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BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:

G.F. BARNES CONSTRUCTION INC. and
GARY and TAMARA BARNES,
Sandpoint, Idaho

Respondents.

DOCKET NO. CWA-10-2008-0149

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") by Section 309(g) of the Clean Water Act ("CWA"), 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 CWA, 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, EPA hereby proposes the assessment of a civil penalty against G.F. Barnes Construction Inc. ("Barnes Construction") and Gary and Tamara Barnes (the "Barneses") (collectively referred to as "Respondents") for violations of the CWA.

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DOCKET NO. CWA-10-2008-0149

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

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1 1.3. In accordance with Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1), and
2 40 C.F.R. § 22.38(b), EPA will consult with the State of Idaho within thirty (30) days following
3 proof of service of this complaint on Respondents.

4 **II. STATUTORY AND REGULATORY BACKGROUND**

5 2.1. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the “discharge of any
6 pollutant by any person” except as authorized by a NPDES permit issued pursuant to Section 402
7 of the CWA, 33 U.S.C. § 1342.

8 2.2. Section 502(12) of the CWA, 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 CWA, 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 CWA, 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” to
15 waters that are “interstate waters” and/or waters that “may be susceptible to use in interstate or
16 foreign commerce, including all waters which are subject to the ebb and flow of the tide”

17 2.6. Section 502(14) of the CWA, 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 CWA, 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 CWA, 33 U.S.C. § 1342, specifies that an NPDES permit is
24 required for any storm water discharge “associated with industrial activity.” Section 402(p) also
25

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
5 grading and excavation” resulting in the disturbance of at least five acres of total land area.

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

14 2.11. In July of 2003, EPA reissued the NPDES General Permit for Storm Water
15 Discharges from Construction Activities (“CGP”) pursuant to Section 402 of the CWA, 33
16 U.S.C. § 1342. The CGP became effective on July 1, 2003 and expired on July 1, 2008. For
17 construction sites that obtained coverage under the CGP prior to July 1, 2008, the provisions of
18 the CGP remain in effect under an administrative extension.

19 2.12. The CGP authorizes certain discharges of storm water associated with
20 construction activities. The CGP’s coverage extends to all facilities in the State of Idaho and
21 requires permittees to comply with the conditions and requirements set forth in the CGP.

22 2.13. To obtain coverage for storm water discharges from a construction site under the
23 CGP, a discharger must first “prepare and submit a complete and accurate Notice of Intent.”
24 CGP at Part 2.

1 2.14. The CGP defines a “discharger” as the operator of the construction site. An
2 “operator” is defined as both (1) “[t]he party [who] has operational control over construction
3 plans and specifications ...,” and (2) “[t]he party [who] has day-to-day operational control of
4 those activities at a project which are necessary to ensure compliance with a [storm water
5 pollution prevention plan] for the site or other permit conditions.” CGP at Appendix A.

6 2.15. Section 308(a) of the CWA, 33 U.S.C. § 1318(a), authorizes EPA to require the
7 owner or operator of any point source to provide such information as may be reasonably required
8 in carrying out Section 402 of the CWA, 33 U.S.C. § 1342. Pursuant to Section 308(a), EPA has
9 promulgated NPDES permit application requirements. Among these application requirements
10 are:

- 11 ▪ the requirement set forth in 40 C.F.R. § 122.21(a)(1) that “[a]ny person
12 who discharges or proposes to discharge pollutants ... must submit a
complete application to [EPA],”
- 13 ▪ the requirement set forth in 40 C.F.R. § 122.26(c)(1) that “[d]ischarges of
14 storm water associated with industrial activity and with small construction
activity are required to apply for an individual permit or seek coverage
15 under a promulgated storm water general permit,” and
- 16 ▪ the requirement set forth in 40 C.F.R. § 122.21(c)(1) that regulated
17 dischargers of construction storm water submit an NPDES permit
application or a Notice of Intent to apply for coverage under a NPDES
18 general permit at least ninety (90) days before the date on which
construction is to commence unless an applicable NPDES general permit
19 specifies a different submittal date.

20 2.16. Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1), authorizes EPA to assess
21 administrative penalties against any person who violates Section 301 or 308 of the CWA, 33
22 U.S.C. § 1311 or 1318.

1 3.7. The Pend Oreille River and Lake Pend Oreille are susceptible to use in interstate
2 commerce.

3 3.8. The Pend Oreille River is an interstate water body.

4 3.9. Therefore, the Pend Oreille River, Lake Pend Oreille, Sand Creek, and the
5 unnamed tributary are "navigable waters" as defined in Section 502(7) of the CWA, 33 U.S.C.
6 § 1362(7), and are "waters of the United States" as defined in 40 C.F.R. § 122.2.

7 3.10. As the operator of the construction site that discharges storm water into waters of
8 the United States, Respondent Barnes Construction was required to obtain coverage under the
9 CGP or obtain an individual NPDES permit before beginning construction activities.

10 3.11. On or about April 4, 2005, Respondent Barnes Construction began construction
11 activities that resulted in the clearing, grading, and/or excavation of one or more acres of land at
12 the Site.

13 3.12. On or about May 18, 2006, the Idaho Department of Environmental Quality
14 ("IDEQ") conducted an inspection of the Site.

15 3.13. On or about May 31, 2006, EPA conducted an inspection of the Site.

16 3.14. On or about June 21, 2006, Barnes Construction submitted a Notice of Intent for
17 coverage under the CGP.

18 3.15. On or about June 1, 2007, Bonner County inspectors visited the Site.

19 3.16. On or about June 11, 2007 and October 19, 2007, an IDEQ inspector visited the
20 Site.

21 **Count 1**
22 **(Failure to Apply for a Permit Against Barnes Construction)**

23 3.17. Paragraphs 1.1 through 3.16 are realleged and incorporated herein by reference.
24
25

1 3.18. At the time it commenced construction at the Site, Barnes Construction was a
2 “person who discharges or proposes to discharge pollutants” within the meaning of 40 C.F.R.
3 § 122.21(a)(1).

4 3.19. At the time it commenced construction at the Site, Barnes Construction was a
5 “discharger of storm water associated with industrial activity” within the meaning of 40 C.F.R.
6 § 122.26(c) and was an “operator” within the meaning of the CGP.

7 3.20. As the operator of the Site, Barnes Construction was required to either submit a
8 Notice of Intent to obtain coverage under the CGP or apply for an individual NPDES permit
9 before beginning construction activities at the Site.

10 3.21. Between or about April 2005 and June 2006, Barnes Construction failed to apply
11 for an individual NPDES permit or properly seek coverage under the CGP.

12 3.22. Barnes Construction’s failure to timely apply for an NPDES permit placed Barnes
13 Construction in violation of the requirements imposed pursuant to Section 308 of the CWA, 33
14 U.S.C. § 1318. Pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), and 40 C.F.R Part
15 19, Barnes Construction is liable for civil penalties not to exceed \$11,000 per day for each day
16 during which the violation continues.

17 **Count 2**
18 **(Discharge Without a Permit Against Barnes Construction)**

19 3.23. Paragraphs 1.1 through 3.22 are realleged and incorporated herein by reference.

20 3.24. During the May 18, 2006 Site inspection, IDEQ observed a discharge of
21 sediment-laden water into a drainage ditch adjacent to the Site. The water in the ditch flowed
22 into the unnamed tributary to Schweitzer Creek.

23 3.25. During the May 31, 2006 Site inspection, EPA observed a discharge of sediment-
24 laden water into a drainage ditch adjacent to the Site. The water in the ditch flowed into the
25 unnamed tributary to Schweitzer Creek.

1 3.26. Therefore, the construction activities at the Site resulted in the discharge of
2 "storm water associated with industrial activity" to the unnamed tributary of Schweitzer Creek.

3 3.27. The storm water was contaminated with, among other things, sediment, sand, and
4 dirt.

5 3.28. The drainage ditch adjacent to the Site described in Paragraphs 3.21 and 3.22
6 constitutes a "point source" within the meaning of Section 502(14) of the CWA, 33 U.S.C.
7 § 1362(14).

8 3.29. The sediment, sand and dirt in the storm water constitute "pollutant[s]" within the
9 meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

10 3.30. By causing such storm water to enter waters of the United States, Barnes
11 Construction engaged in a "discharge of pollutants" from a point source within the meaning of
12 Sections 301(a) and 502(12) of the CWA, 33 U.S.C. § 1311(a) and 1362(12).

13 3.31. Barnes Construction's discharges of storm water were not authorized by a permit
14 issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342. Therefore, Barnes Construction
15 violated Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

16 3.32. Each day that storm water was discharged without the required permit constitutes
17 an additional day of violation of Section 301 of the CWA, 33 U.S.C. § 1311. Pursuant to Section
18 309(g) of the CWA, 33 U.S.C. § 1319(g), and 40 C.F.R. Part 19, Barnes Construction is liable
19 for civil penalties not to exceed \$11,000 per day for each day during which the violation
20 continues.

21 **Count 3**
22 **(Failure to Properly Select, Install and/or Maintain Best Management Practices**
23 **in violation of the CGP Against Barnes Construction)**

24 3.33. Paragraphs 1.1 through 3.32 are realleged and incorporated herein by reference.
25

1 3.34. Part 3.13.A of the CGP requires the construction site operator to select, install and
2 maintain best management practices ("BMPs") in accordance with sound engineering practices.

3 3.35. At the time of the June 1, 2007 Site visit, Bonner County inspectors observed
4 numerous BMP deficiencies including, but not limited to, improper installation of silt fences,
5 improper maintenance of the straw bales along the roadside ditch, improper maintenance of
6 stabilizer rock at the entrance of the Site, and improper maintenance of the erosion control
7 blankets.

8 3.36. At the time of the June 11, 2007 Site visit, the IDEQ inspector observed
9 numerous BMP deficiencies including, but not limited to, improper maintenance of the straw
10 bales along the roadside ditch, improper maintenance of the check dams in the roadside ditch,
11 and improper installation of the silt fences at the Site.

12 3.37. At the time of the October 19, 2007 Site visit, the IDEQ inspector observed
13 numerous BMP deficiencies including, but not limited to, improper installation of silt fences on a
14 slope at the Site. In addition, the IDEQ inspector observed that Barnes Construction failed to
15 select and install BMPs on a slope at the Site.

16 3.38. Therefore, Barnes Construction failed to properly install and maintain BMPs at
17 the Site, in violation of Part 3.13.A of the CGP.

18 3.39. Pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), and 40 C.F.R. Part
19 19, Barnes Construction is liable for civil penalties not to exceed \$11,000 per day for each day
20 during which the violation continues.

21
22 **Count 4**
23 **(Failure to Remove Off-Site Accumulation of Sediment**
24 **in violation of the CGP)**

25 3.40. Paragraphs 1.1 through 3.39 are realleged and incorporated herein by reference.

1 3.50. Part 3.1 of the CGP requires an operator of a construction site to prepare a storm
2 water pollution prevention plan ("SWPPP"). The required contents of a SWPPP are set forth in
3 Part 3 of the CGP.

4 3.51. In reviewing the SWPPP, EPA found that it failed to meet all of the SWPPP
5 requirements in the CGP, as set forth in Paragraphs 3.52-3.67, below.

6 3.52. The SWPPP did not identify all potential sources of pollutant that may reasonably
7 be expected to affect the quality of storm water discharges from the Site, in violation of Part
8 3.1.B.1 of the CGP.

9 3.53. The SWPPP did not identify all the operators for the Site and did not identify the
10 operators' areas of control at the Site, in violation of Part 3.3.A of the CGP.

11 3.54. The SWPPP did not describe the sequence and timing of activities that disturb soil
12 at the Site, in violation of Part 3.3.B.2 of the CGP.

13 3.55. The SWPPP did not include a legible site map with all required components, in
14 violation of Part 3.3.C of the CGP.

15 3.56. The SWPPP did not identify the location and description of any storm water
16 discharge associated with industrial activity other than construction at the Site, in violation of
17 Part 3.3.D of the CGP.

18 3.57. The SWPPP did not identify the general sequence during the construction process
19 in which the control measures will be implemented and which operator is responsible for the
20 control measure's implementation in violation of Part 3.4.A of the CGP.

21 3.58. The SWPPP did not include a schedule of when the interim and permanent
22 stabilization practices will be implemented at the Site, in violation of Part 3.4.B of the CGP.

1 3.59. The SWPPP did not include the dates for major grading activities, dates when
2 construction activities would temporarily or permanently cease on a portion of the Site, and dates
3 when stabilization measures are initiated, in violation of Part 3.4.C of the CGP.

4 3.60. The SWPPP did not include a description of structural practices to divert flows
5 from exposed soils, retain/detain flows or otherwise limit runoff from exposed areas of the Site,
6 in violation of Part 3.4.D of the CGP.

7 3.61. The SWPPP did not include a description of the measures that will be used to
8 minimize the off-site vehicle tracking and generation of dust, in violation of Part 3.4.G of the
9 CGP.

10 3.62. The SWPPP did not include a description of construction and waste materials
11 expected to be stored on-site, in violation of Part 3.4.H of the CGP.

12 3.63. The SWPPP did not include a description of pollutant sources from areas other
13 than construction and a description of controls and measures that will be implemented at those
14 sites, in violation of Part 3.4.I of the CGP.

15 3.64. The SWPPP did not identify all allowable sources of non-storm water discharges,
16 in violation of Part 3.5 of the CGP.

17 3.65. The SWPPP did not include documentation supporting permit eligibility with
18 regard to the Endangered Species Act, in violation of Part 3.7 of the CGP.

19 3.66. The SWPPP did not include a copy of the CGP and certified Notice of Intent
20 submitted to EPA, in violation of Part 3.8 of the CGP.

21 3.67. The SWPPP was not properly signed and/or certified, in violation of Part 3.12.D
22 of the CGP.

23 3.68. Each SWPPP deficiency constitutes a violation of the CGP. Pursuant to Section
24 309(g) of the CWA, 33 U.S.C. § 1319(g), and 40 C.F.R. Part 19, Barnes Construction is liable
25

1 for civil penalties not to exceed \$11,000 per day for each day during which the violation
2 continues.

3 **Count 7**
4 **(Joint and Several Liability Against Gary and Tamara Barnes)**

5 3.69. Paragraphs 1.1 through 3.68 are realleged and incorporated herein by reference.

6 3.70. Since the incorporation of Barnes Construction, Gary and Tamara Barnes have
7 been the sole officers of Barnes Construction.

8 3.71. Gary Barnes personally participated in or was responsible for the violations that
9 occurred at the Site. Therefore, Gary Barnes is directly and personally liable for the CWA
10 violations that occurred at the Site.

11 3.72. Gary and Tamara Barnes have failed to respect the separate identity of Barnes
12 Construction by, among other things: failing to observe corporate formalities; commingling
13 personal funds with those of Barnes Construction; and, treating the assets of Barnes Construction
14 as their own. Therefore, based on piercing the corporate veil of Barnes Construction, Gary and
15 Tamara Barnes are personally liable for the penalty to be assessed for the CWA violations.

16 **IV. PROPOSED PENALTY**

17 4.1. Based on the foregoing allegations, and pursuant to the authority of Section
18 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), EPA proposes that an administrative
19 penalty of Seventy Thousand Dollars (\$70,000.00) be assessed against Respondents.

20 4.2. EPA proposes this penalty amount after considering the applicable penalty factors
21 in Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3). These statutory penalty factors are as
22 follows: the nature, circumstances, extent, and gravity of the violation or violations, and, with
23 respect to Respondents, ability to pay, any prior history of such violations, the degree of
24 culpability, economic benefit or savings (if any) resulting from the violation, and such other
25 matters as justice may require.

1 4.3. Nature, Circumstances, and Gravity of Violations: The proposed penalty reflects
2 EPA's determination that a failure to apply for an NPDES permit, any unpermitted discharges, or
3 a failure to comply with the CGP are serious violations which significantly undermine the
4 CWA's regulatory scheme. The gravity of the violation is aggravated in this case because, prior
5 to obtaining permit coverage, Respondents not only failed to apply for the requisite NPDES
6 permit, they also failed to implement adequate BMPs and structural controls to minimize the
7 adverse environmental effects of storm water discharges which resulted in unpermitted
8 discharges of pollutants into the unnamed tributary of Schweitzer Creek. Moreover,
9 Respondents were aware that there could be significant erosion and storm water runoff from the
10 Site. Even after Respondents obtained coverage under the CGP, Respondent failed to properly
11 implement BMPs and structural controls at the Site and failed to prepare an adequate SWPPP in
12 compliance with the CGP.

13 4.4. Respondent's Ability to Pay: EPA has reviewed publicly available information
14 on Respondents' financial condition as well as information provided to EPA by Respondents and
15 has found no information indicating that Respondents would be unable to pay the proposed
16 penalty. EPA will consider any additional information submitted by Respondents related to their
17 ability to pay the proposed penalty.

18 4.5. Respondent's History of Prior Violations: EPA is unaware of Respondents
19 having any history of prior violations of the CWA.

20 4.6. Respondent's Degree of Culpability: The proposed penalty reflects the fact that,
21 in 2005, Respondents were told by their engineer and consultant that there were significant
22 erosion and storm water runoff issues at the Site. Moreover, in January 2005, Respondents'
23 consultant wrote in a document provided to Respondents that NPDES coverage would be
24 required for the Site. However, Respondents did not obtain NPDES permit coverage until after
25

1 EPA's May 2006 Site inspection, approximately one year after construction activities began at
2 the Site. Prior to obtaining coverage under the CGP, Respondents' construction activities at the
3 Site resulted in the discharge of pollutants into waters of the United States in violation of Section
4 301(a) of the CWA, 33 U.S.C. § 1311(a).

5 4.7. Respondents' Economic Benefit: Prior to obtaining coverage under the CGP,
6 Respondents enjoyed an economic benefit as a result of their unpermitted activities described
7 above. This economic benefit includes the delayed cost associated with timely preparing and
8 submitting a Notice of Intent, the delayed costs associated with preparing and implementing a
9 SWPPP, the avoided costs of installing appropriate BMPs and structural controls, the avoided
10 costs of conducting weekly inspections, and the avoided costs of maintaining appropriate BMPs
11 and structural controls.

12 4.8. Other Matters as Justice May Require: Credible and consistent enforcement of
13 the CWA's requirements to apply for, obtain, and comply with NPDES permits regulating the
14 discharge of construction storm water is necessary to deter Respondents and other similarly
15 situated from violating the law.

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

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

22 5.2. Respondents' Answer, including any request for hearing, must be in writing and
23 must be filed with:

24 Regional Hearing Clerk
25 U.S. Environmental Protection Agency, Region 10

1 1200 Sixth Avenue, Suite 900, Mail Stop ORC-158
2 Seattle, Washington 98101

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

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

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

14 **VII. INFORMAL SETTLEMENT CONFERENCE**

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

19 Courtney Hamamoto
20 Assistant Regional Counsel
21 U.S. Environmental Protection Agency, Region 10
22 1200 Sixth Avenue, Suite 900, Mail Stop ORC-158
23 Seattle, Washington 98101
24 (206) 553-1477
25

1 **CERTIFICATE OF SERVICE**

2 I certify that the foregoing "Complaint" and "Part 22 Rules" was sent to the following
3 persons, in the manner specified, on the date below:

4 Original and one copy, hand-delivered:

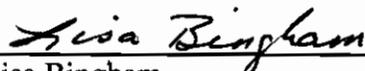
5 Carol Kennedy, Regional Hearing Clerk
6 U.S. Environmental Protection Agency, Region 10
7 1200 Sixth Avenue, Suite 900, Mail Stop ORC-158
Seattle, WA 98101

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

9
10 Richard Campbell
11 Campbell, Bissell & Kirby, PLLC
12 416 Symons Building
7 South Howard Street
Spokane, WA 99201

13 Gary and Tamara Barnes
14 G.F. Barnes Construction, Inc.
15 P.O. Box 122
Liberty Lake, WA 99019

16 Dated: September 12, 2008

17 
18 Lisa Bingham
19 Secretary, EPA Region 10
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