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HEARINGS CLERK EPA -- REGION 10

BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:	) ) ) DOCKET NO. CWA-10-2010-0065
GARCO CONSTRUCTION, INC. Whidbey Island Naval Air Station Oak Harbor, Washington	) COMPLAINT
Respondent.	)

## I. <u>AUTHORITIES</u>

- 1.1. This administrative complaint ("Complaint") is issued under the authority vested in the Administrator of the U.S. Environmental Protection Agency ("EPA" or "Complainant") by Section 309(g) of the Clean Water Act ("CWA" or "Act"), 33 U.S.C. § 1319(g). The Administrator has delegated this authority to the Regional Administrator of EPA Region 10, who in turn has redelegated this authority to the Director of the Office of Compliance and Enforcement in Region 10.
- 1.2. Pursuant to Section 309(g)(2)(B) of the Act, 33 U.S.C. § 1319(g)(2)(B), and in accordance with the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties," 40 C.F.R Part 22 ("Part 22 Rules"), EPA hereby proposes the assessment of a civil penalty against Garco Construction, Inc. ("Respondent") for violations of the Act.

COMPLAINT - 1 DOCKET NO. CWA-10-2010-0065

U.S. Environmental Protection Agency 1200 Sixth Avenue, Suite 900 Seattle, Washington 98101 (206) 553-1037

1.3. In accordance with Section 309(g)(1) of the Act, 33 U.S.C. § 1319(g)(1), and 40 C.F.R. § 22.38(b), EPA will provide the State of Washington an opportunity to consult within 30 days following proof of service of this Complaint on Respondent.

### II. STATUTORY AND REGULATORY BACKGROUND

- 2.1. Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the "discharge of any pollutant by any person" except as authorized by a National Pollutant Discharge Elimination System ("NPDES") permit issued pursuant to Section 402 of the Act, 33 U.S.C. § 1342.
- 2.2. Section 502(12) of the Act, 33 U.S.C. § 1362(12), defines "discharge of a pollutant" to include "any addition of any pollutant to navigable waters from any point source."
- 2.3. Section 502(6) of the Act, 33 U.S.C. § 1362(6), defines "pollutant" to include, *inter alia*, dredged spoil, rock, sand, and biological materials.
- 2.4. Section 502(7) of the Act, 33 U.S.C. § 1362(7), defines "navigable waters" as "waters of the United States."
- 2.5. 40 C.F.R. § 122.2 defines "waters of the United States" to include "tributaries of waters" that "may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide ...," and "all interstate waters."
- 2.6. Section 502(14) of the Act, 33 U.S.C. § 1362(14), defines "point source" to include "any discernible, confined and discrete conveyance ... from which pollutants are or may be discharged."
- 2.7. Section 502(5) of the Act, 33 U.S.C. § 1362(5), defines "person" as "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body."
- 2.8. Section 402(p) of the Act, 33 U.S.C. § 1342(p), specifies that an NPDES permit is required for any storm water discharge "associated with industrial activity."

- 2.9. 40 C.F.R. § 122.26(b)(14) defines "[s]torm water discharge associated with industrial activity" to include discharges associated with "[c]onstruction activity, including clearing, grading and excavation" resulting in the disturbance of five acres or more of total land area.
- 2.10. Section 402(p) of the Act, 33 U.S.C. § 1342(p), also authorizes EPA to issue regulations that designate additional storm water discharge sources and to establish a comprehensive program to regulate these additional sources. In accordance with Section 402(p), 40 C.F.R. § 122.26(a)(9) requires any "storm water discharge associated with small construction activity" to be authorized by an NPDES permit. 40 C.F.R. § 122.26(b)(15) defines "storm water discharge associated with small construction activity" to include the "discharge of storm water from ... [c]onstruction activities including clearing, grading, and excavating that result in land disturbance of equal to or greater than one acre and less than five acres."
- 2.11. Section 308(a) of the Act, 33 U.S.C. § 1318(a), provides that "... the Administrator shall require the owner or operator of any point source to (i) establish and maintain such records, (ii) make such reports, (iii) install, use, and maintain such monitoring equipment or methods (including where appropriate, biological monitoring methods), (iv) sample such effluents (in accordance with such methods, at such locations, at such intervals, and in such manner as the Administrator shall prescribe), and (v) provide such other information as he may reasonably require" to carry out Section 402 of the Act, 33 U.S.C. § 1342.
- 2.12. In July of 2003, EPA reissued the NPDES General Permit for Storm Water Discharges from Construction Activities ("CGP") pursuant to Section 402 of the Act, 33 U.S.C. § 1342. The CGP became effective on July 1, 2003, and expired on July 1, 2008. For construction sites that obtained coverage under the CGP prior to July 1, 2008, the provisions of the CGP remain in effect under an administrative extension.

- 2.13. The CGP authorizes certain discharges of storm water associated with construction activities. The CGP's coverage extends to all federal facilities in the State of Washington and requires permittees to comply with the conditions and requirements set forth in the CGP.
- 2.14. To obtain coverage for storm water discharges from a construction site under the CGP, a discharger must first "prepare and submit a complete and accurate Notice of Intent ("NOI")" at least seven days before construction begins. CGP at Part 2; 40 C.F.R. § 122.21(c).
- 2.15. The CGP defines a "discharger" as the operator of the construction site. An "operator" is defined as both (1) "[t]he party [who] has operational control over construction plans and specifications …," and (2) "[t]he party [who] has day-to-day operational control of those activities at a project which are necessary to ensure compliance with a [storm water pollution prevention plan] for the site or other permit conditions." CGP at Appendix A.
- 2.16. Section 309(g)(1) of the Act, 33 U.S.C. § 1319(g)(1), authorizes EPA to assess administrative penalties against any person who violates Section 301 or 308 of the Act, 33 U.S.C. § 1311 or 1318.
- 2.17. Section 309(g)(1) of the Act, 33 U.S.C. § 1319(g)(1), also authorizes EPA to assess administrative penalties against any person who has violated any permit condition or limitation in a permit issued under Section 402 of the Act, 33 U.S.C. § 1342.

### III. ALLEGATIONS

- 3.1. Respondent is a corporation registered under the laws of the State of Washington and thus is a "person" as defined in Section 502(5) of the Act, 33 U.S.C. § 1362(5).
- 3.2. Respondent has day-to-day operational control of those activities at the P-162 Consolidated Fuels Facility construction site ("Site") necessary to ensure compliance with the CGP. As such, Respondent is an operator under the CGP.

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- 3.3. The Site consists of approximately 12 acres of real property located on the Whidbey Island Naval Air Station, Oak Harbor, Island County, Washington.
- 3.4. The receiving water for any storm water discharges from the Site is the Clover Valley Stream, which flows into Dugualla Bay, an inlet of Puget Sound.
- 3.5. Clover Valley Stream and Puget Sound are "navigable waters" as defined in Section 502(7) of the Act, 33 U.S.C. § 1362(7), and are "waters of the United States" as defined in 40 C.F.R. § 122.2.
- 3.6. As the operator of a construction site that discharges storm water into waters of the United States, Respondent was required to obtain coverage under the CGP or obtain an individual NPDES permit before beginning construction activities.
- 3.7. On or about September 26, 2007, Respondent submitted an NOI to seek coverage under the CGP.
- 3.8. On or about November 6, 2007, Respondent began construction activities that resulted in the clearing, grading, and/or excavation of one or more acres of land at the Site.
  - 3.9. On or about March 24, 2009, EPA conducted an inspection of the Site.

# Count 1 Storm Water Pollution Prevention Plan Deficiencies in Violation of the CGP

- 3.10. Paragraphs 1.1 through 3.9 are realleged and incorporated herein by reference.
- 3.11. Part 3.1 of the CGP requires the operator of a construction site to prepare a storm water pollution prevention plan ("SWPPP"). The required contents of a SWPPP are set forth in Part 3.3 of the CGP.
  - 3.12. Part 3.11 of the CGP describes requirements for Maintaining an Updated Plan.

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- 3.13. During the March 24, 2009, inspection, EPA personnel examined the multiple, identical copies of the SWPPP that were available on-site. All were dated July 23, 2007, and none had any observable additions, deletions, or other modifications.
- 3.14. During the March 24, 2009, inspection, EPA personnel discovered that Respondent had violated SWPPP requirements under the CGP:
- 3.15. The SWPPP was not properly signed and/or certified by Respondent, in violation of Part 3.12.D of the CGP.
  - 3.16. The SWPPP did not show three large soil stockpiles at the east end of the site.
- 3.17. The SWPPP did not include dates for major grading activities, temporary construction cessation, or initiation of stabilization practices.
- 3.18. The SWPPP did not identify sources of non-storm water discharges or appropriate pollution prevention measures for these non-storm water discharges.
- 3.19. The SWPPP did not include documentation supporting permit eligibility with regard to the Endangered Species Act, in violation of Part 3.7 of the CGP.
- 3.20. Each SWPPP deficiency constitutes a violation of the CGP. Pursuant to Section 309(g) of the Act, 33 U.S.C. § 1319(g), and 40 C.F.R. Part 19, Respondent is liable for civil penalties not to exceed \$16,000 per day for each day during which the violation continues.

# Count 2 Failure to Conduct Inspections in Violation of the CGP

- 3.21. Paragraphs 1.1 through 3.20 are realleged and incorporated herein by reference.
- 3.22. Part 3.10.A of the CGP requires a permittee to conduct inspections: (1) "[a]t least once every 7 calendar days," or (2) "[a]t least once every 14 calendar days and within 24 hours of the end of a storm event of 0.5 inches or greater." The inspection frequency must be identified in the permittee's SWPPP.

- 3.23. The Respondent's SWPPP selected an inspection schedule of at least once a week and within 24 hours of the end of a storm event of 0.5 inches or greater.
- 3.24. In response to an EPA information request dated September 25, 2009, Respondent submitted to EPA a complete set of self-inspection reports. Examination of this set of reports showed 22 periods where self-inspections did not occur at least once every 7 calendar days.
- 3.25. Part 3.10 of the CGP requires self-inspection reports that do not identify any incidents of non-compliance to contain a certification that the construction project or site is in compliance with the SWPPP and the permit. Respondent's self-inspection forms lacked the specified certification statement.
- 3.26. Appendix G, Section 11 of the CGP describes the Signatory Requirements for all reports required by this permit, including self-inspection reports. Respondent's self-inspection reports did not comply with the CGP Signatory Requirements.
- 3.27. Each missed inspection constitutes a violation of Part 3.10.A of the CGP, and therefore violates a permit condition or limitation implementing such section in a permit issued under Section 402 of the Act, 33 U.S.C. § 1342. Pursuant to Section 309(g)(2)(B) of the Act, 33 U.S.C. § 1319(g)(2)(B), and 40 C.F.R. Part 19, Respondent is liable for civil penalties not to exceed \$11,000 per day for each day during which the violation continued.
- 3.28. Each inspection report without the required permit conditions of certification and duly designated authority constitutes an additional day of violation of Section 301 of the Act, 33 U.S.C. § 1311. Pursuant to Section 309(g) of the Act, 33 U.S.C. § 1319(g), and 40 C.F.R. Part 19, Respondent is liable for civil penalties not to exceed \$11,000 per day for each day during which the violation continued.

# Count 3 (Failure to Select, Install, and/or Maintain Best Management Practices Properly)

3.29. Paragraphs 1.1 through 3.28 are realleged and incorporated herein by reference.

- 3.30. Part 3.13.A of the CGP requires the construction site operator to select, install, and maintain best management practices ("BMPs") in accordance with sound engineering practices.
- 3.31. At the time of the March 24, 2009, inspection, EPA inspectors observed numerous BMP deficiencies including, but not limited to, improper installation of erosion control sock at an outlet downstream of Site, failure to maintain silt fences, failure to replace failed catch basin inserts, improper maintenance of stabilizer rock at the Kitty Hawk Road entrance of the Site, lack of effective erosion control at the ground water seeps, and lack of erosion control at the large soil stockpiles at the east end of the Site.
- 3.32. Therefore, Respondent failed to install and maintain BMPs properly, in violation of Part 3.13.A of the CGP.
- 3.33. Pursuant to Section 309(g) of the Act, 33 U.S.C. § 1319(g), and 40 C.F.R. Part 19, Respondent is liable for civil penalties not to exceed \$16,000 per day for each day during which the violation continues.

#### IV. PROPOSED PENALTY

4.1. Based on the foregoing allegations, Respondent failed to comply with the conditions and/or limitations or a permit issued under Section 402 of the Act, 33 U.S.C. § 1342; *i.e.*, Respondent failed to meet SWPPP requirements, failed to conduct inspections, and failed to implement BMPs properly. Consequently, pursuant to Section 309(g)(2)(B) of the Act, and 40 C.F.R. Part 19, Respondent is liable for the administrative assessment of civil penalties in an amount not to exceed \$11,000 per day for violations preceding January 12, 2009, and \$16,000 per day for violations on and after January 12, 2009, up to a maximum of \$177,500. Pursuant to

the authority of Section 309(g)(2)(B) of the Act, 33 U.S.C. § 1319(g)(2)(B), EPA proposes that an administrative penalty of \$60,000.00 be assessed against Respondent.

- 4.2. EPA proposes this penalty amount after considering the applicable penalty factors in Section 309(g)(3) of the Act, 33 U.S.C. § 1319(g)(3). These statutory penalty factors are as follows: the nature, circumstances, extent, and gravity of the violation or violations, and, with respect to Respondent, 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.
- 4.3. <u>Nature, Circumstances, and Gravity of Violations</u>: The proposed penalty reflects Complainant's determination that violations of the CGP are serious violations that significantly undermine the Act's regulatory scheme.
- 4.4. Respondent's Ability to Pay: Complainant has no information indicating that Respondent is unable to pay the proposed penalty. Complainant will consider any information submitted by Respondent related to its ability to pay the proposed penalty.
- 4.5. <u>Respondent's History of Prior Violations:</u> Complainant is unaware of Respondent having any history of prior violations of the Act.
- 4.6. Respondent's Degree of Culpability: Respondent is presumed to know the law.

  Respondent obtained coverage under the CGP in September 2007. Thus, it is presumed that

  Respondent was aware of the terms and conditions of the CGP. Further, in its SWPPP

  Respondent selected its own inspection schedule, but failed to carry out those inspections

  pursuant to the schedule it selected.
- 4.7. <u>Respondent's Economic Benefit</u>: Respondent enjoyed an economic benefit as a result of the failure to comply with the CGP requirements. This economic benefit includes the delayed and avoided costs of installing and maintaining appropriate BMPs and structural

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controls, the delayed cost of updating its SWPPP, and the avoided costs of the missed inspections.

4.8. Other Matters as Justice May Require: Credible and consistent enforcement of the CWA's requirements to apply for, obtain, and comply with NPDES permits regulating the discharge of construction storm water is necessary to deter Respondent and others similarly situated from violating the CWA and the terms and conditions of the CGP.

### V. <u>OPPORTUNITY TO REQUEST A HEARING</u>

- 5.1. Respondent has the right to file an Answer requesting a hearing on any material fact contained in this Complaint or on the appropriateness of the penalty proposed herein. Upon request, the Presiding Officer may hold a hearing for the assessment of these civil penalties, conducted in accordance with the provisions of the Part 22 Rules and the Administrative Procedure Act, 5 U.S.C. § 551 et seq. A copy of the Part 22 Rules accompanies this Complaint.
- 5.2. Respondent's Answer, including any request for hearing, must be in writing and must be filed with:

Regional Hearing Clerk U.S. Environmental Protection Agency, Region 10 1200 Sixth Avenue, Suite 900, Mail Stop ORC-158 Seattle, Washington 98101

# VI. FAILURE TO FILE AN ANSWER

- 6.1. To avoid a default order being entered pursuant to 40 C.F.R. § 22.17, Respondent must file a written Answer to this Complaint with the Regional Hearing Clerk within 30 days after service of this Complaint.
- 6.2. In accordance with 40 C.F.R. § 22.15, Respondent's Answer must clearly and directly admit, deny, or explain each of the factual allegations contained in this Complaint with regard to which Respondent has any knowledge. Respondent's Answer must also state: (1) the

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circumstances or arguments that are alleged to constitute the grounds of defense; (2) the facts that Respondent intends to place at issue; and (3) whether a hearing is requested. Failure to admit, deny, or explain any material factual allegations contained herein constitutes an admission of the allegation.

#### VII. INFORMAL SETTLEMENT CONFERENCE

7.1. Whether or not Respondent requests a hearing, Respondent may request an informal settlement conference to discuss the facts of this case, the proposed penalty, and the possibility of settling this matter. To request such a settlement conference, Respondent should contact:

Jennifer Byrne Assistant Regional Counsel U.S. Environmental Protection Agency, Region 10 1200 Sixth Avenue, Suite 900, Mail Stop ORC-158 Seattle, Washington 98101 (206) 553-0050

- 7.2. Note that a request for an informal settlement conference does not extend the 30-day period of filing a written Answer to this Complaint, nor does it waive Respondent's right to request a hearing.
- 7.3. Respondent is advised that, after the Complaint is issued, the Part 22 Rules prohibit any *ex parte* (unilateral) discussion of the merits of these or any other factually related proceedings with the Administrator, the Environmental Appeals Board or its members, the Regional Judicial Officer, the Presiding Officer, or any other person who is likely to advise these officials in the decision of this case.

#### VIII. <u>RESERVATIONS</u>

8.1. Neither assessment nor payment of an administrative civil penalty pursuant to this Complaint shall affect Respondent's continuing obligation to comply with: (1) the Clean Water

# 1 **CERTIFICATE OF SERVICE** 2 I certify that the foregoing "Complaint" was sent to the following persons, in the manner 3 specified, on the date below: 4 Original and one copy, hand-delivered: 5 Carol Kennedy, Regional Hearing Clerk U.S. Environmental Protection Agency, Region 10 6 1200 Sixth Avenue, Mail Stop ORC-158 Seattle, WA 98101 7 8 A true and correct copy, by certified mail, return receipt requested: 9 Hollis Barnett, Vice President 10 Garco Construction, Inc. 4114 E. Broadway 11 Spokane, WA 99202 12 Dated: 13 14 U.S. EPA Region 10 15 16 17 18 19 20 21 22

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