

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 1

RECEIVED

In the Matter of: )

Village on the Common Realty, LLC )  
d/b/a Eco Built Communities )  
133 Pearl Street, Suite 400 )  
Boston, MA 02110 )

Respondent )

Class II Proceeding under Section 309(g) )  
of the Clean Water Act, )  
33 U.S.C. § 1319(g) )

2009 JUL -1 A 10: 20

Docket No. )  
CWA-01-2009-0067 )  
REGIONAL HEARING CLERK )  
COMPLAINT )

**I. STATEMENT OF AUTHORITY**

1. Complainant, the United States Environmental Protection Agency (“EPA”), Region 1, issues this Complaint and Notice of Opportunity for Hearing (“Complaint”) to Village on the Common Realty, LLC (“Respondent”) under Section 309(g) of the Clean Water Act (“CWA”), 33 U.S.C. § 1319(g), and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (“Consolidated Rules of Practice”), 40 C.F.R. Part 22.

2. Pursuant to Section 309(g) of the CWA and in accordance with the Consolidated Rules, Complainant hereby notifies Respondent that EPA intends to assess penalties for violations of Sections 301(a) and 308(a) of the CWA, 33 U.S.C. §§ 1311(a) and 1318(a), and EPA’s “NPDES General Permit for Storm Water Discharges From Construction Activities,” issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342. The alleged violations involve Respondent’s failure to have stormwater permit coverage for a construction site in Littleton, Massachusetts prior to the commencement of

construction activities, to have and/or maintain adequate stormwater controls at the site, and to make stormwater inspection reports available to EPA at the time of an on-site inspection. The Notice of Opportunity for Hearing describes Respondent's option to file an Answer to the Complaint and to request a formal hearing. Pursuant to Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1), Complainant will consult with the Massachusetts Department of Environmental Protection ("MA DEP") prior to the assessment of a penalty in this action.

3. As set forth in Section 101(a) of the CWA, 33 U.S.C. § 1251(a), the CWA is designed to restore and maintain the chemical, physical, and biological integrity of the nation's waters.

4. In order to accomplish the objectives of the CWA, Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants by any person, except in certain circumstances, including compliance with a permit issued pursuant to Section 402 or 404 of the CWA, 33 U.S.C. §§ 1342 or 1344.

5. Section 502(12) of the CWA, 33 U.S.C. § 1362(12), defines "discharge of pollutants" to include "any addition of any pollutant to navigable waters from any point source."

6. Section 502(6) of the CWA, 33 U.S.C. § 1362(6), defines "pollutant" to include, inter alia, dredged spoil, garbage, rock, silt and cellar dirt.

7. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines "navigable waters" as "the waters of the United States, including the territorial seas."

8. Section 502(14) of the CWA, 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.”

9. Section 502(5) of the CWA, 33 U.S.C. § 1362(5), defines “person” to include “an individual, corporation, [or] partnership.”

10. Section 308(a) of the CWA, 33 U.S.C. § 1318(a), authorizes EPA to require the owner or operator of any point source to provide such information as EPA may reasonably require to carry out the objectives of the CWA, including the issuance of NPDES permits pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

11. Section 402(p)(2)(B) of the CWA, 33 U.S.C. § 1342(p)(2)(B), requires any stormwater discharge “associated with industrial activity” to be authorized by a NPDES permit.

12. Pursuant to Sections 308 and 402 of the CWA, 33 U.S.C. §§ 1318 and 1342, EPA promulgated stormwater discharge regulations at 40 C.F.R. § 122.26.

13. Pursuant to 40 C.F.R. § 122.26(c), dischargers of stormwater associated with “industrial activity” and “storm water discharges associated with small construction activities” must apply for an individual permit or seek coverage under a promulgated general permit.

14. Pursuant to 40 C.F.R. § 122.26(b)(14)(x), the definition of “storm water discharge associated with industrial activities” includes stormwater discharges from construction activities, including clearing, grading, and excavation, that result in a disturbance of five or more acres of total land area. Construction activity also includes the disturbance of less than five acres of total land area that is a part of a larger common

plan of development or sale if the larger common plan will ultimately disturb five acres or more.

15. Pursuant to 40 C.F.R. § 122.26(b)(13), the definition of “storm water” includes stormwater runoff, snow melt runoff, and surface runoff and drainage.

### **Construction General Permit**

16. In February 1998, EPA issued the NPDES General Permit for Storm Water Discharges from Construction Activities (“1998 CGP”), 63 Fed. Reg. 7858 (Feb. 17, 1998). The 1998 CGP became effective on February 17, 1998 and expired on February 17, 2003. EPA reissued the 1998 CGP in July 2003 (“CGP”), 68 Fed. Reg. 39087 (July 1, 2003). The reissued CGP became effective on July 1, 2003 and was set to expire on July 1, 2008. EPA reissued the 2003 CGP in July 2008.<sup>1</sup> The reissued permit expires on July 1, 2010. The CGP authorizes, subject to conditions contained therein, the discharge of pollutants in stormwater runoff associated with construction activities, including construction activities within the Commonwealth of Massachusetts.

17. To obtain coverage under the CGP, Part 2 of the CGP requires “operators” to submit a notice of intent (“NOI”). The CGP defines “operator” as “any party associated with a construction project” that maintains either “operational control over construction plans and specifications, including the ability to make modifications to those plans and specifications,” or “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.”

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<sup>1</sup> The reissued CGP did not become effective in Massachusetts until August 4, 2003. See 68 Fed. Reg. 45817 (Aug. 4, 2003). Additionally, the 2003 CGP was modified on December 22, 2004, effective on January 21, 2005. See 69 Fed. Reg. 76743 (Dec. 22, 2004). On July 14, 2008 the 2003 CGP was extended for a period not to exceed two years. See 73 Fed. Reg. 40388 (July 14, 2008)

18. Part 2.3.A of the CGP requires operators of new projects to submit a complete and accurate NOI prior to commencement of construction activities.

19. Part 3 of the CGP requires operators to prepare an adequate stormwater pollution prevention plan (“SWPPP”) addressing the portions of the project for which they are operators. The SWPPP must, among other things, include a description of appropriate controls and measures that will be performed at the site to prevent pollution of the waters of the state. See Part 3, Section 3.4 of the 2003 CGP. The 2003 CGP also requires that the stormwater controls be maintained in effective operating condition. See Part 3, Section 3.6 of the 2003 CGP.

20. The central aspect of the SWPPP involves the selection of best management practices (“BMPs”), designed to eliminate, to the extent feasible, the migration of pollution from construction sites into the nation’s waters. These practices include measures to prevent erosion, such as the scheduling of the project to minimize the amount of land being graded at any particular time, and measures to capture sediment before it leaves the site, such as silt fences and sedimentation basins. The CGP imposes additional requirements, including those for inspection of the site during construction; maintenance of the SWPPP, and potentially other records, at the site; and final stabilization of the site, followed by termination of permit coverage.

## **II. GENERAL ALLEGATIONS**

21. The Village on the Common (a/k/a “The Farms on the Common”) (the “Site”) is located at Robinson Road and Farmstead Way in Littleton, Massachusetts. The Site is an approximately 41.5 acre residential development that will eventually contain about 108 townhouse condominiums and a community center. Phase I of the

development consists of construction activity on the south, west and east sections of the Site; Phase II construction will take place in the north section. As of August 18, 2008, Phase I of the project was less than 50% complete.

22. Respondent is a limited liability corporation established under the laws of the Commonwealth of Massachusetts with a principal office located at 133 Pearl Street, Suite 400, in Boston, Massachusetts. Respondent is the owner of the Site and controls all development activity at the Site.

23. Respondent is a "person," as defined in Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

24. Respondent maintains day-to-day operational control of activities necessary to ensure compliance with the SWPPP for the Site, rendering it an "operator" of the Site, as defined by 40 C.F.R. § 122.2 and Appendix A of the CGP.

25. Respondent began construction activity on the Site sometime in early July 2007. When Respondent commenced clearing, grading, and excavation at the Site, Respondent engaged in the "commencement of construction activities," as defined by Appendix A of the CGP.

26. Respondent submitted a NOI to EPA on August 8, 2007 for coverage under the CGP for construction at the Site.

27. At all times relevant to this Complaint, Pumpkin Hill Path is a unpaved road located on the east side of the Site where the land had been cleared and graded for construction. An unnamed tributary to Nashoba Brook ("Tributary #1") flows from south to north through a culvert under a bridge on Pumpkin Hill Path and into wetlands. The area is known as the "Pumpkin Hill Path wetland crossing" area. During certain storm

events that occurred between the time Respondent commenced construction activity at the Site in early July 2007 and late June 2008, stormwater from this area of the Site flowed into Tributary #1 and its adjacent wetlands.

28. At all times relevant to this Complaint, Cataldo Pond Road is a paved road on the west side of the Site with buildings under construction and exposed soils. Another unnamed tributary to Nashoba Brook ("Tributary #2") flows from north to south along the Site's perimeter between Cataldo Pond Road and an automobile dealership adjacent to the Site. During certain storm events that occurred between the time Respondent commenced construction activity at the Site in early July 2007 and late June 2008, stormwater from this area of the Site flowed into Tributary #2 and its adjacent wetlands.

29. Nashoba Brook flows into the Merrimack River, which, in turn, ultimately flows into the Atlantic Ocean.

30. Tributaries #1 and #2, their adjacent wetlands, Nashoba Brook, the Merrimack River, and the Atlantic Ocean each constitute "waters of the United States," as defined by 40 C.F.R. § 122.2, and, thereby, "navigable waters," as defined by Section 502(7) of the CWA, 33 U.S.C. § 1362(7).

31. On August 30, 2007, an authorized representative of EPA Region 1 conducted a stormwater compliance evaluation inspection of the Site, pursuant to Section 308 of the CWA ("August 2007 Inspection").

32. At the time of the August 2007 Inspection, Respondent had cleared a small area along Pumpkin Hill Path. The cleared area was outside a silt fence border and showed significant silt deposition. Near the silt fence, disturbed soil (apparently from ditching in the silt fence) was present on top of the deposited soil.

33. At the time of the August 2007 Inspection, a line of silt fence and hay bales along a downward slope on the northwest edge of the Site in the Cataldo Pond Road area had failed in two places, depositing silt into the vegetated area beyond the fence.

34. At the time of the August 2007 Inspection, the access area at the main entrance to the Site had a gravel base, but it was primarily covered by soil that could have been tracked off-site by vehicles onto nearby paved roads.

35. At the time of the August 2007 Inspection, the EPA inspector requested to review copies of the SWPPP and the stormwater inspection reports for the Site. Respondent's representative was able to provide a copy of the SWPPP for the Site, but not any inspection reports, before the end of the August 2007 Inspection. On September 12, 2007, Respondent forwarded copies of stormwater inspection reports for the Site dated from July 10, 2007 to September 10, 2007.

36. On January 24, 2008, EPA Region 1 issued an Information Request to Respondent pursuant to Section 308 of the CWA ("Information Request").

37. On February 22, 2008, Respondent submitted its response to the Information Request ("Response").

38. On June 25, 2008 an authorized representative of EPA Region 1 conducted a follow-up stormwater compliance evaluation inspection of the Site, pursuant to Section 308 of the CWA ("June 2008 Inspection").

39. At the time of the June 2008 Inspection, Tributary #1 was dammed up with hay bales on both sides of the Pumpkin Hill Path culvert. The dammed-up portion of Tributary #1 contained significant sediment deposition. Due to failing stormwater controls, several runoff channels along the bridge's retaining wall were eroding into

Tributary #1. Silt fencing behind several stockpiles of excavated material along Pumpkin Hill Path was failing in several places, and the water in Tributary #1 and the wetlands near this fencing was brown and turbid.

40. At the time of the June 2008 Inspection, runoff from construction activity in the Cataldo Pond Road area resulted in sediment deposition (up to 3" deep) around failing hay bales and silt fencing bordering Tributary #2. Turbid brown water was flowing beyond the hay bales into the wetlands adjacent to Tributary #2.

41. At all times relevant to this Complaint, Respondent directed or participated directly in construction activities, including clearing, grading, and excavation, at the Site, which resulted in the disturbance of greater than five acres of total land area, making Respondent's actions "industrial activity" within the meaning of 40 C.F.R. § 122.26(b)(14)(x).

42. At all times relevant to this Complaint, the stormwater discharges from the Site constitute "storm water discharges associated with industrial activity," as defined by 40 C.F.R. § 122.26(b)(14)(x), to waters of the United States.

43. At all times relevant to this Complaint, the stormwater discharges from the Site resulted in the "discharge of pollutants," as defined by Section 502(12) of the CWA, 33 U.S.C. § 1362(12).

44. At all times relevant to this Complaint, the sediment discharged from the Site into waters of the United States is a "pollutant" within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

45. At all times relevant to this Complaint, the failing stormwater controls in the Pumpkin Hill Path wetland crossing area and the Cataldo Pond Road area at the Site that

discharged pollutants are "point sources" within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

### **III. VIOLATIONS**

#### **Count 1 - Discharge of Stormwater Containing Pollutants Without a NPDES Permit**

46. Complainant hereby incorporates by reference Paragraphs 1 through 45.

47. As described above in Paragraphs 4 and 11, Sections 301(a) and 402 of the CWA, prohibit the discharge of pollutants from construction activities by any person except in compliance with a permit issued pursuant to Section 402 of the CWA.

48. As described above in Paragraph 25, Respondent began construction activity at the Site sometime in early July 2007.

49. As described above in Paragraph 26, Respondent submitted a NOI to EPA on August 8, 2007 for coverage under the CGP for construction at the Site.

50. By discharging stormwater containing pollutants at the Site during storm events from the time it began construction activity on the Site sometime in early July 2007 until the time it filed a NOI for coverage under the CGP for the Site on August 8, 2007, without authorization under any NPDES permit, Respondent violated Section 301(a) of the CWA, 33 U.S.C. § 1311.

#### **Count 2 - Failure to Apply for a NPDES Permit**

51. Complainant hereby incorporates by reference Paragraphs 1 through 50.

52. As described above in Paragraph 10, Section 308(a) of the CWA authorizes EPA to require the owner or operator of any point source to provide such information as EPA may reasonably require to carry out the objectives of the CWA, including the issuance of NPDES permits pursuant to Section 402 of the CWA.

53. As described above in Paragraph 48, Respondent began construction activity at the Site sometime in early July 2007.

54. As described above in Paragraph 49, Respondent submitted a NOI to EPA on August 8, 2007 for coverage under the CGP for construction at the Site.

55. By failing to either timely apply for an individual permit or to timely submit an NOI for coverage under the CGP before it began construction activity at the Site, Respondent violated Section 308(a) of the CWA 8(a), from sometime in early July 2007 until August 8, 2007.

**Count 3 - Discharge of Stormwater Containing Pollutants in Violation of Construction General Permit**

**Respondent failed to implement and/or maintain best management practices and to make inspections reports available at the time of an EPA on-site inspection as required by the construction general permit**

56. Complainant hereby incorporates by reference Paragraphs 1 through 55.

57. Section 3.1.D and 3.4.A. of the CGP, and the Site SWPPP, require compliance with the CGP and SWPPP from commencement of construction activity until completion of final stabilization.

58. Section 3.4.G. of the CGP, and the Site SWPPP, require measures to minimize, to the extent practicable, off-site vehicle tracking of sediments onto paved surfaces and the generation of dust.

59. Section 3.6 of the CGP, and the Site SWPPP, require that erosion and sediment controls and other protective measures be maintained in effective operating condition.

60. Section 3.10.G. of the CGP, and the Site SWPPP, requires that the inspection reports be retained as part of the SWPPP for at least three years from the date that permit coverage expires or is terminated.

61. Section 3.12.C. of the CGP requires that the SWPPP, in its entirety (including the inspection reports), be made available upon request to EPA for review and copying at the time of an on-site inspection.

62. At the time of the August 2007 Inspection, as described above in Paragraph 32, Respondent had cleared a small area along Pumpkin Hill Path. The cleared area was outside a silt fence border and showed significant silt deposition. Near the silt fence, disturbed soil (apparently from ditching in the silt fence) was present on top of the deposited soil.

63. At the time of the August 2007 Inspection, as described above in Paragraph 33, a line of silt fence and hay bales along a downward slope on the northwest edge of the Site in the Cataldo Pond Road area had failed in two places, depositing silt into the vegetated area beyond the fence.

64. At the time of the August 2007 Inspection, as described above in Paragraph 34, the access area at the main entrance to the Site had a gravel base, but it was primarily covered by soil that could have been tracked off-site by vehicles onto nearby paved roads.

65. At the time of the June 2008 Inspection, as described above in Paragraph 39, Tributary #1 was dammed up with hay bales on both sides of the Pumpkin Hill Path culvert. The dammed-up portion of Tributary #1 contained significant sediment deposition. Due to failing stormwater controls, several runoff channels along the bridge's

retaining wall were eroding into Tributary #1. Silt fencing behind several stockpiles of excavated material along Pumpkin Hill Path was failing in several places, and the water in Tributary #1 and the wetlands near this fencing was brown and turbid.

66. At the time of the June 2008 Inspection, as described above in Paragraph 40, runoff from construction activity in the Cataldo Pond Road area resulted in sediment deposition (up to 3" deep) around failing hay bales and silt fencing bordering Tributary #2. Turbid brown water was flowing beyond the hay bales into the wetlands adjacent to Tributary #2.

67. At the time of the August 2007 Inspection, as described above in Paragraph 35, stormwater inspection reports for the Site were not available to EPA for review.

68. During at least August 2007 and June 2008, Respondent's failure to maintain effectively operating BMPs, as described above in Paragraphs 32-34 and 39-40, violated the terms and conditions of a permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342, and, therefore, violated Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

69. Respondent's failure to make any stormwater inspection reports for the Site available for review and copying at the time of the August 2007 Inspection, as described above in Paragraph 67, violated the terms and conditions of a permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342, and, therefore, violated Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

### **III. NOTICE OF PROPOSED ASSESSMENT OF CIVIL PENALTY**

70. Based on the foregoing allegations, and pursuant to the authority of Section 309(g) of the CWA, 33 U.S.C. § 1319(g), the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, et seq., the Debt Collection Improvement Act

of 1996, 31 U.S.C. § 3701, et seq., and the Rule for Adjustment of Civil Monetary Penalties for Inflation, 40 C.F.R. Part 19, Complainant proposes the issuance of a Final Order against Respondent assessing a civil penalty of up to eleven thousand dollars (\$11,000) per day per violation (for violations occurring between March 15, 2004 and January 12, 2009), up to a maximum total penalty of one hundred seventy-seven thousand five hundred dollars (\$177,500).

71. In determining the amount of the penalty to be assessed under Section 309(g)(2)(B) of the CAA, 33 U.S.C. § 1319(g)(2)(B), EPA takes into account the statutory factors listed in Section 309(g)(3) of the CAA, 33 U.S.C. § 1319(g)(3), including the nature, circumstances, extent and gravity of the violation, or violations; Respondent's prior compliance history; the degree of culpability for the cited violations; any economic benefit or savings accruing to Respondent resulting from the violations; Respondent's ability to pay the proposed penalty; and such other matters as justice may require.

72. The violations alleged represent significant violations of the CWA because of the extent and duration of the violations and because compliance with the federal stormwater program is important for ensuring that stormwater runoff does not contribute to the impairment of water quality.

73. Prior to any hearing on this case, EPA will file a document specifying a proposed penalty for the CWA violations and explaining how EPA calculated the proposed penalty, as required by the Consolidated Rules.

#### **IV. NOTICE OF OPPORTUNITY TO REQUEST A HEARING**

74. Pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), and 40 C.F.R. § 22.14, EPA hereby notifies Respondent of its right to request a hearing on any material fact alleged in this Complaint and on the appropriateness of the proposed penalty. Any such hearing will be conducted in accordance with the Consolidated Rules, a copy of which is enclosed with this Complaint. Members of the public, to whom EPA must give notice of this proposed action, have a right, under Section 309(g)(4)(B) of the CWA, 33 U.S.C. § 1319(g)(4)(B), to comment on any proposed penalty, as well as be heard and present evidence at the hearing. Respondent must include any request for a hearing in a written Answer to this Complaint.

75. Respondent's Answer must comply with 40 C.F.R. § 22.15. The original and one copy of the Answer, as well as a copy of all other documents that Respondent files in this action, must be sent to:

Wanda Santiago  
Regional Hearing Clerk  
U.S. EPA, Region 1  
One Congress Street, Suite 1100 (RAA)  
Boston, MA 02114-2023

76. Respondent should also send a copy of his Answer, as well as a copy of all other documents that Respondent files in this action, to William D. Chin, the attorney assigned to represent EPA in this case, who is authorized to receive service in this matter, at:

William D. Chin  
Enforcement Counsel  
U.S. EPA, Region 1  
One Congress Street, Suite 1100 (SEL)  
Boston, MA 02114-2023

77. If Respondent fails to file a timely Answer to this Complaint, it may be found in default, which constitutes an admission of all the facts alleged in the Complaint and a waiver of the right to a hearing.

**V. CONTINUED COMPLIANCE OBLIGATION**

78. Neither assessment, nor payment, of a civil penalty pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), shall affect Respondent's continuing obligation to comply with the CWA, the regulations promulgated thereunder, or any other applicable federal, state, or local law.

Date: 07/01/09

Susan Studlien  
Susan Studlien  
Director  
Office of Environmental Stewardship  
U.S. EPA, Region 1