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BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:

GARCO CONSTRUCTION, INC.
Whidbey Island Naval Air Station
Oak Harbor, Washington

Respondent.

DOCKET NO. CWA-10-2010-0065

COMPLAINT

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 redelegate 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"), EPA hereby proposes the assessment of a civil penalty against Garco Construction, Inc. ("Respondent") for violations of the Act.

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 will provide the State of Washington an opportunity to consult within 30
3 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 “discharge of a
9 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.”

23 2.8. Section 402(p) of the Act, 33 U.S.C. § 1342(p), specifies that an NPDES permit is
24 required for any storm water discharge “associated with industrial activity.”
25

1 2.9. 40 C.F.R. § 122.26(b)(14) defines “[s]torm water discharge associated with
2 industrial activity” to include discharges associated with “[c]onstruction activity, including
3 clearing, grading and excavation” resulting in the disturbance of five acres or more of total land
4 area.

5 2.10. Section 402(p) of the Act, 33 U.S.C. § 1342(p), also authorizes EPA to issue
6 regulations that designate additional storm water discharge sources and to establish a
7 comprehensive program to regulate these additional sources. In accordance with Section 402(p),
8 40 C.F.R. § 122.26(a)(9) requires any “storm water discharge associated with small construction
9 activity” to be authorized by an NPDES permit. 40 C.F.R. § 122.26(b)(15) defines “storm water
10 discharge associated with small construction activity” to include the “discharge of storm water
11 from ... [c]onstruction activities including clearing, grading, and excavating that result in land
12 disturbance of equal to or greater than one acre and less than five acres.”

13 2.11. Section 308(a) of the Act, 33 U.S.C. § 1318(a), provides that “. . . the
14 Administrator shall require the owner or operator of any point source to (i) establish and
15 maintain such records, (ii) make such reports, (iii) install, use, and maintain such monitoring
16 equipment or methods (including where appropriate, biological monitoring methods), (iv) sample
17 such effluents (in accordance with such methods, at such locations, at such intervals, and in such
18 manner as the Administrator shall prescribe), and (v) provide such other information as he may
19 reasonably require” to carry out Section 402 of the Act, 33 U.S.C. § 1342.

20 2.12. In July of 2003, EPA reissued the NPDES General Permit for Storm Water
21 Discharges from Construction Activities (“CGP”) pursuant to Section 402 of the Act, 33 U.S.C.
22 § 1342. The CGP became effective on July 1, 2003, and expired on July 1, 2008. For
23 construction sites that obtained coverage under the CGP prior to July 1, 2008, the provisions of
24 the CGP remain in effect under an administrative extension.
25

1 3.13. During the March 24, 2009, inspection, EPA personnel examined the multiple,
2 identical copies of the SWPPP that were available on-site. All were dated July 23, 2007, and
3 none had any observable additions, deletions, or other modifications.

4 3.14. During the March 24, 2009, inspection, EPA personnel discovered that
5 Respondent had violated SWPPP requirements under the CGP:

6 3.15. The SWPPP was not properly signed and/or certified by Respondent, in violation
7 of Part 3.12.D of the CGP.

8 3.16. The SWPPP did not show three large soil stockpiles at the east end of the site.

9 3.17. The SWPPP did not include dates for major grading activities, temporary
10 construction cessation, or initiation of stabilization practices.

11 3.18. The SWPPP did not identify sources of non-storm water discharges or appropriate
12 pollution prevention measures for these non-storm water discharges.

13 3.19. The SWPPP did not include documentation supporting permit eligibility with
14 regard to the Endangered Species Act, in violation of Part 3.7 of the CGP.

15 3.20. Each SWPPP deficiency constitutes a violation of the CGP. Pursuant to Section
16 309(g) of the Act, 33 U.S.C. § 1319(g), and 40 C.F.R. Part 19, Respondent is liable for civil
17 penalties not to exceed \$16,000 per day for each day during which the violation continues.

18 **Count 2**
19 **Failure to Conduct Inspections in Violation of the CGP**

20 3.21. Paragraphs 1.1 through 3.20 are realleged and incorporated herein by reference.

21 3.22. Part 3.10.A of the CGP requires a permittee to conduct inspections: (1) “[a]t least
22 once every 7 calendar days,” or (2) “[a]t least once every 14 calendar days and within 24 hours
23 of the end of a storm event of 0.5 inches or greater.” The inspection frequency must be
24 identified in the permittee’s SWPPP.

1 the authority of Section 309(g)(2)(B) of the Act, 33 U.S.C. § 1319(g)(2)(B), EPA proposes that
2 an administrative penalty of \$60,000.00 be assessed against Respondent.

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

9 4.3. Nature, Circumstances, and Gravity of Violations: The proposed penalty reflects
10 Complainant's determination that violations of the CGP are serious violations that significantly
11 undermine the Act's regulatory scheme.

12 4.4. Respondent's Ability to Pay: Complainant has no information indicating that
13 Respondent is unable to pay the proposed penalty. Complainant will consider any information
14 submitted by Respondent related to its ability to pay the proposed penalty.

15 4.5. Respondent's History of Prior Violations: Complainant is unaware of
16 Respondent having any history of prior violations of the Act.

17 4.6. Respondent's Degree of Culpability: Respondent is presumed to know the law.
18 Respondent obtained coverage under the CGP in September 2007. Thus, it is presumed that
19 Respondent was aware of the terms and conditions of the CGP. Further, in its SWPPP
20 Respondent selected its own inspection schedule, but failed to carry out those inspections
21 pursuant to the schedule it selected.

22 4.7. Respondent's Economic Benefit: Respondent enjoyed an economic benefit as a
23 result of the failure to comply with the CGP requirements. This economic benefit includes the
24 delayed and avoided costs of installing and maintaining appropriate BMPs and structural
25

1 controls, the delayed cost of updating its SWPPP, and the avoided costs of the missed
2 inspections.

3 4.8. Other Matters as Justice May Require: Credible and consistent enforcement of
4 the CWA's requirements to apply for, obtain, and comply with NPDES permits regulating the
5 discharge of construction storm water is necessary to deter Respondent and others similarly
6 situated from violating the CWA and the terms and conditions of the CGP.

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

8 5.1. Respondent has the right to file an Answer requesting a hearing on any material
9 fact contained in this Complaint or on the appropriateness of the penalty proposed herein. Upon
10 request, the Presiding Officer may hold a hearing for the assessment of these civil penalties,
11 conducted in accordance with the provisions of the Part 22 Rules and the Administrative
12 Procedure Act, 5 U.S.C. § 551 *et seq.* A copy of the Part 22 Rules accompanies this Complaint.

13 5.2. Respondent's Answer, including any request for hearing, must be in writing and
14 must be filed with:

15 Regional Hearing Clerk
16 U.S. Environmental Protection Agency, Region 10
17 1200 Sixth Avenue, Suite 900, Mail Stop ORC-158
18 Seattle, Washington 98101

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

19 6.1. To avoid a default order being entered pursuant to 40 C.F.R. § 22.17, Respondent
20 must file a written Answer to this Complaint with the Regional Hearing Clerk within 30 days
21 after service of this Complaint.

22 6.2. In accordance with 40 C.F.R. § 22.15, Respondent's Answer must clearly and
23 directly admit, deny, or explain each of the factual allegations contained in this Complaint with
24 regard to which Respondent has any knowledge. Respondent's Answer must also state: (1) the
25

1 circumstances or arguments that are alleged to constitute the grounds of defense; (2) the facts
2 that Respondent intends to place at issue; and (3) whether a hearing is requested. Failure to
3 admit, deny, or explain any material factual allegations 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 Jennifer Byrne
11 Assistant Regional Counsel
12 U.S. Environmental Protection Agency, Region 10
13 1200 Sixth Avenue, Suite 900, Mail Stop ORC-158
Seattle, Washington 98101
(206) 553-0050

14 7.2. Note that a request for an informal settlement conference does not extend the 30-
15 day period of filing a written Answer to this Complaint, nor does it waive Respondent's right to
16 request a hearing.

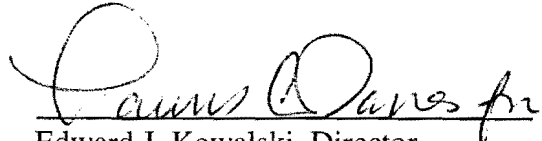
17 7.3. Respondent is advised that, after the Complaint is issued, the Part 22 Rules
18 prohibit any *ex parte* (unilateral) discussion of the merits of these or any other factually related
19 proceedings with the Administrator, the Environmental Appeals Board or its members, the
20 Regional Judicial Officer, the Presiding Officer, or any other person who is likely to advise these
21 officials in the decision of this case.

22 **VIII. RESERVATIONS**

23 8.1. Neither assessment nor payment of an administrative civil penalty pursuant to this
24 Complaint shall affect Respondent's continuing obligation to comply with: (1) the Clean Water
25

1 Act and all other environmental statutes; (2) the terms and conditions of all applicable Clean
2 Water Act permits; and (3) any Compliance Order issued to Respondent under Section 309(a) of
3 the Act, 33 U.S.C. § 1319(a), concerning the violations alleged herein.

4
5 Dated this 11th day of January, 2010

6
7 
8 Edward J. Kowalski, Director
9 Office of Compliance and Enforcement

1 **CERTIFICATE OF SERVICE**

2 I certify that the foregoing "Complaint" was sent to the following persons, in the manner
3 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
8 Seattle, WA 98101

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

10 Hollis Barnett, Vice President
11 Garco Construction, Inc.
12 4114 E. Broadway
13 Spokane, WA 99202

14 Dated: Jan. 12, 2010

15 *Amanda Eng*
16 ORC-158
17 U.S. EPA Region 10