



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 4  
ATLANTA FEDERAL CENTER  
61 FORSYTH STREET  
ATLANTA, GEORGIA 30303-8960

AUG 04 2011

CERTIFIED MAIL 70101060000217027796

RETURN RECEIPT REQUESTED

W. R. Beam  
The Allen Company, Inc.  
3009 Atkinson Avenue, Suite 300  
Lexington, Kentucky 40509

Re: Consent Agreement and Final Order  
Docket No. CWA-04-2011-4511(b)  
Barnes Mill Road Improvements  
NPDES Permit No. KYR10F031  
Richmond, Kentucky

Dear Mr. Beam:

Enclosed please find a fully executed copy of the Consent Agreement and Final Order that has been finalized by the U.S. Environmental Protection Agency and the Regional Judicial Officer. Please make note of the provisions under Section IV. Payment.

Should you have any questions or concerns regarding this matter, please contact Amanda Driskell at (404) 562-9735.

Sincerely,

Denisse D. Diaz, Chief  
Clean Water Enforcement Branch  
Water Protection Division

Enclosure

cc: Jeff Cummins, Acting Director, Division of Enforcement  
Kentucky Department for Environmental Protection  
Bruce Scott  
Kentucky Department for Environmental Protection  
Massoud Shoa, Supervisor, Frankfort Regional Office  
Kentucky Department for Environmental Protection

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 4**

**IN THE MATTER OF:**

**The Allen Company  
Barnes Mill Road Improvements  
Richmond, Kentucky**

**RESPONDENT.**

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)  
) **CONSENT AGREEMENT AND**  
) **FINAL ORDER**  
)  
)  
) **DOCKET NO. CWA-04-2011-4511(b)**  
)

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HEARING CLEAN  
EPA REGION 4

**CONSENT AGREEMENT**

**I. Statutory Authority**

1. This is a civil penalty proceeding pursuant to Section 309(g)(2)(A) of the Clean Water Action ("CWA"), 33 U.S.C. § 1319(g)(2)(A), and the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders and the Revocation, Termination or Suspension of Permits*, including Subpart I, published at 64 Fed. Reg. 40176 (July 23, 1999) and codified at 40 Code of Federal Regulations ("C.F.R.") Part 22.

2. The authority to take action under Section 309(g)(2)(A) of the CWA, 33 U.S.C. § 1319(g)(2)(A), is vested in the Administrator of the United States Environmental Protection Agency ("EPA"). The Administrator has delegated this authority to the Regional Administrator, Region 4, who in turn has delegated this authority to the Director of the Water Protection Division, who in turn has delegated this authority to the Chief of the Clean Water Enforcement Branch of EPA, Region 4 ("Complainant").

**II. Allegations**

3. At all times relevant to this action, the Allen Company, Inc., ("Respondent"), was a corporation duly organized and existing under the laws of the Commonwealth of Kentucky and, is therefore, a "person" within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

4. At all times relevant to this action, Respondent owned and/or operated a construction site known as Barnes Mill Road Improvements ("Development") located at KY 876-Barnes Mill Road, Richmond, Kentucky.

5. To accomplish the objective of the CWA, defined in Section 101(a) of the CWA, 33 U.S.C. § 1251(a), to restore and maintain the chemical, physical and biological integrity of the nation's waters, Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants by any person into waters of the United States except as in compliance with a National Pollutant Discharge

Elimination System (“NPDES”) Permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

6. Section 402 of the CWA, 33 U.S.C. § 1342, establishes an NPDES Permit Program authorizing EPA or authorized states to administer the NPDES Permit Program, including the issuance of NPDES permits allowing for the discharge of pollutants, including stormwater, into navigable waters subject to specific terms and conditions. EPA has granted the Commonwealth of Kentucky through the Department for Environmental Protection (“KDEP”) approval to issue NPDES permits pursuant to Section 402(b) of the CWA. The KDEP is responsible for the enforcement of Kentucky Revised Statutes Chapter 224 and the approval of coverage upon submission and approval of a Notice of Intent (“NOI”) requesting Permit coverage.

7. KDEP issued Permit No. KYR100000 (“Permit”), applicable to stormwater discharges associated with construction activities, in accordance with the provisions of the Kentucky Revised Statutes Chapter 224 and the CWA. The Permit was effective August 1, 2009, and expires July 31, 2014.

8. The Permit is a Kentucky statewide NPDES general permit governing stormwater point source discharges associated with construction activities including clearing, grading, and excavation activities except operations that result in the disturbance of one (1) acre or more of total land area which are not part of a larger common plan of development or sale.

9. For “New Projects” to obtain coverage under the Permit, a signed NOI must be submitted to KDEP a minimum of seven (7) days before the proposed date for commencement of construction activities if the NOI is submitted electronically or a minimum of thirty (30) days before the proposed date of commencement of construction activities if submitted using a paper submission. For “Ongoing Projects”, those authorized and pending authorization by KDEP as of July 1, 2009, an NOI must be submitted to KDEP within one (1) year, terminating on July 31, 2010. Failure to obtain or maintain Permit coverage shall not relieve a discharger from complying with the applicable performance standards. 401 KAR 5:055, Section 1.

10. On October 16, 2008, Respondent submitted an NOI requesting permit coverage to KDEP. This was prior to July 1, 2009, and thereby categorized this project as an “Ongoing Project” with coverage terminating on July 31, 2010, unless a new NOI was submitted. On August 25, 2010, Respondent submitted a new NOI requesting coverage to KDEP. A Notice of Coverage was sent to Respondent with an effective date of August 30, 2010, and an expiration date of July 31, 2014.

11. Part II.A.2 of the Permit requires the Storm Water Pollution Prevention Plan (“SWPPP”) to include a site map of sufficient scale to depict the following: (1) property boundary; if subdivided show all lots and indicate on which lots construction activities will occur; 2) anticipated drainage patterns and slopes after major grading activities, including impervious structures; 3) area of soil disturbance and areas not disturbed, including fill and borrow areas; 4) locations and types of sediment control measures, erosion control measures, planned stabilization measures, and other site management practices; 5) locations of surface waters, including wetlands, and riparian zones; 6) locations of karst features such as sinkholes, springs, etc.; 7) locations of discharge points; 8) locations of equipment storage areas, materials storage areas including but not limited to top soil, storage, fuels, fertilizers, herbicides, etc.; 9) locations of concrete wash-out areas, waste management areas and areas of site

egress; 10) locations where final stabilization has been accomplished and no further construction is required; and 11) other major features and potential pollutant sources.

12. Part II.A.5.a of the Permit requires the Permittee to maintain the erosion prevention measures, sediment control measures, and other site management practices in an effective operating condition. This part also requires the Permittee to develop a schedule for maintenance activities of the erosion prevention measures, sediment control measures, and other site management practices.

13. Part II.A.5.b of the Permit requires the Permittee to perform maintenance on any sediment control measures, erosion control measure or other site management practices that are identified in an inspection as not operating effectively or otherwise require maintenance before the next storm event, or as soon as possible.

14. Part II.A.7.d and Part II.A.7.e of the Permit requires visual inspections to determine proper installation, maintenance, and effectiveness of erosion prevention measures, sediment control measures, other site management practices, disturbed areas, areas used for storage of materials, and discharge points.

15. Part II.A.7.f of the Permit requires inspection reports for all inspections to be retained with the SWPPP and shall include: date of the inspection; name and title of the inspector; synopsis of weather information for the period since the last inspection; weather conditions and description of any discharges; location(s) of discharges of sediment or other pollutants; location(s) of erosion prevention measures, sediment control measures, or other site management practices that failed or proved inadequate; location(s) where additional erosion prevention measures, sediment control measures, or other silt management practices are needed; identify any action taken in response to inspection findings; identify any incidents of noncompliance with SWPPP; certify that there were no incidents of non-compliance if so determined; and sign the inspection report.

16. Part II.A.8 of the Permit requires the SWPPP to be revised whenever erosion prevention measures, sediment control measures, or other site management practices are significantly modified; and within seven (7) calendar days of an inspection if it is determined that the existing sediment control measures, erosion control measures or other site management practices are ineffective or designed ineffectively.

17. Part II.A.8.f of the Permit requires modification to or additional sediment control measures, erosion control measures, or other site management practices, if determined necessary, before the next storm event. If implementation before the next storm event is impracticable, document the reasons and when the changes will be implemented in the SWPPP.

18. Part II.B of the Permit requires the Permittee to minimize the disturbance and period of time that disturbed areas are exposed without stabilization. Stabilization practices shall be implemented within twenty-four (24) hours or "as soon as practicable" after disturbance/grading or following cessation of activities.

19. Part II.C of the Permit requires final or temporary stabilization within fourteen (14) days

of cessation of construction activities. Final stabilization shall be initiated on any site where construction activities have been suspended for more than one-hundred and eighty (180) days as soon as practicable but no later than fourteen (14) days after the one-hundredth and eightieth (180) days.

20. On August 26, 2010, representatives of the EPA in conjunction with the KDEP performed a Compliance Stormwater Evaluation Inspection (“CSWEI”) at Respondent’s Development. The EPA’s CSWEI was to evaluate the treatment and disposal of stormwater at the Development in accordance with the CWA, the regulations promulgated thereunder at 40 C.F.R. § 122.26, and the KDEP Permit.

21. As a result of the CSWEI, EPA has determined that Respondent discharged stormwater associated with industrial activity from its Development within the meaning of Section 402(p) of the CWA, 33 U.S.C. § 1342(p), and its implementing regulations. Sediment was discharged from the Development into the Unnamed Tributary of Silver Creek which flows into Silver Creek. Silver Creek flows into the Kentucky River, a water of the United States.

22. During the CSWEI, the EPA inspectors observed the following:

- A. The Respondent failed to provide a SWPPP site map that depicted all the required information and failed to revise the SWPPP and/or the site map to include these items, as required by Part II.A.2 and Part II.A.8 of the Permit. All discharge locations were not identified on the SWPPP site map and therefore the SWPPP site map was not revised to show the current state of affairs at the Development.
- B. The Respondent failed to provide proper installation, operation and maintenance of erosion prevention measures, sediment control measures, and other site management practices as required by Part II.A.5.a, Part II.A.5.b, Part II.A.7.d, Part II.A.7.e, and Part II.A.8.f of the Permit. Silt fencing around several outfall/outlet structures had fallen or were falling and/or were  $\frac{3}{4}$  full of sediment and in need maintenance and/or repair. Silt fence framing were not completed around the inlet located on the northern half of the project and the grate was missing. Silt fencing around the inlet south of that described above, was down in one corner and was in need of repair and the grate was missing from the inlet. A sand bag was missing and/or displaced from around the drop inlet on the southern portion of the project and was in need of replacement. Rip rap and/or rock in the rip rap lined channel/ditching located on the southern portion of the project was missing and/or displaced and was in need of maintenance and/or repair. Construction materials and sediment accumulation was observed in the small culvert inlet and outlet and was in need of cleaning/removal of sediment. There was no inlet protection installed at the driveway crossing on the northern portion of the Development. The silt traps were not properly installed and/or designed. The silt traps at the mouth of outfalls were improperly installed and needed to be removed. The ditching on the southwestern portion of the project was not fully stabilized and needed additional stabilization. The rock/rip rap in the ditching on the western side of KY876 was missing and/or displaced and was in need of maintenance and repair. The rock lining in the ditching north of that just

described was missing and/or displaced and was in need of maintenance and repair. The ditching on the northern portion of the project was unlined and had no erosion control protection installed and was in need of stabilization. Rock outlet protection at culvert outlets and at the outfalls was not installed, missing, and/or displaced and was in need of installation, maintenance, and/or repair.

- C. The Respondent failed to maintain erosion prevention measures, sediment control measures, and other site management practices in an effective operating condition, as required by Part II.A.5.a, as evidenced by the discharge of sediment off-site. Sediment was observed in the Unnamed Tributary of Silver Creek downfield of the outlet located in approximately the middle portion of the project.
- D. The Respondent failed to fully implement stabilization of the development, as required by Part II.B and Part II.C of the Permit. Some stabilization was observed during the CSWEI. However, additional stabilization was needed throughout the Development, especially of the slopes and ditching. Stabilization was also needed in a few of the areas where no stabilization had yet to be installed, specifically of some slopes and ditching on the Development.
- E. The Respondent failed to properly document the inspections conducted on an inspection report, as required by Part II.A.7.f of the Permit. The Permit requires the Permittee to conduct inspections of all Best Management Practices (BMPs); however, the inspection reports which were reviewed during the CSWEI only identified some of the measures being inspected. There was no indication on the inspection reports that the remaining controls were being inspected as required.

23. Therefore, Respondent has violated Sections 301 and 402(p) of the CWA, 33 U.S.C. §§ 1311 and 1342(p), by failing to comply with the Permit, and for discharges not authorized by the Permit.

### **III. Stipulations and Findings**

24. Complainant and Respondent have conferred for the purpose of settlement pursuant to 40 C.F.R. § 22.18 and desire to resolve this matter and settle the allegations described herein without a formal hearing. Therefore, without the taking of any evidence or testimony, the making of any argument, or the adjudication of any issue in this matter, and in accordance with 40 C.F.R. § 22.13(b), this Consent Agreement and Final Order (“CA/FO”) will simultaneously commence and conclude this matter.

25. For the purposes of this CA/FO, Respondent admits the jurisdictional allegations set out above and admits the factual allegations set out above.

26. Respondent hereby waives its right to contest the allegations set out above and its right to appeal the Final Order accompanying this Consent Agreement.

27. Respondent consents to the assessment of and agrees to pay the civil penalty as set forth in this CA/FO and consents to the other conditions set forth in this CA/FO.

28. By signing this CA/FO, Respondent certifies that the information it has supplied concerning this matter was at the time of submission, and is, truthful, accurate, and complete for each such submission, response and statement. Respondent realizes that there are significant penalties for submitting false or misleading information, including the possibility of fines and/or imprisonment for knowing submission of such information.

29. The EPA reserves the right to assess and collect any and all civil penalties for any violation described herein to the extent that any information or certification provided by Respondent was materially false or inaccurate at the time such information or certification was provided to the EPA.

30. Complainant and Respondent agree to settle this matter by their execution of this CA/FO. The parties agree that the settlement of this matter is in the public interest and that this CA/FO is consistent with the applicable requirements of the CWA.

#### IV. Payment

31. Pursuant to Section 309(g)(2)(A) of the CWA, 33 U.S.C. § 1319(g)(2)(A), and 40 C.F.R. Part 19, and considering the nature of the violations and other relevant factors, the EPA has determined that seven thousand and two hundred dollars (\$7,200) is an appropriate civil penalty to settle this action.

32. Respondent shall submit payment of the penalty specified in the preceding paragraph within thirty (30) days of the effective date of this CA/FO via a cashier's or certified check, payable to the order of "Treasurer, United States of America." The check shall reference on its face the name of Respondent and the Docket Number of this CA/FO. Such payment shall be tendered to:

U.S. Environmental Protection Agency  
Fines and Penalties  
Cincinnati Finance Center  
P.O. Box 979077  
St. Louis, Missouri 63197-9000

33. At the time of payment, Respondent shall send a separate copy of the check, and a written statement that payment has been made in accordance with this CA/FO, to the following persons at the following addresses:

Regional Hearing Clerk  
U.S. Environmental Protection Agency, Region 4  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303-8960

and

Mary Mattox  
U.S. Environmental Protection Agency, Region 4  
Water Protection Division  
Clean Water Enforcement Branch  
Municipal and Industrial Enforcement Section  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303-8960

34. The penalty amount specified above shall represent civil penalties assessed by EPA and shall not be deductible for purposes of federal taxes.

35. Pursuant to Section 309(g)(9) of the CWA, 33 U.S.C. § 1319(g)(9), failure by Respondent to pay the penalty assessed by the CA/FO in full by its due date may subject Respondent to a civil action to collect the assessed penalty plus interest (at currently prevailing rates from the effective date of this CA/FO), attorney's fees, costs for collection proceedings and a quarterly nonpayment penalty for each quarter during which such failure to pay persists. Such nonpayment penalty shall be in an amount equal to twenty percent (20%) of the aggregate amount of such penalty and nonpayment penalty which are unpaid as of the beginning of such quarter. In any such collection action, the validity, amount and appropriateness of the penalty and of this CA/FO shall not be subject to review.

#### **V. General Provisions**

36. This CA/FO shall not relieve Respondent of its obligation to comply with all applicable provisions of federal, state, or local law, nor shall it be construed to be a ruling on, or determination of, any issue related to any federal, state, or local permit. Other than as expressed herein, compliance with this CA/FO shall not be a defense to any actions subsequently commenced pursuant to federal laws and regulations administered by the EPA.

37. Nothing in this CA/FO shall be construed as prohibiting, altering, or in any way limiting the ability of the United States to seek any other remedies or sanctions available by virtue of Respondent's violation of this CA/FO or of the statutes and regulations upon which this CA/FO is based, or for Respondent's violation of any federal or state statute, regulation or permit.

38. Except as otherwise set forth herein, this CA/FO constitutes a settlement by Complainant and Respondent of all claims for civil penalties pursuant to the CWA with respect to only those violations alleged in this CA/FO. Except as otherwise set forth herein, compliance with this CA/FO shall resolve the allegations of violations contained herein. Nothing in this CA/FO is intended to nor shall be construed to operate in any way to resolve any criminal liability of Respondent, or other liability resulting from violations that were not alleged in this CA/FO. Other than as expressed herein, Complainant does not waive any right to bring an enforcement action against Respondent for violation of any federal or state statute, regulation or permit, to initiate an action for imminent and substantial endangerment, or to pursue criminal enforcement.

39. Each undersigned representative of the parties to this CA/FO certifies that he or she is fully authorized to enter into the terms and conditions of this CA/FO and to execute and legally bind that



party to it.

40. This CA/FO applies to and is binding upon Respondent and its officers, directors, employees, agents, successors and assigns.

41. Any change in the legal status of Respondent, including but not limited to any transfer of assets of real or personal property, shall not alter Respondent's responsibilities under this CA/FO.

42. Each party shall bear its own costs and attorneys fees in connection with the action resolved by this CA/FO.

43. In accordance with 40 C.F.R. § 22.5, the individuals below are authorized to receive service relating to this proceeding.

For Complainant:

Rolando Bascumbe  
Associate Regional Counsel  
Office of Environmental Accountability  
U.S. Environmental Protection Agency, Region 4  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303-8960  
(404) 562-9545

For Respondent:

W.R. Beam  
The Allen Company, Inc.  
3009 Atkinson Avenue, Suite 300  
Lexington, Kentucky 40509  
(859) 543-3361

44. The parties acknowledge and agree that this CA/FO is subject to the requirements of 40 C.F.R. § 22.45(c)(4), which provides a right to petition to set aside a consent agreement and proposed final order based on comments received during the public comment period.

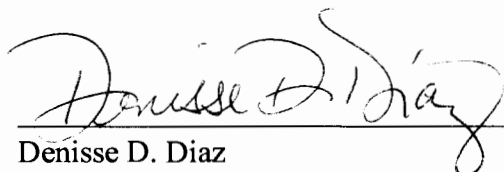
45. Pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), and 40 C.F.R. § 22.38(b), Complainant represents that the Commonwealth of Kentucky was provided a prior opportunity to consult with Complainant regarding this matter.

**VI. Effective Date**

46. The effective date of this CA/FO shall be the date on which the CA/FO is filed with the Regional Hearing Clerk.

**AGREED AND CONSENTED TO:**

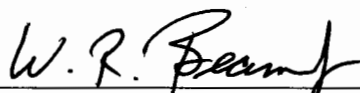
**For COMPLAINANT, U.S. ENVIRONMENTAL PROTECTION AGENCY:**

  
\_\_\_\_\_

Denisse D. Diaz  
Clean Water Enforcement Branch  
Water Protection Division

Date: 7/27/11

**For RESPONDENT, THE ALLEN COMPANY, INC.:**

  
\_\_\_\_\_

NAME: W. R. Beam, Jr.  
TITLE: Secretary-Treasurer

Date: May 25<sup>th</sup>, 2011

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 4**

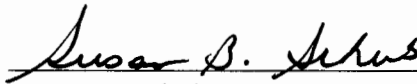
**IN THE MATTER OF:** )  
 ) **CONSENT AGREEMENT AND**  
**The Allen Company** ) **FINAL ORDER**  
**Barnes Mill Road Improvements** )  
**Richmond, Kentucky** )  
 )  
**RESPONDENT.** ) **DOCKET NO. CWA-04-2010-4511(b)**  
\_\_\_\_\_ )

**FINAL ORDER**

In accordance with the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders and the Revocation, Termination or Suspension of Permits*, including Subpart I, 40 C.F.R. Part 22, and authorities delegated to me, the foregoing Consent Agreement is hereby approved and incorporated by reference into this Final Order. Pursuant to Section 309(g) (2)(A) of the CWA, 33 U.S.C. § 1319(g)(2)(A), Respondent is hereby ordered to comply with the terms of the foregoing Consent Agreement.

U.S. ENVIRONMENTAL PROTECTION AGENCY

Date: August 2, 2011

  
\_\_\_\_\_  
Susan B. Schub  
Regional Judicial Officer

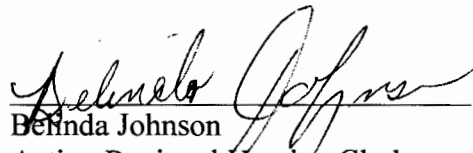
**CERTIFICATE OF SERVICE**

The undersigned certifies that a true and correct copy of the attached **CONSENT AGREEMENT AND FINAL ORDER** in the matter of **Barnes Mill Road Improvements, Docket No. CWA-04-2011-4511(b)** (filed with the Regional Hearing Clerk on August 4, 2011, was served on August 4, 2011, in the manner specified to each of the persons listed below.

By hand-delivery: Rolando Bascumbe  
Associate Regional Counsel  
Office of Environmental Accountability  
U.S. Environmental Protection Agency, Region 4  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303-8960

By certified mail,  
return receipt requested: W.R. Beam  
The Allen Company, Inc.  
3009 Atkinson Avenue, Suite 300  
Lexington, Kentucky 40509

Mr. Jeff Cummins  
Acting Director, Division of Enforcement  
Kentucky Department for Environmental Protection  
14 Reilly Road  
Frankfort, Kentucky 40601

  
Brenda Johnson  
Acting Regional Hearing Clerk  
U.S. Environmental Protection Agency, Region 4  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303-8960  
(404) 562-9511