

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

UNITED STATES OF AMERICA,)
STATE OF COLORADO,)
STATE OF MARYLAND,)
STATE OF NEVADA,)
STATE OF UTAH, and)
COMMONWEALTH OF VIRGINIA,)

Plaintiffs,)

vs.)

M.D.C. HOLDINGS, INC.,)
ENERWEST, INC.,)
M.D.C. LAND CORPORATION,)
MDC/WOOD, INC.,)
RAH OF FLORIDA, INC.,)
RICHMOND AMERICAN CONSTRUCTION,)
INC.,)
RICHMOND AMERICAN HOMES OF)
ARIZONA, INC.,)
RICHMOND AMERICAN HOMES OF)
CALIFORNIA, INC.,)
RICHMOND AMERICAN HOMES OF)
COLORADO, INC.,)
RICHMOND AMERICAN HOMES OF)
DELAWARE, INC.,)
RICHMOND AMERICAN HOMES OF)
FLORIDA, LP,)
RICHMOND AMERICAN HOMES OF)
ILLINOIS, INC.,)
RICHMOND AMERICAN HOMES OF)
MARYLAND, INC.,)
RICHMOND AMERICAN HOMES OF)
NEVADA, INC.,)
RICHMOND AMERICAN HOMES OF)
NEW JERSEY, INC.,)
RICHMOND AMERICAN HOMES OF)
NORTHERN CALIFORNIA, INC.)
now known as RAH CALIFORNIA)
CONTRACTING, INC.,)

Civil Action No. _____

RICHMOND AMERICAN HOMES OF)
 PENNSYLVANIA, INC.,)
 RICHMOND AMERICAN HOMES OF)
 UTAH, INC.,)
 RICHMOND AMERICAN HOMES OF)
 VIRGINIA, INC.,)
 RICHMOND AMERICAN HOMES OF)
 WEST VIRGINIA, INC., and)
 YOSEMITE FINANCIAL, INC.,)
)
 Defendants.)
 _____)

COMPLAINT

Plaintiff, the United States of America, by authority of the Attorney General of the United States, at the request of the Administrator of the United States Environmental Protection Agency (“EPA”), by and through their undersigned attorneys, with respect to claims under federal law; and Plaintiffs, the State of Colorado, by the authority of the Colorado Attorney General’s Office, at the request of the Colorado Department of Public Health and Environment; the State of Maryland by the authority of the Attorney General of Maryland, at the request of the Maryland Department of the Environment; the State of Nevada by the authority of the Attorney General of Nevada, at the request of the Department of Conservation and Natural Resources through Nevada Division of Environmental Protection; the State of Utah by the authority of the Utah Department of Environmental Quality; and the Commonwealth of Virginia at the request of the Virginia Department of Conservation and Recreation and by approval of the Governor of Virginia, (hereinafter, “State Plaintiffs”) by and through their undersigned attorneys, with respect to their state law claims, allege as follows:

INTRODUCTION

1. This is a civil action for injunctive relief and civil penalties brought pursuant to Section 309(b) and (d) of the Clean Water Act (“CWA”), 33 U.S.C. § 1319(b) and (d), against M.D.C. Holdings, Inc. and its listed subsidiaries (collectively “Defendants”) for the discharge of pollutants in storm water without a permit in violation of CWA Section 301, 33 U.S.C. § 1311; for failure to provide information to the Administrator in violation of CWA Section 308, 33 U.S.C. § 1318; and for failure to comply with the conditions of permits (including various state general permits) issued pursuant to CWA Section 402, 33 U.S.C. § 1342, for the discharge of pollutants in storm water from construction sites, in violation of CWA Section 301, 33 U.S.C. § 1311. This action also is brought pursuant to the Colorado Water Quality Control Act (“CWQCA”), §§ 25-8-607 and -608, C.R.S.; Sections 9-339 and 9-342 of the Environment Article, Annotated Code of Maryland; Nev. Rev. Stat. §§ 445A.695 and 445A.700; Utah Water Quality Act, Utah Code Ann. §§ 19-5-101 to -123; and the Virginia Stormwater Management Act, Va. Code Ann. §§ 10.1-603.1 to -603.15, against Defendants for similar violations of State Plaintiffs’ state laws (hereinafter referred to as State Plaintiffs’ “analogous state laws”).

JURISDICTION AND VENUE

2. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331, 1345 and 1355 and 33 U.S.C. § 1319(b). This Court has jurisdiction over the State Plaintiffs’ claims pursuant to 28 U.S.C. § 1367 (supplemental jurisdiction).

3. Venue is proper in this District pursuant to 33 U.S.C. § 1319(b), and 28 U.S.C. §§ 1391 and 1395, because one or more of the Defendants conduct business in this District, because certain of the violations occurred in this District, and because Defendants consent to venue in this District.

4. Notice of the commencement of this action has been given to the States of Arizona, California, Colorado, Delaware, Florida, Illinois, Maryland, New Jersey, Nevada, Texas, Utah, and West Virginia, and the Commonwealths of Pennsylvania and Virginia in accordance with 33 U.S.C. § 1319(b).

DEFENDANTS

5. Defendants are corporations or limited partnerships organized under the laws of Colorado, Delaware, Maryland, and Virginia and each is a “person” as defined in CWA Section 502, 33 U.S.C. § 1362(5), 40 C.F.R. § 122.2.

6. Defendants do business in 14 states of the United States, including this District. Hereinafter, the term Defendants includes subsidiaries wholly owned by any Defendant or combination of Defendants.

7. Defendants have constructed and/or are currently constructing residential homes on various pieces of property owned and/or operated by Defendants throughout the United States, including this District. Defendants construct thousands of new homes each year.

STATUTORY AND REGULATORY AUTHORITY

8. The Clean Water Act is designed to restore and maintain the chemical, physical

and biological integrity of the nation's waters. 33 U.S.C. § 1251(a).

9. To accomplish the objectives of the Act, CWA Section 301(a), 33 U.S.C. § 1311(a), prohibits the “discharge of any pollutant” by any person except in certain circumstances, including in compliance with a National Pollutant Discharge Elimination System (“NPDES”) permit issued by EPA pursuant to CWA Section 402, 33 U.S.C. § 1342.

10. CWA Section 502(12), 33 U.S.C. § 1362(12), defines the term “discharge of a pollutant” as, inter alia, “any addition of any pollutant to navigable waters from any point source.”

11. CWA Section 402(p), 33 U.S.C. § 1342(p), requires a permit for storm water discharges associated with industrial activity.

12. EPA regulations define the term “storm water discharge associated with industrial activity” to include storm water discharges from construction activities, including clearing, grading, and excavation activities, that result in a disturbance of five or more acres of total land area. 40 C.F.R. § 122.26(b)(14)(x). Construction activity also includes the disturbance of less than five acres of total land area that is part of a larger common plan of development or sale if the larger common plan will ultimately disturb equal to or greater than five acres. Id.

13. EPA regulations also define the term “storm water discharge associated with small construction activity” to include storm water discharges from construction activities, including clearing, grading, and excavation activities, that result in a disturbance of equal to or greater than one acre and less than five acres. 40 C.F.R. § 122.26(b)(15)(I). Construction activity also includes the disturbance of less than one acre of total land area that is part of a larger common plan of development or sale if the larger common plan will ultimately disturb equal to or greater than one acre. Id.

14. State Plaintiffs' analogous state laws require a permit for discharges of storm water associated with construction activities to state waters.

15. In 1992, EPA issued a Final NPDES General Permit for Storm Water Discharges from Construction Activities. 57 Fed. Reg. 41176, 41209 (Sept. 9, 1992). EPA has, on various occasions, subsequently modified and reissued this general permit. See 63 Fed. Reg. 7858-7906 (Feb. 17, 1998); 63 Fed. Reg. 36490-36519 (July 6, 1998); 65 Fed. Reg. 25122-25145 (Apr. 28, 2000); 68 Fed. Reg. 39087-39091 (July 1, 2003).

16. Pursuant to the CWA Section 402(b), 33 U.S.C. § 1342(b), states may issue their own storm water permits for discharges into navigable waters within their jurisdiction if they are authorized by EPA to do so. Most states, including State Plaintiffs, are so authorized and have issued their own NPDES general permits governing discharges of storm water associated with construction activities. See Colorado General Permit for Storm Water Discharges Associated with Construction Activity No. COR - 030000; Maryland State Discharge Permit Number 09GP, General NPDES Permit Number MDR10; Nevada Stormwater General Permit NVR100000; Utah Storm Water General Permit for Construction Activities, Permit No. UTR100000; Virginia General Permit for Discharges of Stormwater from Construction Activities, General Permit No. DCR01. For states that have not been authorized, EPA remains the permitting authority for purposes of the CWA, and the federal general permit applies. The United States may enforce the state-issued NPDES permit under the CWA, and State Plaintiffs may enforce their state-issued permits pursuant to their analogous state laws. The federal or state NPDES general permit for storm water discharges associated with construction activities that applies in a state is hereinafter referred to as the "Applicable Permit."

17. Section 308 of the Clean Water Act, 33 U.S.C. § 1318, requires owners and operators of point sources to submit information to the EPA Administrator as needed to carry out the objectives of the Clean Water Act, including the NPDES permit program of CWA Section 402, 33 U.S.C. § 1342.

18. Under EPA's regulations, persons who discharge or who propose to discharge "storm water associated with industrial activity" are required to apply for an individual permit or seek coverage under a promulgated storm water general permit. 40 C.F.R. §§ 122.21(a) & (c), 122.26(c), 122.28. In applying for coverage under a storm water individual or general permit, a potential permittee must provide the necessary information on the basis of which EPA (or the state permitting agency) may evaluate the appropriateness of the issuance of and the terms of any such permit.

19. Under 40 C.F.R. § 122.21(c), a discharger proposing a new discharge of storm water associated with construction activity covered by 40 C.F.R. § 122.26(b)(14)(x) and (15)(I) must submit an application 90 days before the date construction is to commence, or by the deadlines provided by the terms of any applicable general permit. See 40 C.F.R. § 122.28(b)(2).

20. State Plaintiffs' analogous state laws require persons proposing to discharge storm water associated with construction activity to submit information to the State as needed to carry out the objectives of State Plaintiffs' analogous state laws.

21. Though they differ in some of the details, in general, under the general permits, any person subject to the permit is required to develop a storm water pollution prevention plan ("SWPPP"), which sets forth a plan to control and reduce pollutants in storm water discharges from construction activities. Federal CGP, Parts 3.1.B.2 and 3.4.A. The SWPPP must meet

specific requirements and include certain information. Federal CGP, Part 3.

22. A central requirement of the SWPPP is the selection of best management practices (“BMPs”). BMPs are management practices implemented “to prevent or reduce the discharge of pollutants to waters of the United States.” Federal CGP, Appendix A. These practices include measures to prevent erosion (such as the scheduling of the project to minimize the amount of land that is being graded at any particular time) and measures to capture sediment before it leaves the site (such as silt fences and sedimentation basins).

23. The permits also require the permittee to implement the SWPPP and to properly operate and maintain the BMPs. Federal CGP, Parts 3.1.D and 3.6.A.

24. The permits impose additional requirements, including, inter alia: inspection of the site during construction, Federal CGP, Part 3.10; maintenance of the SWPPP and sometimes other records at the site, Federal CGP, Part 3.12; and final stabilization of the site followed by termination of permit coverage, Federal CGP, Part 5.1.A.

25. CWA Section 309(b), 33 U.S.C. § 1319(b), authorizes the Administrator of EPA “to commence a civil action for appropriate relief, including a permanent or temporary injunction,” when any person is in violation of 33 U.S.C. §§ 1311, 1318, or of any permit issued pursuant to CWA Section 402, 33 U.S.C. § 1342. State Plaintiffs are authorized to seek injunctive relief for such violations pursuant to their analogous state laws. CWQCA § 25-8-607, C.R.S.; §§ 4-116, 4-416, and 9-339 of the Environment Article, Annotated Code of Maryland; Nev. Rev. Stat. §§ 445A.465, 445A.695 and 445A.700; Utah Code Ann. § 19-5-115; and Virginia Stormwater Management Act, Va. Code Ann. § 10.1-603.12:4.

26. CWA Section 309(d), 33 U.S.C. § 1319(d), provides, in part, that any person who

violates 33 U.S.C. §§ 1311, 1318, or any permit issued pursuant to CWA Section 402, 33 U.S.C. § 1342, shall be subject to a civil penalty not to exceed \$27,500 per day for each such violation occurring after January 29, 1997 through and including March 15, 2004, and \$32,500 per day for each such violation thereafter. 33 U.S.C. § 1319(d); 40 C.F.R. § 19.4; 62 Fed. Reg. 7121-01 (Feb. 13, 2004) (codified at 40 C.F.R. pt. 19). State Plaintiffs are authorized to seek civil penalties for such violations pursuant to their analogous state laws. CWQCA § 25-8-608(1), C.R.S.; §§ 4-116, 4-417 and 9-342 of the Environment Article, Annotated Code of Maryland; Nev. Rev. Stat. § 445A.700; Utah Code Ann. § 19-5-115; and Virginia Stormwater Management Act, Va. Code Ann. § 10.1-603.14.

GENERAL ALLEGATIONS

27. Based on inspections conducted at 21 of Defendants' construction sites in 5 states between 2002 and 2005, EPA discovered a pattern of failures by Defendants to timely obtain coverage under Applicable Permits prior to site disturbing activities that could or did result in discharges of pollutants, and a pattern of failures to comply with the requirements of Applicable Permits for the discharge of storm water from these construction sites. These sites are included in the list of sites attached as Appendix A. Additional information was obtained, including from Defendants' responses to information requests issued by EPA pursuant to CWA Section 308, 33 U.S.C. § 1318, which provided evidence of additional violations at Defendants' sites that are also included in Appendix A. Appendix A also includes sites at which Defendants were engaged in construction activities between September 30, 2007 and March 31, 2008. Based on the inspections, responses to information requests and other information, the United States alleges

(and State Plaintiffs allege with respect to sites in their states) that Defendants have a pattern of failures to timely obtain coverage under Applicable Permits prior to site disturbing activities that could or did result in discharges of pollutants, and a pattern of failures to comply with the requirements of Applicable Permits for the discharge of storm water from Defendants' construction sites listed in Appendix A.

28. At each of the sites listed on Appendix A, Defendants engaged in construction activities that resulted in the disturbance of at least one acre.

29. Defendants' sites in Appendix A, themselves, as well as the storm sewers, ditches, or other conveyances referenced in Paragraph 30 below, constitute "point source[s]" within the meaning of CWA Section 502(14), 33 U.S.C. § 1362(14).

30. Defendants' construction activities resulted in the addition of "pollutants," including rock, sand, cellar dirt, industrial waste, solid waste, and other pollutants, to storm sewers, ditches, or other conveyances that discharge to streams, creeks, and other water bodies that are "waters of the United States," within the meaning of CWA Section 502(6) and (7), 33 U.S.C. § 1362(6), (7), and 40 C.F.R. § 122.2, and also resulted in the discharge of pollutants to state waters under State Plaintiffs' analogous state laws.

31. Defendants have discharged pollutants within the meanings of Sections 301 and 502(12) of the CWA, 33 U.S.C. §§ 1311 and 1362(12), and 40 C.F.R. § 122.2, without permit authorization.

32. Defendants are persons that proposed to discharge or who otherwise were required to timely apply for coverage under an Applicable Permit, pursuant to CWA Sections 308 and 402(p), 33 U.S.C. §§ 1318 and 1342(p), 40 C.F.R. §§ 122.21(a), (c), 122.26(c), and 122.28, and

State Plaintiffs' analogous state laws.

33. Defendants failed to timely submit the information required to apply for or obtain coverage under the Applicable Permit, including but not limited to, at the following sites: Piney Creek in Centennial, CO; Lanier Farms and Crossmans Creek in Bristow, VA; Hunt Chase in Haymarket, VA; and Evergreen Meadows in Leesburg, VA.

34. At sites for which Defendants did obtain permit coverage, Defendants violated the Applicable Permit, including but not limited to, at the following sites: Piney Creek in Centennial, CO; Crossmans Creek in Bristow, VA; Saddle View site in Forest Hill, MD; and the Hidden Springs site in Fruit Heights City, UT. Violations of storm water requirements at these and other sites include, but are not necessarily limited to: failure to install and maintain storm water controls (such as vehicle track out pads, inlet protection, silt fencing to minimize off-site sediment and erosion runoff); failure to properly design or implement BMPs; failure to prepare an adequate SWPPP; failure to conduct inspections; and failure to conduct inspections in accordance with the Applicable Permit requirements.

FIRST CLAIM FOR RELIEF

DEFENDANTS DISCHARGED POLLUTANTS IN STORM WATER WITHOUT AN APPLICABLE PERMIT

35. Plaintiffs reallege and incorporate by reference Paragraphs 1 through 34.

36. Defendants discharged pollutants in storm water to waters of the United States without coverage under an Applicable Permit in violation of CWA Section 301, 33 U.S.C. § 1311, and discharged pollutants in storm water to waters of one or more of the State Plaintiffs in

violation of analogous state laws.

37. Unless enjoined, these violations will continue or will recur at other construction sites.

38. Pursuant to 33 U.S.C. § 1319, Defendants are liable for injunctive relief and civil penalties of up to \$27,500 per day for each such violation occurring after January 29, 1997 through and including March 15, 2004 and \$32,500 per day for each such violation thereafter per day per violation.

39. Pursuant to State Plaintiffs' analogous state laws, Defendants are liable to each State Plaintiff for injunctive relief and civil penalties for each violation that occurred at a site in its state that is listed on Appendix A. CWQCA §§ 25-8-607 and -608, C.R.S.; §§ 4-116, 4-416, 4-417, 9-339, and 9-342 of the Environment Article, Annotated Code of Maryland; Nev. Rev. Stat. §§ 445A.695 and 445A.700; Utah Code Ann. § 19-5-115; Virginia Stormwater Management Act, Va. Code Ann. §§ 10.1-603.12:4 and -603.14.

SECOND CLAIM FOR RELIEF

DEFENDANTS FAILED TO TIMELY SUBMIT THE INFORMATION REQUIRED TO OBTAIN COVERAGE UNDER AN APPLICABLE PERMIT

40. Plaintiffs reallege and incorporate by reference Paragraphs 1 through 34.

41. Defendants failed to timely submit the information required to obtain coverage under an Applicable Permit for the discharge of storm water associated with construction activities in violation of CWA Section 308, 33 U.S.C. § 1318, and failed to timely submit the information required to obtain coverage under an Applicable Permit for the discharge of storm

water pursuant to one or more State Plaintiffs' analogous state laws.

42. Pursuant to 33 U.S.C. § 1319, Defendants are liable for injunctive relief and civil penalties of up to \$27,500 per day for each such violation occurring after January 29, 1997 through and including March 15, 2004 and \$32,500 per day for each such violation thereafter per day per violation.

43. Pursuant to State Plaintiffs' analogous state laws, Defendants are liable to each State Plaintiff for injunctive relief and civil penalties for each violation that occurred at a site in its state that is listed on Appendix A. CWQCA §§ 25-8-607 and -608, C.R.S.; §§ 4-116, 4-416, 4-417, 9-339, and 9-342 of the Environment Article, Annotated Code of Maryland; Nev. Rev. Stat. §§ 445A.695 and 445A.700; Utah Code Ann. § 19-5-115; Virginia Stormwater Management Act, Va. Code Ann. §§ 10.1-603.12:4 and -603.14.

THIRD CLAIM FOR RELIEF

DEFENDANTS VIOLATED THE REQUIREMENTS OF THE APPLICABLE PERMITS

44. Plaintiffs reallege and incorporate by reference Paragraphs 1 through 34.

45. Defendants failed to comply with the terms and conditions of the Applicable Permits, in violation of CWA Section 301, 33 U.S.C. § 1311, and one or more State Plaintiffs' analogous state laws.

46. Unless enjoined, these violations will continue or will recur at other construction sites.

47. Pursuant to 33 U.S.C. § 1319, Defendants are liable for injunctive relief and civil

penalties of up to \$27,500 per day for each such violation occurring after January 29, 1997 through and including March 15, 2004 and \$32,500 per day for each such violation thereafter per day per violation.

48. Pursuant to State Plaintiffs' analogous state laws, Defendants are liable to each State Plaintiff for injunctive relief and civil penalties for each violation that occurred at a site in its state that is listed on Appendix A. CWQCA §§ 25-8-607 and -608, C.R.S.; §§ 4-116, 4-416, 4-417, 9-339, and 9-342 of the Environment Article, Annotated Code of Maryland; Nev. Rev. Stat. §§ 445A.695 and 445A.700; Utah Code Ann. § 19-5-115; Virginia Stormwater Management Act, Va. Code Ann. §§ 10.1-603.12:4 and -603.14.

PRAYER FOR RELIEF

WHEREFORE, the United States of America and the State Plaintiffs respectfully request that this Court:

A. Order Defendants to comply with the terms of the Act and the conditions of Applicable Permits at its construction sites by requiring, among other things, the development and implementation of appropriate storm water pollution prevention plans, the application of BMPs to minimize or eliminate discharges of pollutants from their sites, and the implementation of corporate policies designed to achieve and assure compliance with the Applicable Permits and the Act;

B. Assess civil penalties against Defendants of up to \$27,500 per day for each violation occurring after January 29, 1997 through and including March 15, 2004 and \$32,500 per day for each violation thereafter per day for each violation;

- C. Award the United States its costs and disbursements in this action; and
- D. Grant any such further relief as this Court deems just and proper.

Respectfully submitted,

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