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BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:)	DOCKET NO. CWA 10-2009-0247
)	
Idaho Transportation Department & Parsons RCI, Inc.)	COMPLAINT
)	
Sandpoint, Idaho)	
)	
Respondents.)	

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(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"), Complainant hereby seeks to assess a civil penalty against the Idaho Transportation Department ("ITD") and Parsons RCI, Inc.

COMPLAINT - 1
DOCKET NO. CWA 10-2009-0247

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

1 ("Parsons"), for violations of the Act, 33 U.S.C. § 1251 *et seq.* ITD and Parson are hereinafter
2 referred to collectively as "Respondents."

3 1.3 In accordance with Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1), and
4 40 C.F.R. § 22.38(b), EPA has provided the State of Idaho with an opportunity to consult with
5 EPA on this matter.

6 **II. STATUTORY AND REGULATORY BACKGROUND**

7 2.1 Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the "discharge of any
8 pollutant by any person" except, *inter alia*, as authorized by a National Pollutant Discharge
9 Elimination System ("NPDES") permit issued pursuant to Section 402 of the Act, 33 U.S.C. §
10 1342.

11 2.2 Section 502(12) of the Act, 33 U.S.C. § 1362(12), defines the term "discharge of
12 a 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,
14 *inter 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
16 "waters of the United States."

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

20 2.6 Section 502(14) of the Act, 33 U.S.C. § 1362(14), defines "point source" to
21 include "any discernible, confined and discrete conveyance ... from which pollutants are or may
22 be discharged."
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1 2.7 Section 502(5) of the Act, 33 U.S.C. § 1362(5), defines "person" as "an
2 individual, corporation, partnership, association, State, municipality, commission, or political
3 subdivision of a State, or any interstate body."

4 2.8 Section 402(p) of the Act, 33 U.S.C. § 1342(p), specifies that a NPDES permit is
5 required for any storm water discharge "associated with industrial activity."

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

10 2.10 In June of 2008, EPA re-issued the NPDES General Permit for Storm Water
11 Discharges from Construction Activities ("CGP") pursuant to Section 402 of the Act, 33 U.S.C.
12 § 1342. The CGP became effective on June 30, 2008 and authorizes certain discharges of storm
13 water associated with construction activities. The CGP's coverage extends to all facilities in the
14 State of Idaho and requires permittees to comply with the conditions and requirements set forth
15 in the CGP. To obtain coverage under the CGP, an operator must first "prepare and submit a
16 complete and accurate Notice of Intent ["NOI"]" at least seven days before construction begins.
17 CGP at Part 2; 40 C.F.R. § 122.21(c).

18 2.11 An "operator" is defined as both: (1) "[t]he party [who] has operational control
19 over construction plans and specifications . . .," and (2) "[t]he party [who] has day-to-day
20 operational control of those activities at the project which are necessary to ensure compliance
21 with a [storm water pollution prevention plan] for the site or other permit conditions." CGP at
22 Appendix A.
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1 3.7 Storm water running off the Site discharges to Sand Creek. Sand Creek flows to
2 Lake Pend Oreille which flows to the Pend Oreille River. Pend Oreille River flows to the
3 Columbia River, which flows to the Pacific Ocean.

4 3.8 Sand Creek, Lake Pend Oreille, the Pend Oreille River, the Columbia River and
5 the Pacific Ocean are "navigable waters" as defined in Section 502(7) of the Act, 33 U.S.C.
6 § 1362(7), and are "waters of the United States" as defined in 40 C.F.R. § 122.2.

7 3.9 The Site constitutes a "point source" within the meaning of Section 502(14) of
8 the CWA, 33 U.S.C. § 1362(14).

9 3.10 The sediment, sand and dirt in the storm water constitute "pollutant[s]" within
10 the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

11 3.11 By causing such storm water to enter waters of the United States, Respondents
12 engaged in a "discharge of pollutants" from a point source within the meaning of Sections 301(a)
13 and 502(12) of the CWA, 33 U.S.C. § 1311(a) and 1362(12).

14 **Count 1**

15 3.12 Paragraphs 1.1 through 3.11 are realleged and incorporated herein by reference.

16 3.13 Part 3.1.H.2 of the CGP requires the Respondents to initiate stabilization
17 measures as soon as practicable in any portion of the Site where construction activities have
18 temporarily or permanently ceased, but in no case more than fourteen days after the construction
19 activity in that portion of the Site has temporarily or permanently ceased.

20 3.14 The Respondents had completed construction activities in several areas within
21 the Site at least fourteen days prior to the January 26, 2009 inspection date. As of the date of
22 January 26, 2009 inspection, the Respondents had not initiated stabilization measures for piles of
23 dirt in those portions of the Site.
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1 3.33 Part 5.5 of the CGP requires the Respondents to include in the SWPPP
2 documentation supporting a determination of permit eligibility with regard to endangered
3 species.

4 3.34 As of the date of EPA's January 26, 2009 inspection, the Respondents had
5 failed to include in the SWPPP documentation supporting a determination of permit eligibility
6 with regard to endangered species.

7 3.35 The Respondents' failure to include in the SWPPP documentation supporting a
8 determination of permit eligibility with regard to endangered species violates the CGP, and
9 therefore, violates a permit condition or limitation implementing any of such sections in a permit
10 issued under Section 402 of the Act, 33 U.S.C. § 1342. In accordance with Section 309(g)(2)(B)
11 of the Act, 33 U.S.C. § 1319(g)(2)(B), and 40 C.F.R. Part 19, Respondents are liable for civil
12 penalties not to exceed \$16,000 per day for each day during which the violation continues.
13

14 Count 7

15 3.36 Paragraphs 1.1 through 3.11 are realleged and incorporated herein by reference.

16 3.37 Part 5.4 of the CGP requires the Respondents to identify in the SWPPP all
17 allowable sources of non storm water discharges. Part 5.4 of the CGP also requires the
18 Respondents to describe in the SWPPP the pollution prevention measures used to eliminate or
19 reduce non storm water discharges.
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21 3.38 As of the date of EPA's January 26, 2009 inspection, the Respondents had
22 failed to include in the SWPPP the pollution prevention measures used to eliminate or reduce
23 non storm water discharges for all the sources of non storm water discharges identified in the
24 SWPPP.
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1 3.39 Respondents' failure to include in the SWPPP the pollution prevention
2 measures used to eliminate or reduce non storm water discharges for all the sources of non storm
3 water discharges identified in the SWPPP, violates the CGP, and therefore, violates a permit
4 condition or limitation implementing any of such sections in a permit issued under Section 402
5 of the Act, 33 U.S.C. § 1342. In accordance with Section 309(g)(2)(B) of the Act, 33 U.S.C.
6 § 1319(g)(2)(B), and 40 C.F.R. Part 19, Respondents are liable for civil penalties not to exceed
7 \$16,000 per day for each day during which the violation continues.

9 IV. PENALTY

10 4.1 Based on the foregoing allegations, and pursuant to the authority of Section
11 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), EPA proposes that an administrative
12 penalty of \$65,000 be assessed against Respondents, jointly and severally.

13 4.2 This penalty is proposed in consideration of the penalty factors identified in
14 Section 309(g)(3) of the Act, 33 U.S.C. § 1319(g)(3). These statutory penalty factors are as
15 follows: the nature, circumstances, extent, and gravity of the violation or violations, and, with
16 respect to Respondents' ability to pay, prior history of violations, degree of culpability, economic
17 benefit or savings (if any) resulting from the violation, and such other matters as justice may
18 require.

19 4.2.1 Nature, Circumstances, Extent and Gravity of Violations: The proposed
20 penalty reflects Complainant's determination that violations of the CGP are serious
21 violations that significantly undermine the Act's regulatory scheme. In addition, the
22 proposed penalty reflects Complainant's determination that the alleged violations have
23 the potential to harm the environment. The Site is contiguous with Sand Creek. Given
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1 the close proximity to the creek and the amount of exposed soils along the length of the
2 creek, the potential to cause significant environmental harm was high in this case. The
3 potential for environment harm is exacerbated by the wet winter weather in which the
4 Respondents have worked.

5 4.2.2 Respondents' Ability to Pay: Complainant has no information indicating
6 that the Respondents are unable to pay the proposed penalty. Complainant will consider
7 any information submitted by the Respondents related to their ability to pay the proposed
8 penalty.

9 4.2.3 Respondents' History of Prior Violations: Respondent ITD has a
10 significant history of noncompliance with the construction storm water requirements of
11 the Clean Water Act. In 2006, ITD paid a \$495,000 penalty to settle allegations that it
12 dumped tons of sediment into Mica Bay near Coeur d'Alene, Idaho in violation of the
13 CGP. Under the terms of the consent decree, ITD was required to engage in extensive
14 training of its personnel in compliance with the CGP. Complainant is not aware of any
15 prior history of violations by Parsons.

16 4.2.4 Respondents' Degree of Culpability: ITD had previously been fined for
17 violations of the CGP, and is still subject to the requirements of a consent decree that
18 requires ITD to train its personnel on compliance with the CGP. Given these facts, ITD
19 should have known how to comply with the CGP, and should have been acutely aware of
20 the requirements of that permit, yet still violated several basic permit provisions.

21 Parsons, which is an established construction contractor in the road-construction business
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1 likewise should have been aware of the CGP requirements. The Respondents obtained
2 coverage under the CGP in November 2008.

3 4.2.5 Respondents' Economic Benefit: The Respondents enjoyed an economic
4 benefit as a result of the activities described above. This economic benefit includes the
5 avoided costs associated with a failure to prepare and maintain an adequate SWPPP,
6 failure to implement and maintain storm water control measures, and failure to implement
7 stabilization measures, among other things.

8 4.3 Other Matters as Justice May Require: Complainant is not aware of any facts
9 that would require the application of the "other matters" factor.

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

11 5.1 The Respondents have the right to file an Answer requesting a hearing on any
12 material fact contained in this Complaint or on the appropriateness of the penalty proposed
13 herein. Upon request, the Presiding Office may hold a hearing for the assessment of the civil
14 penalties conducted in accordance with the provisions of the Part 22 Rules and the
15 Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* A copy of the Part 22 Rules accompanies
16 this Complaint.

17 5.2 The Respondents' Answers, including any request for hearing, must be in
18 writing and must be filed with:

19
20 Regional Hearing Clerk
21 U.S. Environmental Protection Agency, Region 10
22 1200 Sixth Avenue,
23 Suite 900 (Mail Stop ORC-158)
24 Seattle, Washington 98101
25

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, the
3 Respondents must file a written Answer to this Complaint with the Regional Hearing Clerk
4 within thirty (30) days after service of this Complaint.

5 6.2 In accordance with 40 C.F.R. § 22.15, the Respondents' Answer(s) must clearly
6 and directly admit, deny, or explain each of the factual allegations contained in this Complaint
7 with regard to which the Respondents have any knowledge. The Respondents' Answer(s) must
8 also state: (1) the circumstances or arguments which are alleged to constitute the grounds of
9 defense; (2) the facts which the Respondents intend to place at issue; and (3) whether a hearing is
10 requested. Failure to admit, deny, or explain any material factual allegation contained herein
11 constitutes an admission of the allegation.
12

13 **VII. INFORMAL SETTLEMENT CONFERENCE**

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

18 Mark Ryan
19 Assistant Regional Counsel
20 U.S. Environmental Protection Agency, Region 10
21 1435 N. Orchard
22 Boise, Idaho 83706
23 (208) 378-5768

24 7.2 Note that a request for an informal settlement conference does not extend the
25 thirty (30) day period for filing a written Answer to this Complaint, nor does it waive the
Respondents' right to request a hearing.

1 **CERTIFICATE OF SERVICE**

2 I certify that the foregoing "Complaint" was filed and sent to the following persons, in
3 the 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
7 Region 10, Mail Stop: ORC-158
8 1200 Sixth Avenue, Suite 900
9 Seattle, WA 98101

9 A true and correct copy, together with a copy of the Consolidated Rules of Practice Governing
10 the Administrative Assessment of Civil Penalties," 40 C.F.R. Part 22, by certified mail, return
11 receipt requested:

11 Murray Feldman
12 Holland & Hart LLP
13 101 S. Capitol Blvd.
14 Suite 1400
15 P.O. Box 2527
16 Boise, ID 83701-2527

15 Andrew Albrecht, President
16 Parsons RCI, Inc.
17 1216 140th Avenue Ct. East
18 Sumner, WA 98390

19 Dated:

9-30-09

Shawn Eng

ORC-158

U.S. EPA Region 10

23 COMPLAINT - 15
24 DOCKET NO. CWA 10-2009-0247
25

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