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BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the matter of:)	
)	
LANDSING DEVELOPMENT)	DOCKET NO. CWA-10-2005-0081
GROUP, LLC)	
)	
Boise, Idaho)	COMPLAINT
)	
)	
Respondent.)	
)	
)	

I. AUTHORITIES

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 of the Clean Water Act ("Act"), 33 U.S.C. § 1319. 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"), Complainant hereby proposes the assessment of a civil penalty against Landsing Development Group, LLC ("Respondent") for the unlawful discharge of pollutants into waters of the United States without authorization by a National Pollutant

1 Discharge Elimination System (“NPDES”) permit and for failing to apply for an NPDES permit
2 issued pursuant to Section 402 of the Act, 33 U.S.C. § 1342, in violation of Sections 301(a) and
3 308(a) of the Act, 33 U.S.C. §§ 1311(a) and 1318(a).

4 1.3. In accordance with Section 309(g)(1) of the Act, 33 U.S.C. § 1319(g)(1), and 40
5 C.F.R. § 22.38(b), EPA will consult with the State of Idaho within thirty (30) days following proof
6 of service of this complaint on Respondent.

7 **II. STATUTORY AND REGULATORY BACKGROUND**

8 2.1. Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the “discharge of any
9 pollutant by any person” except as authorized by a NPDES permit issued pursuant to Section 402 of
10 the Act, 33 U.S.C. § 1342.

11 2.2. Section 502(12) of the Act, 33 U.S.C. § 1362(12), defines the term “discharge of a
12 pollutant” to include “any addition of any pollutant to navigable waters from any point source.”

13 2.3. Section 502(6) of the Act, 33 U.S.C. § 1362(6) defines “pollutant” to include, *inter*
14 *alia*, dredged spoil, rock, sand, and biological materials.

15 2.4. Section 502(7) of the Act, 33 U.S.C. § 1362(7) defines “navigable waters” as “waters
16 of the United States.”

17 2.5. 40 C.F.R. § 122.2 defines “waters of the United States” to include “tributaries” to
18 waters that “may be susceptible to use in interstate or foreign commerce, including all waters which
19 are subject to the ebb and flow of the tide”

20 2.6. Section 502(14) of the Act, 33 U.S.C. § 1362(14), defines “point source” to include
21 “any discernible, confined and discrete conveyance . . . from which pollutants are or may be
22 discharged.”

23 2.7. Section 502(5) of the Act, 33 U.S.C. § 1362(5), defines “person” as “an individual,
24 corporation, partnership, association, State, municipality, commission, or political subdivision of a
25 State, or any interstate body.”

26 2.8. Section 402(p) of the Act, 33 U.S.C. § 1342(p), specifies that an NPDES permit is
27 required for any storm water discharge “associated with industrial activity.” Section 402(p) also

1 authorizes EPA to issue regulations that designate additional storm water discharge sources and
2 establish a comprehensive program to regulate these additional sources.

3 2.9. 40 C.F.R. § 122.26(b)(14)(x) defines “[s]torm water associated with industrial
4 activity” to include discharges associated with “[c]onstruction activity, including clearing, grading,
5 and excavation” resulting in the disturbance of at least five acres of total land area.

6 2.10. In July of 2003, EPA re-issued the NPDES General Permit for Storm Water
7 Discharges from Construction Activities (“CGP”) pursuant to Section 402 of the Act, 33 U.S.C.
8 § 1342. The CGP became effective on July 1, 2003 and authorizes certain discharges of storm water
9 associated with construction activities. The CGP’s coverage extends to all facilities in the State of
10 Idaho (except those on Indian land) and requires permittees to comply with the conditions and
11 requirements set forth in the CGP.

12 2.11. To obtain coverage for storm water discharges from a construction site under the
13 CGP, a discharger must first “prepare and submit a complete and accurate Notice of Intent.” CGP at
14 Part 2.

15 2.12. The CGP defines a “discharger” as the operator of the construction site. An
16 “operator” is defined as both (1) “[t]he party [who] has operational control over construction plans
17 and specifications . . . ,” and (2) “[t]he party [who] has day-to-day operational control of those
18 activities at a project which are necessary to ensure compliance with a [storm water pollution
19 prevention plan] for the site or other permit conditions.” CGP at Appendix A.

20 2.13. Section 308(a) of the Act, 33 U.S.C. § 1318(a), authorizes EPA to require the owner
21 or operator of any point source to provide such information as may be reasonably required in
22 carrying out Section 402 of the Act, 33 U.S.C. § 1342. Pursuant to Section 308(a), EPA has
23 promulgated NPDES permit application requirements. Among these application requirements are:

- 24 • the requirement set forth in 40 C.F.R. § 122.21(a)(1) that “[a]ny person who
25 discharges or proposes to discharge pollutants . . . must submit a complete
application to [EPA],”
- 26 • the requirement set forth in 40 C.F.R. § 122.26(c)(1) that “[d]ischarges of
27 storm water associated with industrial activity and with small construction

1 activity are required to apply for an individual permit or seek coverage under a
2 promulgated storm water general permit,” and

- 3 • the requirement set forth in 40 C.F.R. § 122.21(c)(1) that regulated
4 dischargers of construction storm water submit an NPDES permit application
5 or a Notice of Intent to apply for coverage under an NPDES general permit at
6 least ninety (90) days before the date on which construction is to commence
7 unless an applicable NPDES general permit specifies a different submittal
8 date.

9 2.14. Section 309(g)(1) of the Act, 33 U.S.C. § 1319(g)(1), authorizes EPA to assess
10 administrative penalties against any person who violates Section 301 or 308 of the Act, 33 U.S.C.
11 § 1311 or 1318.

12 **III. ALLEGATIONS**

13 3.1. Respondent is a “person” as defined in Section 502(5) of the Act, 33 U.S.C.
14 § 1362(5).

15 3.2. Respondent owns and operates the Southfork Development construction site (“Site”).
16 Respondent has operational control over the construction plans and specifications at the Site. In
17 addition, Respondent has day-to-day operational control of those activities at the Site necessary to
18 ensure compliance with the CGP. As such, Respondent is an operator under the CGP.

19 3.3. The Site consists of approximately forty-eight (48) acres of real property located at
20 South Cole Road and Stirrup Avenue in Boise, Idaho.

21 3.4. The receiving water for any storm water discharges from the Site is a drainage ditch
22 located along South Cole Road. The drainage ditch is a tributary to the New York Canal which is a
23 tributary to Lake Lowell. Water in Lake Lowell flows into the Deer Flat Low Line Canal which is a
24 tributary to the Snake River. The Snake River is susceptible to use in interstate or foreign
25 commerce, and thus is a “navigable water” as defined in Section 502(7) of the Act, 33 U.S.C. §
26 1362(7), and is a “water of the United States” as defined in 40 C.F.R. § 122.2. Therefore, the
27 drainage ditch is a “navigable water” as defined in Section 502(7) of the Act, 33 U.S.C. § 1362(7),
28 and is a “water of the United States” as defined in 40 C.F.R. § 122.2.

Count 2
(Discharge Without a Permit)

3.13. Paragraphs 1.1 through 3.12 are realleged and incorporated herein by reference.

3.14. On May 10, 2004, EPA conducted an inspection at the Site to determine compliance with the CGP. During the inspection, EPA found evidence of discharges of sediment into the South Cole Road drainage ditch, including, but not limited to, sediment in the storm drain downgradient from the Site.

3.15. Upon information and belief, EPA alleges that the discharge of pollutants occurred on nine (9) separate days.

3.16. Therefore, the construction activities at the Site resulted in the discharge of "storm water associated with industrial activity" to the South Cole Road drainage ditch.

3.17. The storm water was conveyed via the South Cole Road drainage ditch through the disturbed areas of the Site and was contaminated with, among other things, sediment, sand, and dirt.

3.18. The South Cole Road drainage ditch described in Paragraph 3.17 constitute "point source[s]" within the meaning of Section 502(14) of the Act, 33 U.S.C. § 1362(14).

3.19. The sediment, sand, and dirt described in Paragraph 3.17 constitute "pollutant[s]" within the meaning of Section 502(6) of the Act, 33 U.S.C. § 1362(6).

3.20. By causing such storm water to enter waters of the United States, Respondent has engaged in a "discharge of pollutants" from a point source within the meaning of Sections 301(a) and 502(12) of the Act, 33 U.S.C. §§ 1311(a) and 1362(12).

3.21. Respondent's discharges of storm water were not authorized by a permit issued pursuant to Section 402 of the Act, 33 U.S.C. § 1342. Therefore, Respondent violated Section 301(a) of the Act, 33 U.S.C. § 1311(a).

3.22. Each day that storm water was discharged without the required permit constitutes an additional day of violation of Section 301 of the Act, 33 U.S.C. § 1311. Pursuant to Section 309(g), 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 continues.

IV. PROPOSED PENALTY

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2 4.1. Based on the foregoing allegations, and pursuant to the authority of Section
3 309(g)(2)(B) of the Act, 33 U.S.C. § 1319(g)(2)(B), Complainant proposes that an administrative
4 penalty not to exceed Forty Thousand Dollars (\$40,000.00) be assessed against Respondent.

5 4.2. Complainant proposes this penalty amount after considering the applicable penalty
6 factors in Section 309(g)(3) of the Act, 33 U.S.C. § 1319(g)(3). These statutory penalty factors are
7 as follows: the nature, circumstances, extent, and gravity of the violation or violations, and, with
8 respect to Respondent, ability to pay, any prior history of such violations, the degree of culpability,
9 economic benefit or savings (if any) resulting from the violation, and such other matters as justice
10 may require.

11 4.3. Nature, Circumstances, Extent, and Gravity of Violations: The proposed penalty
12 reflects Complainant's determination that a failure to apply for an NPDES permit or any unpermitted
13 discharge is a serious violation which significantly undermines the Act's regulatory scheme. The
14 gravity of the violations is aggravated in this case because Respondent not only failed to apply for
15 the requisite NPDES permit, it also operated the Site without a storm water pollution prevention
16 plan, and failed to implement adequate best management practices and structural controls to
17 minimize the adverse environmental effects of Respondent's storm water discharges which resulted
18 in the unpermitted discharge of pollutants into the South Cole Road drainage ditch.

19 4.4. Respondent's Ability to Pay: Complainant has reviewed publicly available
20 information on Respondent's financial condition and has found no information indicating that
21 Respondent would be unable to pay the proposed penalty. Complainant will consider any
22 information submitted by Respondent related to its ability to pay the proposed penalty.

23 4.5. Respondent's History of Prior Violations: Complainant is unaware of Respondent
24 having any history of prior violations of the Act.

25 4.6. Respondent's Degree of Culpability: The proposed penalty reflects the fact that
26 Respondent was informed by EPA of the requirement to apply for an NPDES permit during EPA's
27 May 10, 2004 inspection. To date, Respondent has failed to submit a complete and accurate Notice
28

1 of Intent to be covered by the CGP. Furthermore, Respondent's construction activities at the Site
2 have resulted in the discharge of pollutants into waters of the United States in violation of Section
3 301(a) of the Act, 33 U.S.C. §1311(a).

4 4.7. Respondent's Economic Benefit: Respondent enjoyed an economic benefit as a result
5 of its unpermitted activities described above. This economic benefit includes the avoided cost
6 associated with timely preparing and submitting a Notice of Intent, the avoided costs associated with
7 preparing and implementing a storm water pollution prevention plan, and the avoided costs of
8 installing appropriate best management practices and structural controls.

9 4.8. Other Matters as Justice May Require: Credible and consistent enforcement of the
10 Act's requirements to apply for, obtain, and comply with NPDES permits regulating the discharge of
11 construction storm water is necessary to deter Respondent and others similarly situated from
12 violating the law.

13 **V. OPPORTUNITY TO REQUEST A HEARING**

14 5.1. Respondent has the right to file an Answer requesting a hearing on any material fact
15 contained in this Complaint or on the appropriateness of the penalty proposed herein. Upon request,
16 the Presiding Officer may hold a hearing for the assessment of these civil penalties, conducted in
17 accordance with the provisions of the Part 22 Rules and the Administrative Procedure Act, 5 U.S.C.
18 § 551 *et seq.* A copy of the Part 22 Rules accompanies this Complaint.

19 5.2. Respondent's Answer, including any request for hearing, must be in writing and must
20 be filed with:

21 Regional Hearing Clerk
22 U.S. Environmental Protection Agency
1200 Sixth Avenue, Mail Stop ORC-158
Seattle, Washington 98101

1 **VI. FAILURE TO FILE AN ANSWER**

2 6.1. To avoid a default order being entered pursuant to 40 C.F.R. § 22.17, Respondent
3 must file a written Answer to this Complaint with the Regional Hearing Clerk within thirty (30) days
4 after service of this Complaint.

5 6.2. In accordance with 40 C.F.R. § 22.15, Respondent's Answer must clearly and directly
6 admit, deny, or explain each of the factual allegations contained in this Complaint with regard to
7 which Respondent has any knowledge. Respondent's Answer must also state: (1) the circumstances
8 or arguments which are alleged to constitute the grounds of defense; (2) the facts which Respondent
9 intends to place at issue; and (3) whether a hearing is requested. Failure to admit, deny, or explain
10 any material factual allegation contained herein constitutes an admission of the allegation.

11 **VII. INFORMAL SETTLEMENT CONFERENCE**

12 7.1. Whether or not Respondent requests a hearing, Respondent may request an informal
13 settlement conference to discuss the facts of this case, the proposed penalty, and the possibility of
14 settling this matter. To request such a settlement conference, Respondent should contact:

15 Courtney Hamamoto
16 Assistant Regional Counsel
17 U.S. Environmental Protection Agency, Region 10
18 1200 Sixth Avenue, Mail Stop ORC-158
19 Seattle, Washington 98101
20 (206) 553-1477

21 7.2. Note that a request for an informal settlement conference does not extend the thirty
22 (30) day period for filing a written Answer to this Complaint, nor does it waive Respondent's right to
23 request a hearing.

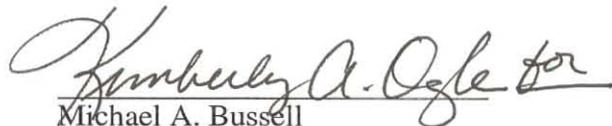
24 7.3. Respondent is advised that, after the Complaint is issued, the Part 22 Rules prohibit
25 any *ex parte* (unilateral) discussion of the merits of these or any other factually related proceedings
26 with the Administrator, the Environmental Appeals Board or its members, the Regional Judicial
27 Officer, the Presiding Officer, or any other person who is likely to advise these officials in the
28 decision on the 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 Respondent under Section 309(a) of the Act, 33 U.S.C. § 1319(a), concerning the violations alleged herein.

Dated this 30 day of March, 2005


Michael A. Bussell
Office of Compliance and Enforcement

CERTIFICATE OF SERVICE

I certify that the foregoing "Complaint" was sent to the following persons, in the manner specified, on the date below:

Original and one copy, hand-delivered:

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

Copy, together with a cover letter and copy of the Part 22 Rules, by personal delivery:

Bruce Hessing, Registered Agent
Landsing Development Group, LLC
5800 South Cole Road
Boise, Idaho 83709

Dated: April 5, 2005

Melissa L. Whitaker
Melissa Whitaker
U.S. EPA Region 10



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 10

1200 Sixth Avenue
Seattle, WA 98101

Reply To
Attn Of: OCE-133

PERSONAL DELIVERY

Bruce Hessing, Owner
Landsing Development Group, LLC
5800 South Cole Road
Boise, ID 83709

Dear Mr. Hessing:

On May 10, 2004, the U.S. Environmental Protection Agency ("EPA") conducted an inspection of the Southfork Development located at South Cole Road and Stirrup Avenue in Boise, Idaho. The inspection was conducted to assess Landsing Development Group's ("Landsing's") compliance with the National Pollutant Discharge Elimination System ("NPDES") General Permit for Storm Water Discharges from Construction Activities ("CGP"). During the inspection, EPA determined that Landsing had failed to apply for coverage under the CGP and was operating without an NPDES permit. Operating without a permit where there is a discharge to a water of the United States is a violation of the Clean Water Act, 33 U.S.C. § 1251 *et seq.*

Enclosed is the original signed 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. Please note that Landsing must file an Answer to the Administrative Complaint within thirty (30) days after service of the complaint. *See* 40 C.F.R. § 22.15.

If you have any questions, please feel free to contact Courtney Hamamoto, Assistant Regional Counsel, at (206) 553-1477.

Sincerely,

A handwritten signature in black ink that reads "Michael A. Bussell" followed by a stylized flourish.

Michael A. Bussell, Director
Office of Compliance and Enforcement

Enclosures

cc: Mike McGown, Regional Administrator, IDEQ - Boise Office