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EPA--REGION 10

BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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7)
8 In the Matter of:) DOCKET NO. CWA 10-2008-0009
9)
9 Anthony Lerma,) **COMPLAINT**
10)
10 Anchorage, Alaska)
11)
11 Respondent.)

I. AUTHORITIES

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14 1.1 This administrative complaint ("Complaint") is issued under the authority vested
15 in the Administrator of the U.S. Environmental Protection Agency ("EPA" or "Complainant") by
16 Section 309 of the Clean Water Act ("CWA" or "Act"), 33 U.S.C. § 1319. The Administrator
17 has delegated this authority to the Regional Administrator of EPA Region 10 who, in turn, has
18 re delegated this authority to the Director of the Office of Compliance and Enforcement in
19 Region 10.

20 1.2 Pursuant to Section 309(g)(2)(B) of the Act, 33 U.S.C. § 1319(g)(2)(B), and in
21 accordance with the "Consolidated Rules of Practice Governing the Administrative Assessment
22 of Civil Penalties," 40 C.F.R. Part 22 ("Part 22 Rules"), Complainant hereby seeks to assess a
23 civil penalty against Anthony Lerma ("Respondent"), for violations of the Act, 33 U.S.C. § 1251
24 *et seq.*
25

COMPLAINT - 1
DOCKET NO. CWA 10-2008-0009

U.S. Environmental Protection Agency
1200 Sixth Avenue, Suite 900
Seattle, Washington 98101
(206) 553-1796

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

4 **II. STATUTORY AND REGULATORY BACKGROUND**

5 2.1 Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the “discharge of any
6 pollutant by any person” except as authorized by a National Pollutant Discharge Elimination
7 System (“NPDES”) permit issued pursuant to Section 402 of the Act, 33 U.S.C. § 1342.

8 2.2 Section 502(12) of the Act, 33 U.S.C. § 1362(12), defines the term “discharge of
9 a pollutant” to include “any addition of any pollutant to navigable waters from any point source.”

10 2.3 Section 502(6) of the Act, 33 U.S.C. § 1362(6), defines “pollutant” to include,
11 *inter alia*, dredged spoil, rock, sand, and biological materials.

12 2.4 Section 502(7) of the Act, 33 U.S.C. § 1362(7), defines “navigable waters” as
13 “waters of the United States.”

14 2.5 40 C.F.R. § 122.2 defines “waters of the United States” to include “tributaries of
15 waters” that “may be susceptible to use in interstate or foreign commerce, including all waters
16 which are subject to the ebb and flow of the tide ...,” and “all interstate waters.”

17 2.6 Section 502(14) of the Act, 33 U.S.C. § 1362(14), defines “point source” to
18 include “any discernible, confined and discrete conveyance ... from which pollutants are or may
19 be discharged.”

20 2.7 Section 502(5) of the Act, 33 U.S.C. § 1362(5), defines “person” as “an
21 individual, corporation, partnership, association, State, municipality, commission, or political
22 subdivision of a State, or any interstate body.”
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1 2.8 Section 402(p) of the Act, 33 U.S.C. § 1342(p), specifies that a NPDES permit is
2 required for any storm water discharge “associated with industrial activity.”

3 2.9 40 C.F.R. § 122.26(b)(14)-(15) provides that “[s]torm water discharge associated
4 with industrial activity means the discharge from any conveyance that is used for collecting and
5 conveying storm water” including construction activity disturbing five acres or more, or “storm
6 water discharge associated with small construction activity” disturbing one to five acres.

7 2.10 Section 308(a) of the Act, 33 U.S.C. § 1318(a), provides that “. . .the
8 Administrator shall require the owner or operator of any point source to (i) establish and
9 maintain such records, (ii) make such reports, (iii) install, use, and maintain such monitoring
10 equipment or methods (including where appropriate, biological monitoring methods), (iv) sample
11 such effluents (in accordance with such methods, at such locations, at such intervals, and in such
12 manner as the Administrator shall prescribe), and (v) provide such other information as he may
13 reasonably require” to carry out Section 402 of the Act, 33 U.S.C. § 1342.

14 2.11 In July of 2003, EPA re-issued the NPDES General Permit for Storm Water
15 Discharges from Construction Activities (“CGP”) pursuant to Section 402 of the Act, 33 U.S.C.
16 § 1342. The CGP became effective on July 1, 2003 and authorizes certain discharges of storm
17 water associated with construction activities. The CGP’s coverage extends to all facilities in the
18 State of Alaska and requires permittees to comply with the conditions and requirements set forth
19 in the CGP. To obtain coverage under the CGP, an operator must first “prepare and submit a
20 complete and accurate Notice of Intent [“NOI”]” at least 7 days before construction begins. CGP
21 at Part 2; 40 C.F.R. § 122.21(c).
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1 3.28 During the May 11, 2006 inspection, EPA discovered that active construction at
2 the Site had ceased. EPA also discovered that no stabilization measures were implemented on
3 the Site.

4 3.29 Respondent's failure to properly implement stabilization measures from March
5 27, 2006 through May 11, 2006 violates the CPG, and therefore, violates a permit condition or
6 limitation implementing any of such sections in a permit issued under Section 402 of the Act, 33
7 U.S.C. § 1342. In accordance with Section 309(g)(2)(B) of the Act, 33 U.S.C. § 1319(g)(2)(B),
8 and 40 C.F.R. Part 19, Respondent is liable for civil penalties not to exceed \$11,000 per day for
9 each day during which the violation continues.
10

11 **IV. PENALTY**

12 4.1. Based on the foregoing allegations, Respondent failed to comply with the
13 conditions and/or limitations of a permit issued under Section 402 of the Act, 33 U.S.C. § 1342;
14 *i.e.*, Respondent failed to meet SWPPP requirements; failed to implement storm water control
15 measures; failed to conduct inspections; and failed to implement stabilization measures.
16 Consequently, pursuant to Section 309(g)(2)(B) of the Act, and 40 C.F.R. Part 19, Respondent is
17 liable for the administrative assessment of civil penalties in an amount not to exceed \$11,000 per
18 violation for each day during which the violation continues, up to a maximum of \$157,500.

19 4.2. In accordance with Section 22.14 of the Part 22 Rules, 40 C.F.R. § 22.14(a)(4)(ii),
20 this Complaint does not include a specific penalty demand. To determine a specific penalty
21 demand, EPA must consider several penalty factors defined under Section 309(g)(3) of the Act,
22 33 U.S.C. § 1319(g)(3). These statutory penalty factors are as follows: the nature,
23 circumstances, extent, and gravity of the violation or violations, and, with respect to
24
25

1 Respondent's ability to pay, prior history of violations, degree of culpability, economic benefit or
2 savings (if any) resulting from the violation, and such other matters as justice may require.

3 4.2.1 Nature, Circumstances, Extent and Gravity of Violations: The proposed
4 penalty reflects Complainant's determination that violations of the CGP are serious
5 violations that significantly undermine the Act's regulatory scheme. In addition, the
6 proposed penalty reflects Complainant's determination that the alleged violations have
7 the potential to harm human health and the environment.

8 4.2.2 Respondent's Ability to Pay: Complainant has no information indicating
9 that Respondent is unable to pay the proposed penalty. Complainant will consider any
10 information submitted by Respondent related to its ability to pay the proposed penalty.

11 4.2.3 Respondent's History of Prior Violations: Complainant is unaware of
12 Respondent having any history of prior violations of the Act.

13 4.2.4 Respondent's Degree of Culpability: Respondent is presumed to know the
14 law. Respondent obtained coverage under the CGP in March 2006. Thus, it is presumed
15 that Respondent was aware of the terms of conditions of the CGP. Furthermore, despite
16 an EPA inspection on May 11, 2006, Respondent failed to implement or comply with
17 numerous portions of the CGP by June 27, 2007.

18 4.2.5 Respondent's Economic Benefit: Respondent enjoyed an economic benefit
19 as a result of the activities described above. This economic benefit includes the avoided
20 costs associated with a failure to prepare an adequate SWPPP, failure to implement and
21 maintain storm water control measures, failure to conduct inspections, and failure to
22 implement stabilization measures.
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1 circumstances or arguments which are alleged to constitute the grounds of defense; (2) the facts
2 which Respondents intend to place at issue; and (3) whether a hearing is requested. Failure to
3 admit, deny, or explain any material factual allegation contained herein constitutes an admission
4 of the allegation.

5 **VII. INFORMAL SETTLEMENT CONFERENCE**

6 7.1. Whether or not Respondent requests a hearing, Respondent may request an
7 informal settlement conference to discuss the facts of this case, the proposed penalty, and the
8 possibility of settling this matter. To request such a settlement conference, Respondent should
9 contact:

10
11 Ankur Tohan
12 Assistant Regional Counsel
13 U.S. Environmental Protection Agency, Region 10
14 1200 Sixth Avenue
15 Suite 900 (Mailstop ORC-158)
16 Seattle, Washington 98101
17 (206) 553-1796

18 7.2. Note that a request for an informal settlement conference does not extend the
19 thirty (30) day period for filing a written Answer to this Complaint, nor does it waive
20 Respondents' right to request a hearing.

21 7.3. Respondent is advised that, after the Complaint is issued, the Part 22 Rules
22 prohibit any *ex parte* (unilateral) discussion of the merits of these or any other factually related
23 proceedings with the Administrator, the Environmental Appeals Board or its members, the
24 Regional Judicial Officer, the Presiding Officer, or any other person who is likely to advise these
25 officials in the decision on this case.

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VIII. RESERVATIONS

8.1. Neither assessment nor payment of an administrative civil penalty pursuant to this Complaint shall affect Respondent's continuing obligations to comply with: (1) the Clean Water Act and all other environmental statutes; (2) the terms and conditions of all applicable Clean Water Act permits; and (3) any Compliance Order issued to Respondents under Section 309(g) of the Act, 33 U.S.C. § 1319(a), concerning violations alleged herein.

Dated this 25 day of November, 2007.



Michael A. Bussell, Director
Office of Compliance and Enforcement

1 **CERTIFICATE OF SERVICE**

2 I certify that the foregoing "Complaint" was filed and sent to the following person, in the
3 manner specified, on the date below:

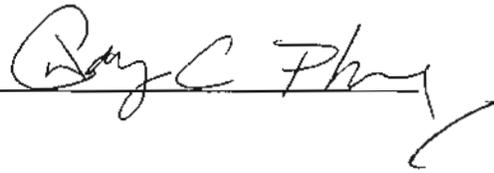
4 Original and one copy, hand-delivered:

5 Carol Kennedy, Regional Hearing Clerk
6 U.S. Environmental Protection Agency, Region 10
7 1200 Sixth Avenue, Mail Stop ORC-158
Seattle, WA 98101

8 A true and correct copy, by certified mail, return receipt requested:

9 Anthony Lerma
10 6741 E. 10th Ave. Suite 1
11 Anchorage, AK 99504

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13 Dated: 11/21/07



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15 U.S. EPA Region 10

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COMPLAINT - 14
DOCKET NO. CWA 10-2008-0009

U.S. Environmental Protection Agency
1200 Sixth Avenue, Suite 900
Seattle, Washington 98101
(206) 553-1796



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 10

1200 Sixth Avenue, Suite 900
Seattle, Washington 98101-3140

Reply To: OCE-133

21 NOV 2007

CERTIFIED MAIL -- RETURN RECEIPT REQUESTED

Anthony Lerma
6741 E. 10th Ave. Suite 1
Anchorage, AK 99504

Re: *In the Matter of Anthony Lerma*
Docket No. CWA 10-2008-0009

Dear Mr. Lerma:

Enclosed is a copy of the administrative complaint that was filed with the Regional Hearing Clerk along with a copy of the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties," 40 C.F.R. Part 22. This Administrative Complaint concerns the Clean Water Act violations that occurred at the Northern Harbors Estate construction site located at 5151 Lake Otis and East 52nd Avenue in Anchorage, Alaska. Please note that you must file an Answer to the complaint with the Regional Hearing Clerk within thirty (30) days after service of the complaint. See 40 C.F.R. § 22.15.

If you have any questions, please contact Ankur Tohan, Assistant Regional Counsel, at (206)553-1796.

Sincerely,

Michael A. Bussell, Director
Office of Compliance and Enforcement

Enclosures

cc: Lynn Kent, ADEC
Chris Foley, ADEC

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Sent To **Mr. Anthony Lerma**
6741 E. 10th Avenue
Suite 1
Anchorage, AK 99504