
58.	Email from Matthew P. Castelli, Esq. to David W. Steffensen, Esq. regarding Incomplete Documentation of Ability to Pay Claim with Letter Attachment, dated August 2, 2018 4:38PM	3
59.	East Canyon State Park Boat Rentals Page, dated August 8, 2018	2
60.	Email from Matthew P. Castelli, Esq. to David W. Steffensen, Esq. regarding Ability to Pay Discussion with Attachment, dated August 13, 2018 12:51PM	3
61.	East Canyon State Park Homepage Screen Capture, dated August 14, 2018 3:19PM	1
62.	USGS National Water Information System Data for USGS 10133650 E CANYON CR BL I-80 REST STOP NR PARK CITY, UT, for the Period from January 1, 2016 to August 14, 2018, dated August 15, 2018	41
63.	2018.08.15 USGS National Water Information System Data for USGS 10133800 EAST CANYON CREEK NEAR JEREMY RANCH, UT, for the Period from January 1, 2016 to August 14, 2018, dated August 15, 2018	40
64.	USGS National Water Information System Data for USGS 10133980 EAST CANYON CREEK AB EAST CYN RES NR MORGAN, UTAH, for the Period from January 1, 2016 to August 14, 2018, dated August 15, 2018	40
65.	Screen Capture of USGS National Water Information System Map View Centered on East Canyon Creek, dated August 15, 2018	1
66.	U.S. EPA Inspection Report for August 9-10, NPDES Reconnaissance Inspection, dated August 17, 2018	192



### III. TIME TO PRESENT CASE AND TRANSLATION SERVICES

Complainant's preferred hearing location is Salt Lake City, Utah. Complainant estimates that presenting the direct case will take two (2) days. Complainant needs no translation services.

### IV. DOCUMENTATION OF SERVICE

Documentation showing service of the complaint was completed in accordance with Section 22.5(b)(1) of the Consolidated Rules of Practice is attached as CX 38, CX 40 and CX 41.

### V. NARRATIVE STATEMENT EXPLAINING ALLEGATIONS

Complainant included summaries of witness testimony and exhibits to support the factual and legal bases for the allegations denied or otherwise not admitted in Respondents' Answer.

Complainant notes that Respondents have stipulated to the fact that Complaint ¶12 contains a typographical error and should read "EPA regulations state regulated storm water discharges include discharges from small construction activity. 40 C.F.R. § 122.26(a)(9)(i)(B)." Counsel for Respondents stated that Respondents admit to the corrected Complaint ¶12, as written above.

Complainant also confirmed with counsel for Respondents that Answer ¶54 contains a typographical error, and the parties stipulated that Answer ¶54 should say Respondents did not accept the Expedited Settlement Agreement.

### VI. INFORMATION AND DOCUMENTATION SUPPORTING PENALTIES

In proposing the amount of civil penalty in this matter, the Clean Water Act requires the EPA to take into account the applicable statutory factors, which according to section 309(g)(3) of the Act, 33 U.S.C. § 1319(g)(3), are "... the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the

violation, and such other matters as justice may require.” Complainant has included summaries of witness testimony and documentation in its proposed exhibits that support the civil penalty based on the applicable statutory factors.

## VII. GUIDANCE, POLICIES, AND PREAMBLES

In developing the proposed civil penalty to be specified in Complainant’s Rebuttal Prehearing Exchange, Complainant intends to rely upon the following Agency guidance documents to account for the Act’s penalty factors: EPA’s *General Enforcement Policy #GM-21* (CX 1) and *A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA’s Policy On Civil Penalties #GM-22* (CX 2). These penalty policies calculate civil penalties based on the economic benefit accrued, gravity, degree of willfulness and/or negligence, cooperation or noncooperation, and other legal and equitable factors. Gravity evaluates the seriousness of the violations by in three applicable categories: (1) determining the actual or possible harm by evaluating the amount of pollutant, sensitivity of the environment, toxicity of the pollutant and length of time the violation(s) continued; (2) the importance of the violated requirement to the regulatory scheme; and (3) addressing recordkeeping and reporting requirements based on the availability of the data to the EPA from other sources. Generally, for a discharge without a permit violation, the level of actual or potential harm is evaluated on the seriousness scale as moderate to major depending upon the length of violation and sensitivity of the waters where the discharges occurred. For permit violations of non-numeric effluent limitations, the level of actual or potential harm is evaluated based on the length of violation, the sensitivity of the waters where the discharges occurred, and impact on the amount of pollutants discharged. For the second category, the importance of the violated requirement to the regulatory scheme, discharge without a permit is also generally evaluated on the seriousness scale as

moderate to serious depending upon the length of violation. Violations of conditions of a permit are evaluated for seriousness in the second category by evaluating importance of the violations to the regulatory scheme. Generally, permit condition recordkeeping violations are determined as minor to moderate violations on the seriousness scale depending upon whether the information is available from other sources. The violations are determined to be major violations if the information is not available from another source.

Complainants listed other guidance, policies, and preambles as exhibits, above.

#### VIII. PROOF OF PUBLIC NOTICE

EPA is required to provide the public with the opportunity to comment on the proposed administrative Class II penalty under the Clean Water Act, as provide by 33 U.S.C.

§ 1319(g)(4)(A) and 40 C.F.R. § 22.45(b). Documentation of EPA's July 11, 2018 Public Notice of Opportunity to Comment on the Proposed Administrative Penalty Assessment against Respondents is attached as CX 57.

#### X. PAPERWORK REDUCTION ACT

The Paperwork Reduction Act is not applicable to an enforcement proceeding under the Consolidated Rules of Practice.

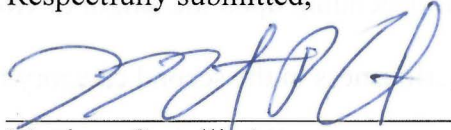
#### XI. RESERVATIONS AND REBUTTAL SUBMISSIONS

Complainant respectfully reserves the right to supplement its list of witnesses upon adequate notice to the Presiding Officer and Respondents, and to call such witnesses at the hearing of this matter should Respondents' Initial Prehearing Exchange or other discovery reveal the need for further witnesses to rebut Respondents' case. Complainant reserves the right to cross-examine any witnesses offered by Respondents.

8/17/18

Date

Respectfully submitted,



Matthew Castelli, Attorney,  
303-312-6491

Mark A.R. Chalfant, Senior Attorney,  
303-312-6177

U.S. Environmental Protection Agency, Region 8  
1595 Wynkoop Street (8ENF-L)

Denver, CO 80202

Counsel for Complainant

**CERTIFICATE OF SERVICE**

I certify that the foregoing Complainant's Initial Prehearing Exchange in In the Matter of Kent Hoggan, Frostwood 6 LLC, and David Jacobsen, Respondents, Docket No. CWA-08-2017-0026, dated August 17, 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: August 17, 2018