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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

NORTHWEST ENVIRONMENTAL
DEFENSE CENTER, a non-profit corporation,
and FRIENDS OF THE TUALATIN RIVER
NATIONAL WILDLIFE REFUGE, a non-
profit corporation,

Plaintiffs,

v.

GRABHORN, INC., an Oregon corporation,

Defendant.

Civil No.:

CV '08 548 ST
**COMPLAINT FOR INJUNCTIVE
AND DECLARATORY RELIEF
AND CIVIL PENALTIES**

(Pursuant to Clean Water Act, 33 U.S.C.
§ 1365)

INTRODUCTION

1. This is a complaint for injunctive and declaratory relief and civil penalties under the Federal Water Pollution Control Act, more commonly referred to as the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.* The Northwest Environmental Defense Center and Friends of the Tualatin River National Wildlife Refuge (“Plaintiffs”) bring this citizen suit under §505(a)(1) of the Clean Water Act, 33 U.S.C. §1365(a)(1), against Grabhorn, Inc. (“Defendant”) for past and continuing violations of the Clean Water Act. Defendant is the owner and operator of Lakeside Reclamation Landfill (“Lakeside”). At Lakeside, Defendant is discharging pollutants and storm water into the Tualatin River, an unnamed tributary of the Tualatin River and an impoundment of that tributary, without a required National Pollution Discharge Elimination System (“NPDES”) permit, in violation of 33 U.S.C. § 1311(a). Defendant’s discharges are impairing water quality in the Tualatin River and are interfering with Plaintiffs’ ability to enjoy the Tualatin area. These violations are ongoing as of the date of this complaint.

2. Plaintiffs seek declaratory and injunctive relief and the imposition of civil penalties resulting from these violations. Plaintiffs also seek an award of costs and attorney fees pursuant to 33 U.S.C. § 1365(d).

JURISDICTION AND VENUE

3. Jurisdiction over this action is conferred by 28 U.S.C. § 1331 (federal question) and 33 U.S.C. § 1365(a) (Clean Water Act jurisdiction). An actual, justiciable controversy exists between Plaintiffs and Defendant. The requested relief is proper under 28 U.S.C. § 2201, 28 U.S.C. § 2202, and 33 U.S.C. § 1365(a).

4. As required by Clean Water Act § 505(b), 33 U.S.C. § 1365(b), on January 24, 2008, Plaintiffs sent a sixty-day notice of intent to sue for violations of the Clean Water Act. *See* Exhibit 1. More than 60 days have passed since Plaintiffs sent the notice of intent to sue. Defendant has not remedied the violations alleged in this complaint and/or Defendant's violations will continue.

5. Neither the Environmental Protection Agency ("EPA") nor the Oregon Department of Environmental Quality ("DEQ") has commenced a court action to redress the Clean Water Act violations alleged herein. Accordingly, Plaintiffs' Clean Water Act claims are not barred by § 505(b)(1)(B) of the Clean Water Act, 33 U.S.C. § 1365(b)(1)(B).

6. Venue is properly vested in this Court pursuant to 33 U.S.C. § 1365(c)(1), because the events giving rise to this claim occurred at the Lakeside facility in Beaverton, Oregon and in the Tualatin River watershed, which are located within this judicial district.

PARTIES

7. Defendant GRABHORN, INC. is an Oregon domestic business corporation, whose president and secretary is Howard Grabhorn. Defendant owns and operates Lakeside, a construction and demolition landfill and composting facility, located at 14930 S.W. Vandermost Road, Beaverton, Oregon 97007.

8. Plaintiff NORTHWEST ENVIRONMENTAL DEFENSE CENTER ("NEDC") is an Oregon non-profit corporation with its principal place of business located at 10015 SW Terwilliger Boulevard, Portland, Oregon, 97219. NEDC was founded in 1969 and is dedicated to the preservation and protection of the natural

resources of the Pacific Northwest. NEDC's members are lawyers, scientists, students, and citizens interested in protecting the environment of the Pacific Northwest, including the waters of the Tualatin watershed.

9. Plaintiff FRIENDS OF THE TUALATIN RIVER NATIONAL WILDLIFE REFUGE ("FRIENDS") is an Oregon non-profit corporation with its principal place of business located at 19255 SW Pacific Highway, Sherwood, Oregon, 97140. Friends was founded in 1993 and is dedicated to the protection and restoration of the Tualatin River National Wildlife Refuge for the benefit of fish and wildlife and for public education and recreation. Friends' members are citizens interested in protecting and enjoying the Tualatin River National Wildlife Refuge.

10. Some of Plaintiffs' members reside in the immediate vicinity of Lakeside and many use and enjoy the Tualatin River, its tributaries, and surroundings for recreational, scientific and aesthetic purposes, including canoeing, kayaking, sightseeing, birdwatching, wildlife viewing, and bicycling, in areas directly affected by Defendant's failure to comply with the Clean Water Act, as alleged herein. Defendant's discharges of pollutants into the impoundment of the unnamed creek, the unnamed creek, which is a tributary of the Tualatin River, and the Tualatin River itself, diminish Plaintiffs' members' use and enjoyment of the Tualatin area.

11. Lakeside discharges volatile organic compounds, toxic pollutants and suspended solids into the impoundment of the unnamed creek, the unnamed creek and the Tualatin River. In addition to presenting threats to the health of aquatic species and wildlife, the turbid water discharged from Lakeside also lessens Plaintiffs' members' aesthetic enjoyment of the Tualatin River. Plaintiffs' members are reasonably concerned

about the presence of pollutants in Defendant's discharges. Plaintiffs' members are reasonably concerned that Defendant's discharges present risks to those members who use and come in contact with the water in the Tualatin, and to the area's sensitive wildlife.

12. Moreover, because Defendant is operating without required permits, Defendant has failed to satisfy the monitoring, reporting and recordkeeping requirements that would provide information to Plaintiffs and Plaintiffs' members about the types and quantities of pollutants being discharged into the impoundment of the unnamed creek, the unnamed creek and the Tualatin. Thus, Plaintiffs and Plaintiffs' members are reasonably concerned that pollutants discharged by Defendant exceed levels allowed by law and protective of human health and the environment.

13. The water quality of the Tualatin River and its tributaries directly affects the health, recreational, aesthetic, and environmental interests of Plaintiffs' members. The interests of Plaintiffs' members have been, are being, and unless the relief requested is granted, will continue to be, adversely affected by Defendant's failure to comply with the terms of the Clean Water Act. Plaintiffs' injuries in fact are fairly traceable to Defendant's conduct and would be redressed by the relief that Plaintiffs seek in this case. Plaintiffs have no adequate remedy at law.

LEGAL BACKGROUND

14. Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), provides that "the discharge of any pollutant . . . shall be unlawful" unless, in pertinent part, the discharge is made pursuant to and is authorized by a NPDES permit, as provided by § 402 of the Act, 33 U.S.C. § 1342. "Discharge of a pollutant" means any "addition of a

pollutant to navigable waters from any point source.” 33 U.S.C. § 1362(12). Pollutant is defined to include “industrial, municipal, and agricultural waste discharged into water.” 33 U.S.C. § 1362(6). A point source is “any discernable, confined and discrete conveyance,” and navigable waters are broadly defined as “the waters of the United States.” 33 U.S.C. §§ 1362(7) & (14).

15. The NPDES permitting scheme is the primary means by which discharges of pollutants are controlled. NPDES permits must include conditions that will ensure compliance with the Clean Water Act. At a minimum, NPDES permits must include technology-based effluent limitations, any more stringent limitations necessary to meet water quality standards, and monitoring and reporting requirements. *See* 33 U.S.C. §§ 1342, 1311, 1318.

16. Although EPA is the primary administrator of the Clean Water Act, § 402 of the Clean Water Act authorizes EPA to delegate its authority to states to implement and administer the Clean Water Act. 33 U.S.C. § 1342(b). Pursuant to this provision, DEQ has authority to regulate discharges of pollutants by, among other actions, issuing NPDES permits to dischargers. *See* OAR Chapter 340, Division 045.

17. Compliance with an NPDES permit is deemed compliance with the general discharge prohibition in § 301(a). 33 U.S.C. § 1342(k).

Individual NPDES Permits and the 1200-Z NPDES General Storm Water Permit

18. The Clean Water Act section 402(p)(3)(A) requires EPA, and accordingly DEQ, to regulate discharges of pollutants through storm water associated with industrial activities. 33 U.S.C. § 1342(p)(3)(A). Permits issued pursuant to this section must meet all requirements of sections 402 and 301 of the Clean Water Act.

19. The Clean Water Act allows permit-issuing agencies to regulate dischargers that engage in substantially similar practices and discharge substantially the same pollutants through general NPDES permits. A facility that qualifies for coverage under a general NPDES permit need not apply for an individual NPDES permit.

20. DEQ typically regulates discharges of storm water associated with industrial activities through general NPDES permits. DEQ regulates industrial storm water discharges in most Oregon watersheds, including the Tualatin watershed, through the 1200-Z NPDES Permit, which it recently reissued in 2007.

21. The 1200-Z NPDES Permit, however, covers only discharges of storm water. Federal regulations define storm water as “storm water runoff, snow melt runoff, and surface runoff and drainage.” 40 C.F.R. § 122.26(b)(13). DEQ has further defined storm water as “water from precipitation or snow melt that collects on or runs off outdoor surfaces such as buildings, roads, paved surfaces and unpaved land surfaces.” OAR 340-044-0005(41).

22. Although “[l]andfills, land application sites and open dumps” can be covered under the 1200-Z NPDES Permit, the general permit is explicitly unavailable to landfills that discharge “contaminated stormwater,” as defined by 40 C.F.R. § 445.2, to waters of the United States. 1200-Z Permit, Table 1. Federal regulations define “contaminated storm water” as “storm water which comes in direct contact with landfill wastes, the waste handling and treatment areas, or landfill wastewater.” 40 C.F.R. § 445.2(b).

23. Additionally, the 1200-Z NPDES Permit cannot cover discharges of process wastewater. Federal regulations define “process wastewater” as “any water which, during manufacturing or processing, comes into direct contact with or results from the

use of any raw material, intermediate product, finished product, byproduct or waste product.” 40 C.F.R. § 122.2.

24. In the context of landfills, EPA has explicitly defined “landfill wastewater” as a type of “process wastewater.” “Landfill wastewater” is “all wastewater associated with, or produced by, landfilling activities except for sanitary wastewater, non-contaminated storm water, contaminated ground water, and wastewater from recovery pumping wells.” 40 C.F.R. § 445.2(f).

25. Facilities that discharge contaminated stormwater or process wastewater must obtain an individual NPDES Permit, as the 1200-Z General Permit is, by its own terms, not applicable to such facilities.

Citizen Enforcement

26. Clean Water Act violators are subject to enforcement actions initiated by EPA, states, and citizens. 33 U.S.C. §§ 1319, 1365(a). Citizens are required to provide sixty days’ notice of any alleged violations prior to commencing suit. 33 U.S.C. § 1365(b). After sixty days have passed, citizens may bring an action in federal district court to enforce against any ongoing violations of the Clean Water Act.

27. Section 505 of the Clean Water Act authorizes citizens to bring suit against any person, including a corporation, who is alleged to be in violation of an effluent standard or limitation under the Clean Water Act. 33 U.S.C. § 1365(a). Effluent limitation is defined broadly to include “any unlawful act under subsection (a) of [section 301] of this title.” 33 U.S.C. § 1365(f).

28. Section 309 of the Clean Water Act, 33 U.S.C. § 1319(d), adjusted by 40 C.F.R. § 19.4, provides for civil penalties of up to \$32,500 per day per violation.

Violations occurring before March 15, 2004 carry penalties of up to \$27,500 per day of violation.

FACTS COMMON TO ALL CLAIMS

29. Defendant Grabhorn, Inc. owns and operates a construction and demolition landfill and composting facility. The landfill and compost pile share a contiguous parcel of property with a tree farm, the Grabhorn residence, industrial and agricultural buildings and four interconnected ponds (“the impoundment”). An unnamed creek flows along the facility’s eastern property line. A diversion dam in the creek fills the impoundment of the unnamed creek. The impoundment is on the National Wetland Inventory (NWI, USFS 2007b-6.2 acres, PUBKHx).

30. Defendant Grabhorn, Inc. is a “person” within the meaning of § 301(a) of the Clean Water Act, 33 U.S.C. 1311(a), and is subject to suit under the Clean Water Act citizen suit provision, 33 U.S.C. § 1365.

31. The Tualatin River, the unnamed creek that empties into the Tualatin River, and the impoundment of the unnamed creek are all waters of the United States as defined by 33 U.S.C. §§ 1311(a), 1362(7) and 40 C.F.R. § 230.3(s)(5).

32. When it rains, water comes into direct contact with industrial and waste products as it flows over and runs off the open face of the landfill, landfill equipment, landfill leachate seeps, the compost pile(s) and soil stockpiles at the Lakeside facility. As it does so, it collects pollutants including oil, heavy metals and suspended solids.

33. This contaminated stormwater and process wastewater run over the surface of the Lakeside facility into the impoundment and the unnamed creek. It also collects in

catch basins and pipes, which drain the contaminated stormwater and process wastewater into the impoundment.

34. Groundwater containing contaminated stormwater and process wastewater also seeps out of the landfill and runs in rivulets down the side of the landfill, into the impoundment. This contaminated groundwater also discharges directly into the impoundment through the soil.

35. The contaminated stormwater and process wastewater that enter the impoundment is then also discharged into the unnamed creek and/or the Tualatin River. These discharges occur from a drainage pipe or pipes into the unnamed creek, through the groundwater and/or soil into the unnamed creek and/or the Tualatin River, and/or when the impoundment overflows into the unnamed creek and/or the Tualatin River.

36. Additionally, when it rains, water flows over and runs off the buildings and paved and unpaved surfaces at the Lakeside facility. As it does so, it collects pollutants including oil and suspended solids.

37. This stormwater runs over the surface of the Lakeside facility into the impoundment and into the unnamed creek. It also collects in catch basins and pipes, which drain the stormwater into the impoundment.

38. The stormwater described in paragraph 37 that enters the impoundment is also discharged into the unnamed creek and/or the Tualatin River. These discharges occur from a drainage pipe or pipes into the unnamed creek, through the groundwater and/or soil into the unnamed creek and/or the Tualatin River, and/or when the impoundment overflows into the unnamed creek and/or the Tualatin River.

39. The landfill, catch basin(s) and pipes that channel and convey stormwater,

contaminated stormwater, and process waste water to the impoundment, the pipe(s) leading from the impoundment to the unnamed creek, and/or the impoundment itself constitute point sources, as defined in the Clean Water Act, 33 U.S.C. § 1362(14).

40. The unnamed creek flows into the Tualatin River approximately one-half mile from the diversion dam structure.

41. Defendant's unpermitted discharges of pollutants degrade the environment and the quality of Oregon's water resources.

FIRST CLAIM FOR RELIEF

(Violation of Clean Water Act Section 301(a), 33 U.S.C. § 1311(a))

Discharge of Pollutants via Contaminated Stormwater and Process Wastewater

Without a Permit

42. Plaintiffs reallege all preceding paragraphs.

43. Sections 301(a) and 402 of the Clean Water Act, 33 U.S.C. §§1311(a) and 1342, prohibit the discharge of pollutants, from a point source, into waters of the United States without a NPDES permit.

44. The 1200-Z general storm water NPDES permit covers only discharges of storm water.

45. Pursuant to state regulation, storm water is defined as "storm water runoff, snow melt that collects on or runs off outdoor surfaces such as buildings, roads, paved surfaces and unpaved land surfaces." OAR 340-044-0005(41).

46. The 1200-Z Permit does not cover landfills that discharge "contaminated stormwater," as defined by 40 C.F.R. § 445.2, nor does it cover process wastewater.

47. Federal regulations define "contaminated storm water" as "storm water which

comes in direct contact with landfill wastes, the waste handling and treatment areas or landfill wastewater as defined in paragraph (f) of this section.” 40 C.F.R. § 445.2(b). Federal regulations define “landfill wastewater” as “all wastewater associated with or produced by, landfilling activities, except for sanitary wastewater, non-contaminated storm water, contaminated ground water, and wastewater from recovery pumping wells.” 40 C.F.R. § 445.2(f).

48. “Process wastewater” is “any water which, during manufacturing or processing, comes into direct contact with or results from the use of any raw material, intermediate product, finished product, byproduct or waste product.” 40 C.F.R. § 122.2. Process wastewater includes “landfill wastewater,” which is “all wastewater associated with, or produced by, landfilling activities except for sanitary wastewater, non-contaminated storm water, contaminated ground water, and wastewater from recovery pumping wells.” 40 C.F.R. § 445.2(f).

49. Defendant has discharged and continues to discharge contaminated stormwater and process wastewater into waters of the United States from a point source or point sources.

50. Defendant does not have an individual NPDES permit for the discharge of contaminated stormwater or process wastewater from the Lakeside facility. Consequently, Defendant has violated and is continuing to violate the Clean Water Act, 33 U.S.C. § 1311(a), on at least every day it has rained since at least May 7, 2003.

51. These discharges are continuing and are reasonably likely to continue after the date of the filing of this Complaint.

52. As provided in 33 U.S.C. § 1319(d), the violations set forth above subject Defendant to injunctive relief and penalties of up to \$27,500 per day per violation, for violations occurring before March 15, 2004, and up to \$32,500 per day per violation occurring thereafter, for every day on which Defendant has discharged pollutants without a permit.

53. Unless the court grants the relief requested, Plaintiffs, Plaintiffs' members, and their communities will suffer ongoing harm.

SECOND (ALTERNATIVE) CLAIM FOR RELIEF

(Violation of Clean Water Act Section 301(a), 33 U.S.C. § 1311(a))

Discharge of Pollutants via Industrial Storm Water Without a Permit

54. Plaintiffs reallege preceding paragraphs 1-41.

55. In the alternative to Plaintiffs' First Claim for Relief, Plaintiffs allege as follows.

56. Sections 301(a) and 402 of the Clean Water Act, 33 U.S.C. §§1311(a) and 1342, prohibit the discharge of pollutants, from a point source, into waters of the United States without a NPDES permit.

57. Section 402(p)(3)(A) of the Clean Water Act subjects the discharge of pollutants through stormwater associated with industrial activities to the same prohibition and permitting requirement as any other point source discharge of a pollutant. 33 U.S.C. § 1342(p)(3)(A).

58. Defendant has discharged and continues to discharge stormwater into waters of the United States from a point source or point sources.

59. Defendant does not have a NPDES permit for the discharge of stormwater

from the Lakeside facility. Consequently, Defendant has violated and is continuing to violate the Clean Water Act, 33 U.S.C. § 1311(a), on at least every day it has rained since at least May 7, 2003.

60. These discharges are continuing and are reasonably likely to continue after the date of the filing of this Complaint.

61. As provided in 33 U.S.C. § 1319(d), the violations set forth above subject Defendant to injunctive relief and penalties of up to \$27,500 per day per violation, for violations occurring before March 15, 2004, and up to \$32,500 per day per violation occurring thereafter, for every day on which Defendant has discharged pollutants without a permit.

62. Unless the court grants the relief requested, Plaintiffs, Plaintiffs' members, and their communities will suffer ongoing harm.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully requests that this Court:

- A. Declare that Grabhorn, Inc. has violated and is violating § 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), by discharging pollutants without a permit;
- B. Permanently enjoin Grabhorn, Inc. from operating its facility or storing materials on site exposed to precipitation except in accordance with an NPDES permit and the Clean Water Act;
- C. Issue injunctive relief requiring Defendant to remediate the environmental damage and ongoing impacts resulting from its illegal discharges to the impoundment of the unnamed creek, the unnamed creek and the Tualatin River;
- D. Assess civil penalties against Grabhorn, Inc. of \$27,500 per day per violation, for

violations occurring before March 15, 2004, and \$32,500 per day per violation occurring thereafter;

E. Award Plaintiffs their costs of this action and attorneys' fees; and

F. Grant such other relief as the Court deems just and proper.

DATED this 7 day of May, 2008.



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