

**BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION III  
1650 Arch Street  
Philadelphia, Pennsylvania 19103-2029**

In the Matter of	:	Proceeding to Assess Class II Administrative
	:	Penalty under Section 309(g)
	:	of the Clean Water Act
Dominion Boulevard Partners, LLC	:	Docket No. CWA-03-2011-0089
5299 Greenwich Road	:	AMENDED ADMINISTRATIVE
Virginia Beach, VA 23462	:	PENALTY COMPLAINT
	:	and
Respondent	:	NOTICE OF OPPORTUNITY
	:	TO REQUEST HEARING

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EPA REGION III, PHILADELPHIA

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**I. STATUTORY AUTHORITY**

1. This Amended Administrative Penalty Complaint is issued under the authority vested in the Administrator of the United States Environmental Protection Agency (“EPA”) by Section 309(g)(1)(A) of the Clean Water Act (“Act”), 33 U.S.C. § 1319(g)(1)(A). The Administrator has delegated this authority to the Regional Administrator of EPA Region III, who has further delegated this authority to the Director of the Water Protection Division of EPA Region III (“Complainant”).

**II. FACTUAL ALLEGATIONS AND FINDING OF VIOLATIONS**

2. Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant by any person from a point source into waters of the United States except in compliance with a National Pollutant Discharge Elimination System (“NPDES”) permit issued pursuant to Section 402 of the Act, 33 U.S.C. § 1342, and 40 C.F.R. Part 122, or other specific authorization.
3. Section 402(p) of the Act, 33 U.S.C. § 1342(p), and 40 C.F.R. §§ 122.1 and 122.26 provide that facilities with stormwater discharges associated with industrial activity are “point sources” subject to NPDES permitting requirements under Section 402(a) of the Act, 33 U.S.C. § 1342(a).
4. The term “industrial activity” includes, among others, “[c]onstruction activity including clearing, grading and excavation, except operations that result in the disturbance of less than five 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[.]” 40 C.F.R. § 122.26(b)(14)(x).

5. Operators who discharge stormwater associated with industrial activities to waters of the United States are required to seek NPDES permit coverage. 40 C.F.R. § 122.26(c).
6. The Commonwealth of Virginia has been approved by EPA to administer the NPDES program in the Commonwealth of Virginia. Pursuant to the authority of the Act, and the NPDES program approval, and the Virginia State Water Control Law, Virginia has issued Virginia Pollutant Discharge Elimination System (“VPDES”) Permit No. VAR10 [Virginia Stormwater Management Program (“VSMP”) General Permit for Discharges of Stormwater from Construction Activities] (“Permit”). The effective date of the Permit is July 1, 2009 and the expiration date is June 30, 2014.
7. VPDES Permit No. VAR10 authorizes discharges of stormwater associated with construction activities to waters of the United States (including discharges to, or through municipal separate storm sewer systems), but only in accordance with the conditions of the permit and the Storm Water Pollution Prevention Plan (“SWPPP”) required by the permit.
8. Dominion Boulevard Partners, LLC (“Respondent”) is a “person” within the meaning of Section 502(5) of the Act, 33 U.S.C. § 1362(5) and 40 C.F.R. § 122.2. Eric C. Anderson is the Manager of Dominion Boulevard Partners.
9. At all times relevant to this Order, upon information and belief, Respondent was the owner and operator of a site known as Equestrian Estates North (“Site”), located in Chesapeake, Virginia.
10. At the Site, the Respondent has been at all relevant times engaged in construction activity that discharges stormwater from a point source to Lindsey Canal. The construction activity at the Site has disturbed or will disturb approximately 93 acres of land.
11. Lindsey Canal is a tributary of New Mill Creek, which in turn is a tributary of the Southern Branch of the Elizabeth River. Both New Mill Creek and the Southern Branch of the Elizabeth River are “waters of the United States” as that term is defined in Section 502(7) of the Act, 33 U.S.C. § 1362(7) and 40 C.F.R. § 122.2, and Lindsey Canal is therefore a water of the United States. In the alternative, Lindsey Canal is a point source discharging into New Mill Creek, which is a water of the U.S.
12. Pursuant to Sections 402(a) and 402(p) of the Act, 33 U.S.C. §§ 1342(a) and (p), and VPDES Permit No. VAR10, Mr. Anderson submitted on behalf of Dominion Boulevard Partners a VSMP General Permit Registration Statement on or about May 6, 2009, and received approval, effective July 1, 2009, for the discharge of stormwater from construction activities at the Site under VPDES Permit No. VAR10-10-100499.

13. On June 14, 2010, representatives of EPA Region III and the Virginia Department of Conservation and Recreation (“VA DCR”) conducted an inspection at the Site.

**Failure to amend the SWPPP**

14. Paragraph II(A)(1) of the Permit states that “A stormwater pollution prevention plan (SWPPP) shall be developed prior to submission of a registration statement and implemented for the construction activity covered by this permit.”
15. Paragraph II(C)(1) of the Permit states that “The operator shall amend the SWPPP whenever there is a change in design, construction, operation, or maintenance that has a significant effect on the discharge of pollutants to state waters and that has not been previously addressed in the SWPPP.”
16. The Respondent’s SWPPP incorporates by reference the Erosion and Sedimentation Control Plan (“E&S Plan”) prepared by Engineering Resources Group, LLC dated April 20, 2009.
17. The E&S Plan identifies a single “area of staging and stockpile” approximately 2,800 square feet in size located at the north end of Section 2 of the stormwater pond.
18. At the time of the June 2010 inspection, EPA representatives did not observe any stockpile at the north end of Section 2 of the stormwater pond.
19. At the time of the June 2010 inspection, EPA representatives observed a large stockpile of sand approximately 46,000 square feet in size located to the south of Section 2 of the stormwater pond (“Stockpile”) and drop pipes were installed between the Stockpile and Section 2 of the stormwater pond.
20. Photographs of the Site show that the Stockpile has been in the same place to the south of the stormwater pond as early as January 26, 2010, and was still there during an EPA visit to the area on January 25, 2011.
21. At the time of the June 2010 inspection, and in the materials submitted by Mr. Anderson to EPA on December 7, 2010, EPA representatives observed that neither the E&S Plan nor the SWPPP were amended to include the Stockpile or the drop pipes.

**Failure to implement the SWPPP: No stabilization**

22. Paragraph II(A)(7) of the Permit states that “The operator must implement the SWPPP as written and updated in accordance with Section II C from commencement of construction activity until final stabilization is complete.”
23. The SWPPP states that “No areas shall be left denuded for any period longer than seven (7) days.”

24. At the time of the June 2010 inspection, EPA representatives observed that the Stockpile was not stabilized.
25. Neither was the Stockpile stabilized during a DCR inspection on December 14, 2010, and during the January 25, 2011, EPA visit to the area.

**Failure to properly install or maintain control measures: Silt fences/check dams**

26. Paragraph II(A)(7) of the Permit states that “The operator must implement the SWPPP as written and updated in accordance with Section II C from commencement of construction activity until final stabilization is complete.”
27. Paragraph II(D)(2)(a)(2) of the Permit states that “All control measures required by the [E&S] plan shall be designed, installed, and maintained in accordance with good engineering practices and the minimum standards of the Virginia Erosion and Sediment Control Law (§ 10.1-560 et seq. of the Code of Virginia) and regulations (4VAC50-30).”
28. The E&S Plan identifies that the “area of staging and stockpile” shall be surrounded on all sides by silt fence.
29. At the time of the June 2010 inspection, EPA representatives observed that there was not any silt fence surrounding the Stockpile. Silt fencing was also missing from around the Stockpile as early as January 26, 2010.
30. At the time of the June 2010 inspection, EPA representatives observed that silt fences around the perimeter of the Site and check dams on site had not been properly designed, installed, or maintained.
31. During a December 14, 2010 inspection conducted by DCR, the inspectors observed that there was silt fencing around the Stockpile, but the fencing had not been properly maintained.
32. During a visit to the area by EPA on January 25, 2011, sections of the silt fencing around the Stockpile were missing.

**Failure to conduct inspections after runoff storm events**

33. Paragraph II(D)(4)(a) of the Permit states that “Inspections shall be conducted (i) at least every seven calendar days; or (ii) at least once every 14 calendar days and within 48 hours following any runoff producing storm event.”
34. The SWPPP states that “Inspections shall be conducted at least once every fourteen (14) calendar days and within 48 hours of the end of a storm event that is 0.5 inch or greater.”

35. Self-inspection reports submitted to EPA by Site representatives after the June 2010 inspection indicate that inspections were not conducted within 48 hours of several 0.5-inch or greater storm events.

#### **Failure to post notice**

36. Paragraph II(B)(4) of the Permit states that "A sign or other notice must be posted conspicuously near the main entrance of the construction site. The sign or other notice must contain the following information: a. A copy of the permit coverage letter that includes the registration number for the construction activity; and b. The internet address at which a copy of the SWPPP may be found or the location of a hard copy of the SWPPP and name and telephone number of a contact person for scheduling viewing times."
37. At the time of the June 2010 inspection, EPA representatives did not observe any sign or notice posted near the main entrance of the Site.
38. By violating the conditions of the VPDES Permit No. VAR10-10-100499, Respondent violated the Act and is liable under Section 309(g) of the Act, 33 U.S.C. § 1319(g).

#### **III. PROPOSED CIVIL PENALTY**

45. Pursuant to Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996, and the subsequent Civil Monetary Penalty Inflation Adjustment Rule, 40 C.F.R. Part 19 (effective January 12, 2009), any person who has violated any NPDES permit condition or limitation after January 12, 2009 is liable for an administrative penalty not to exceed \$16,000 per day for each such violation occurring after January 12, 2009 up to a total penalty amount of \$177,500.
46. Based upon the foregoing allegations, and pursuant to the authority of Section 309(g)(2)(B) of the Act, and in accordance with the enclosed "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; Final Rule", 40 C.F.R. Part 22), Complainant hereby proposes to issue a Final Order Assessing Administrative Penalties to the Respondent in the amount of **sixty-one thousand dollars (\$61,000)**. This does not constitute a "demand" as that term is defined in the Equal Access to Justice Act, 28 U.S.C. § 2412.
47. The proposed penalty was determined after taking into account the nature, circumstances, extent and gravity of the violation. Respondent's prior compliance history, Respondent's ability to pay, the degree of culpability for the cited violations, and any economic benefit or savings to Respondent because of the violations, all of which are factors identified at Section 309(g)(3) of the Clean Water Act, 33 U.S.C. § 1319(g)(3). In addition, to the extent that facts or circumstances unknown to Complainant at the time of issuance of this Amended Complaint become known after issuance of this Amended Complaint, such

facts or circumstances may also be considered as a basis for adjusting the proposed administrative penalty.

48. The Regional Administrator or his delegate may issue a Final Order Assessing Administrative Penalties after thirty (30) days and without further proceedings following Respondent's receipt of this Amended Complaint, unless Respondent, within that time, either pays the penalty or responds to the allegations in the Amended Complaint and requests a hearing according to the terms of Section IV, below.
49. Neither assessment nor payment of an administrative civil penalty pursuant to Section 309 of the Act, 33 U.S.C. § 1319, shall affect Respondent's continuing obligation to comply with the Act, any other Federal or State laws, and with any separate Compliance Order issued under Section 309(a) of the Act, 33 U.S.C. § 1319(a), for the violations alleged herein.

#### **IV. ANSWER TO AMENDED COMPLAINT AND OPPORTUNITY TO REQUEST HEARING**

50. Respondent must file an Answer to this Amended Complaint; failure to file an Answer may result in entry of a Default Judgment against Respondent.
51. Upon issuance of a Default Judgment, the civil penalty proposed herein shall become due and payable.
53. Respondent's failure to fully pay the entire penalty, assessed by the Default Order, by the due date may result in a civil action to collect the assessed penalty, plus interest, attorney's fees, costs, and an additional quarterly nonpayment penalty pursuant to Section 309(g)(9) of the Act, 33 U.S.C. § 1319(g)(9).
54. In addition, the default penalty is subject to the provisions relating to imposition of interest, penalty and handling charges set forth in the Federal Claims Collection Act at the rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717.
55. Any Answer must clearly and directly admit, deny, and/or explain each of the factual allegations contained in the Amended Complaint with respect to which the Respondent has any knowledge, or clearly and directly state that the Respondent has no knowledge as to particular factual allegations in the Amended Complaint.
56. The Answer shall also state the following:
  - a. the specific factual and legal circumstances or arguments which are alleged to constitute any grounds of defense;
  - b. the specific facts that Respondent disputes;
  - c. Respondent's basis for opposing the proposed penalty; and

d. whether Respondent requests a hearing.

**Failure to admit, deny or explain any of the factual allegations in the Amended Complaint constitutes admission of the undenied allegations.**

57. Pursuant to Section 309(g)(2)(B) of the Act, 33 U.S.C. § 1319(g)(2)(B), Respondent may request a hearing on the proposed civil penalty within thirty (30) days of receiving this Amended Complaint.
58. At the hearing, Respondents may contest any material fact contained in the Findings listed in Section II, above, and the appropriateness of the amount of the proposed civil penalty in Section III, above.
59. The procedures for hearings are set out in 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*, (Consolidated Rules), 40 C.F.R. Part 22, a copy of which is enclosed.
60. Any Answer to this Amended Complaint and any Request for Hearing must be filed within thirty (30) days of receiving this Amended Complaint with the following:

Regional Hearing Clerk (3RC00)  
U.S. Environmental Protection Agency, Region III  
1650 Arch Street  
Philadelphia, PA 19103-2029

61. Copies of any Answer to this Amended Complaint and any Request for Hearing, along with any and all other documents filed in this action, shall also be sent to the following:

Ms. Nina Rivera (3RC20)  
Assistant Regional Counsel  
U.S. Environmental Protection Agency, Region III  
1650 Arch Street  
Philadelphia, PA 19103-2029

**V. SETTLEMENT CONFERENCE**

62. EPA encourages settlement of proceedings at any time after issuance of a complaint if such settlement is consistent with the provisions and objectives of the Act.
63. Whether or not a hearing is requested, the Respondent may request a settlement conference with Complainant to discuss the allegations of the Amended Complaint and the amount of the proposed civil penalty. **However, a request for a settlement conference does not relieve the Respondent of the responsibility to file a timely Answer to the Amended Complaint.**

64. In the event settlement is reached, its terms shall be expressed in a written Consent Agreement prepared by Complainant, signed by the parties, and incorporated into a Final Order signed by the Regional Administrator or his delegatee.
65. The execution of such a Consent Agreement shall constitute a waiver of Respondent's right to contest the allegations of the Amended Complaint or to appeal the Final Order accompanying the Consent Agreement.
66. If you wish to arrange a settlement conference or if you have any questions related to this proceeding, please contact the Ms. Nina Rivera, Assistant Regional Counsel, U.S. Environmental Protection Agency, Region III, at (215) 814-2667 before the expiration of the thirty (30) day period following your receipt of this Amended Complaint. If you are represented by legal counsel, you must have your counsel contact Ms. Rivera on your behalf. **Once again, however, such a request for a settlement conference does not relieve the Respondent of the responsibility to file an Answer within 30 days following Respondent's receipt of this Amended Complaint.**

#### VI. QUICK RESOLUTION

67. In accordance with 40 C.F.R. § 22.18(a), and subject to the limitations of 40 C.F.R. § 22.45, Respondent may resolve this proceeding at any time by paying the specific penalty proposed in this Amended Complaint.
68. If Respondent pays the specific penalty proposed in this Amended Complaint within thirty (30) days of receiving this Amended Complaint, then, pursuant to 40 C.F.R. § 22.18(a)(1), no Answer need be filed.
69. If Respondent wishes to resolve this proceeding by paying the penalty proposed in this Amended Complaint instead of filing an Answer, but needs additional time (more than thirty (30) days) to pay the penalty, pursuant to 40 C.F.R. § 22.18(a)(2), Respondent may file a written statement with the Regional Hearing Clerk within thirty (30) days after receiving this Amended Complaint stating that Respondent agrees to pay the proposed penalty in accordance with 40 C.F.R. § 22.18(a)(1) but needs additional time in which to do so.
70. Such written statement need not contain any response to, or admission of, the allegations in the Amended Complaint.
71. Such statement shall be filed with the:

Regional Hearing Clerk (3RC00)  
U.S. EPA, Region III  
1650 Arch Street  
Philadelphia, Pennsylvania 19103-2029

and a copy shall be provided to:

Ms. Nina Rivera (3RC20)  
Assistant Regional Counsel  
U.S. EPA, Region III  
1650 Arch Street  
Philadelphia, Pennsylvania 19103-2029

Upon filing such a written statement, Respondent will receive an additional thirty (30) days in which to pay the proposed penalty; thus, Respondent must pay the full amount of the proposed penalty within sixty (60) days of receiving this Amended Complaint.

72. **If Respondent chooses to proceed pursuant to 40 C.F.R. § 22.18(a)(2) instead of filing an answer, but then fails to pay in full the proposed penalty within thirty (30) days of receipt of this Amended Complaint, or within sixty (60) days of receipt of this Amended Complaint should Respondent file a written statement with the Regional Hearing Clerk pursuant to 40 C.F.R. § 22.18(a)(2), the Respondent may be subject to default pursuant to 40 C.F.R. § 22.17.**

73. Payment of the penalty shall be made by one of the following methods and shall reference Respondent's name and address and the Docket number of this action Docket No. CWA-03-2011-0089:

a. Via certified or cashier's check drawn on a bank with branches in the United States, made payable to "United States Treasury."

i. If sent via first-class mail, to:

U.S. Environmental Protection Agency  
Fines & Penalties  
Cincinnati Finance Center  
P. O. Box 979077  
St. Louis, MO 63197-9000  
Contact: Eric Volck 513-487-2105

ii. If sent via UPS, Federal Express, or Overnight Mail, to:

U.S. Bank  
Government Lockbox 979077  
U.S. EPA, Fines & Penalties  
1005 Convention Plaza  
Mail Station SL-MO-C2-GL  
St. Louis, MO 63101  
Contact: 314-418-1028

b. Via certified check or cashier's check in any currency drawn on a bank with no branches in the United States, made payable to "United States Treasury" and addressed for delivery to:

Cincinnati Finance  
U.S. EPA, MS-NWD  
26 W. M.L. King Drive  
Cincinnati, OH 45268-0001

c. Via wire transfer, sent to:

Federal Reserve Bank of New York  
ABA: 021030004  
Account Number: 68010727  
SWIFT address: FRNYUS33  
33 Liberty Street  
New York, NY 10045  
Field Tag 4200 of the Fedwire message should read "D 68010727  
Environmental Protection Agency"

d. Via electronic payment made through the ACH (Automated Clearing House), also known as Remittance Express (REX), directed to:

US Treasury REX/Cashlink ACH Receiver  
ABA: 051036706  
Account Number: 310006, Environmental Protection Agency  
CTX Format Transaction Code 22 – checking

Physical location of U.S. Treasury facility:  
5700 Rivertech Court  
Riverdale, MD 20737

Finance Center Contacts:  
John Schmid: 202-874-7026, or  
REX: 866-234-5681

74. These payment instructions are also available online at  
[http://www.epa.gov/ocfo/finservices/make\\_a\\_payment.htm](http://www.epa.gov/ocfo/finservices/make_a_payment.htm)

75. At the same time payment is made, copies of the check and/or proof of payment via wire transfer or ACH shall be mailed to:

Regional Hearing Clerk (3RC20)  
U.S. EPA, Region III  
1650 Arch Street  
Philadelphia, PA 19103-2029

and to:

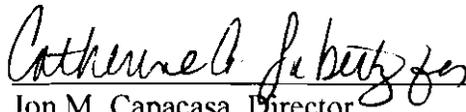
Ms. Nina Rivera (3RC20)  
Assistant Regional Counsel  
U.S. EPA, Region III  
1650 Arch Street  
Philadelphia, Pennsylvania 19103-2029.

76. Upon receipt of payment in full, in accordance with 40 C.F.R. § 22.18(a)(3), the Regional Judicial Officer or Regional Administrator shall issue a final order. Payment of the penalty by Respondent shall constitute a waiver of Respondent's rights to contest the allegations and to appeal the final order.

#### **VII. PUBLIC PARTICIPATION**

77. EPA is obligated, pursuant to Section 309(g)(4)(A) of the Act, 33 U.S.C. § 1319(g)(4)(A), to give members of the public notice of and an opportunity to comment on this proposed penalty assessment.
78. If Respondent requests a hearing on this proposed penalty assessment, members of the public who submitted timely comments on this proposed penalty assessment will have a right under Section 309(g)(4)(B) of the Act, 33 U.S.C. § 1319(g)(4)(B), to not only be notified of the hearing but also to be heard and to present evidence at the hearing on the appropriateness of this proposed penalty assessment.
79. If Respondent does not request a hearing, EPA may issue a Final Order Assessing Administrative Penalties, in which case those members of the public who submitted timely comments on this proposed penalty assessment will have an additional thirty (30) days to petition EPA to set aside the Final Order Assessing Administrative Penalties and to hold a hearing thereon. 33 U.S.C. § 1319(g)(4)(C). EPA will grant the petition and will hold a hearing if the petitioner's evidence is material and was not considered by EPA in the issuance of the Final Order Assessing Administrative Penalties.

Date:           AUG 04 2011          

  
\_\_\_\_\_  
Jon M. Capacasa, Director  
Water Protection Division

CERTIFICATE OF SERVICE

I certify that the enclosed Amended Administrative Penalty Complaint with Notice of Opportunity to Request Hearing was delivered to the following persons:

Delivery by Certified Mail Return Receipt Requested:

Marina Liacouras Phillips  
Kaufman & Canoles  
P.O. Box 3037  
Norfolk, Virginia 23514

Delivery by hand (original and one copy):

Regional Hearing Clerk (3RC00)  
U.S. Environmental Protection Agency, Region III  
1650 Arch Street  
Philadelphia, PA 19103-2029

Date: AUG 04 2011



Ms. Nina Rivera  
Senior Assistant Regional Counsel