

RECEIVED

09 SEP 30 AM 10: 52

HEARINGS CLERK
EPA -- REGION 10

BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:

DOCKET NO. CWA-10-2009-0270

Sal Gallucci, JJS Southwest LLC and
Whitehawk Land Development Corporation LLC
Smiths Ferry, Idaho

COMPLAINT

Respondents.

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 redelegated 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 Sal Gallucci, JJS Southwest LLC and Whitehawk Land Development Corporation LLC ("Respondents") for violations of the CWA.

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 has provided the State of Idaho with an opportunity to consult with
3 EPA on this matter.

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, *inter alia*, as authorized by a NPDES permit issued pursuant to
7 Section 402 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. In July of 2003, EPA reissued the NPDES General Permit for Storm Water
7 Discharges from Construction Activities (“CGP”) pursuant to Section 402 of the CWA, 33
8 U.S.C. § 1342. The CGP became effective on July 1, 2003 and expired on July 1, 2008. For
9 construction sites that obtained coverage under the CGP prior to July 1, 2008, the provisions of
10 the CGP remain in effect under an administrative extension.

11 2.11. To obtain coverage for storm water discharges from a construction site under the
12 CGP, a discharger must first “prepare and submit a complete and accurate Notice of Intent.”
13 CGP at Part 2.

14 2.12. Section 308(a) of the CWA, 33 U.S.C. § 1318(a), authorizes EPA to require the
15 owner or operator of any point source to provide such information as may be reasonably required
16 in carrying out Section 402 of the CWA, 33 U.S.C. § 1342. Pursuant to Section 308(a), EPA has
17 promulgated NPDES permit application requirements. Among these application requirements
18 are:

- 19 ▪ the requirement set forth in 40 C.F.R. § 122.21(a)(1) that “[a]ny person
20 who discharges or proposes to discharge pollutants ... must submit a
21 complete application to [EPA],”
- 22 ▪ the requirement set forth in 40 C.F.R. § 122.26(c)(1) that “[d]ischarges of
23 storm water associated with industrial activity and with small construction
24 activity are required to apply for an individual permit or seek coverage
25 under a promulgated storm water general permit,” and
- the requirement set forth in 40 C.F.R. § 122.21(c)(1) that regulated
 dischargers of construction storm water submit an NPDES permit

1 application or a Notice of Intent to apply for coverage under a NPDES
2 general permit at least ninety (90) days before the date on which
3 construction is to commence unless an applicable NPDES general permit
4 specifies a different submittal date.

5 2.13. Section 309(g) of the CWA, 33 U.S.C. § 1319(g), authorizes EPA to assess
6 administrative penalties against any person who violates Section 301 or 308 of the CWA, 33
7 U.S.C. § 1311 or 1318.

8 2.14. Section 309(g) of the CWA, 33 U.S.C. § 1319(g), also authorizes EPA to assess
9 administrative penalties against any person who has violated any permit condition or limitation
10 in a permit under Section 402 of the CWA, 33 U.S.C. § 1342.

11 **III. ALLEGATIONS**

12 3.1. JJS Southwest LLC ("JJS") is a limited liability company registered under the
13 laws of the State of Idaho. JJS owned and/or operated the Whitehawk Subdivision
14 ("Subdivision") located on Smiths Ferry Drive near Smiths Ferry in Valley County, Idaho from
15 2005 to 2007. JJS is a "person" as defined in Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

16 3.2. Whitehawk Land Development Corporation, LLC ("Whitehawk") is a limited
17 liability company registered under the laws of the State of Idaho. Whitehawk currently owns the
18 Subdivision. Whitehawk is a "person" as defined in Section 502(5) of the CWA, 33 U.S.C.
19 § 1362(5).

20 3.3. Respondent Sal Gallucci is an individual, and is affiliated with both JJS and
21 Whitehawk. Mr. Gallucci has been the primary point of contact for JJS and Whitehawk, and he
22 has directed the contractors' work at the Subdivision. Mr. Gallucci is a "person" as defined in
23 Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

24 3.4. From 2005 to 2007, JJS owned and/or operated the Subdivision, and Whitehawk
25 has owned the Subdivision from 2007 to the present. From 2005 to 2007 JJS and Gallucci had

1 operational control of construction and storm water-control activities at the Subdivision. From
2 2007 to the present Whitehawk and Gallucci have had operational control of the Subdivision,
3 and all storm water-related activities within the Subdivision.

4 3.5. The active construction within the Subdivision consists of approximately 6.65
5 acres of road construction and improvements associated with the Subdivision. That road
6 construction and improvements began in the spring of 2005 in connection with the Subdivision
7 development.

8 3.6. Several unnamed tributaries ("UNTs") to the North Fork of the Payette River
9 cross the Subdivision. All of these UNTs are in close proximity to and downhill of the road
10 construction and improvement projects within the Subdivision.

11 3.7. The North Fork of the Payette River flows into the Payette River, which flows
12 into the Snake River, which flows into the Columbia River, which flows into the Pacific Ocean.

13 3.8. The UNTs running through the Site, the North Fork of the Payette River, the
14 Payette River, the Snake River, the Columbia River and the Pacific Ocean are all "navigable
15 waters" as defined in Section 502(7) of the CWA, 33 U.S.C. § 1362(7), and are "waters of the
16 United States" as defined in 40 C.F.R. § 122.2. In the alternative, the UNTs are conduits to
17 waters of the United States.

18 3.9. As operators of a construction site that discharges storm water into waters of the
19 United States, Respondents were required to obtain coverage under an NPDES permit before
20 beginning construction activities. They have never obtained a valid NPDES permit to discharge
21 storm water at the Subdivision.

22 3.10. Upon information and belief, in the spring of 2005, Respondents began
23 construction activities that resulted in the clearing, grading, and/or excavation of one or more
24
25

1 acres of land in the Subdivision in connection with the construction, widening and maintenance
2 of roads.

3 3.11. On August 18, 2008 and June 16, 2009, the Idaho Department of Environmental
4 Quality ("IDEQ") conducted inspections of the Site. During those inspections, IDEQ
5 documented discharges of sediment from the construction activities to one or more of the UNTs
6 in the Subdivision.

7 3.12. On December 3, 2008 and May 1, 2009, EPA conducted inspections of the
8 Subdivision. During those inspections, EPA documented discharges of sediment from the
9 construction activities to one or more of the UNTs in the Subdivision.

10 **Count 1**
11 **(Failure to Apply for a Permit)**

12 3.13. At the time they commenced construction at the Site, Respondents were
13 "person[s] who discharge[] or propose[] to discharge pollutants" within the meaning of 40 C.F.R.
14 § 122.21(a)(1).

15 3.14. During the time of construction at the Subdivision, Respondents were
16 "discharger[s] of storm water associated with industrial activity" within the meaning of 40
17 C.F.R. § 122.26(c)

18 3.15. As owners and operators of the Subdivision, Respondents were required to either
19 submit a Notice of Intent to obtain coverage under the CGP or apply for an individual NPDES
20 permit before beginning construction activities at the Site.

21 3.16. Respondents failed to apply for an individual NPDES permit or properly seek
22 coverage under the CGP.

23 3.17. The road construction and improvements within the Subdivision continue to
24 discharge sediment to the UNTs, and Respondents have not stabilized the disturbed areas of the
25 construction sites within the Subdivision.

1 3.18. Respondents' failure to apply for NPDES permits placed Respondents in violation
2 of the requirements imposed pursuant to Section 308 of the CWA, 33 U.S.C. § 1318. Pursuant to
3 Section 309(g) of the CWA, 33 U.S.C. § 1319(g), and 40 C.F.R Part 19, Respondents are liable
4 for civil penalties not to exceed \$11,000 per day for each day during which the violation
5 continues for violations occurring prior to January 12, 2009, and \$16,000 per day for each day
6 during which the violations continue after January 12, 2009.

7 **Count 2**
8 **(Discharge Without a Permit)**

9 3.19. During the August 18, 2008 and June 16, 2009 site inspections, IDEQ observed
10 evidence of large discharges of sediment from the road construction that had entered one or more
11 of the UNTs.

12 3.20. During its December 3, 2008, and May 1, 2009 inspections of the Subdivision,
13 EPA observed evidence of large discharges of sediment from the road construction that had
14 entered one or more of the UNTs.

15 3.21. The construction activities at the Subdivision resulted in the discharge of "storm
16 water associated with industrial activity" to the UNTs of the North Fork of the Payette River.
17 Upon information and belief, owing to the steep slopes, the highly-erodible nature of the soils in
18 the Subdivision, and the close proximity of the construction work to the UNTs, the winter snow
19 pack, and the climatic conditions in the area, Respondents discharged storm water associated
20 with industrial activity to waters of the United States at numerous occasions during rainfall and
21 snowmelt events between May 2005 and the present.

22 3.22. The storm water was contaminated with, among other things, sediment, sand, and
23 dirt.

24 3.23. The road construction and improvements within the Subdivision constitutes a
25 "point source" within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

1 3.24. The sediment, sand and dirt in the storm water constitute "pollutant[s]" within the
2 meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

3 3.25. By causing such storm water to enter waters of the United States, Respondents
4 engaged in a "discharge of pollutants" from a point source within the meaning of Sections 301(a)
5 and 502(12) of the CWA, 33 U.S.C. § 1311(a) and 1362(12).

6 3.26. Respondents' discharges of storm water were not authorized by a permit issued
7 pursuant to Section 402 of the CWA, 33 U.S.C. § 1342. Therefore, Respondents violated
8 Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

9 3.27. Each day that storm water was discharged without the required permit constitutes
10 an additional day of violation of Section 301 of the CWA, 33 U.S.C. § 1311. Pursuant to Section
11 309(g) of the CWA, 33 U.S.C. § 1319(g), and 40 C.F.R. Part 19, Respondents are liable for civil
12 penalties not to exceed \$11,000 per day for each day during which the violation continues for
13 violations occurring prior to January 12, 2009, and \$16,000 per day for each day during which
14 the violations continue after January 12, 2009.

15 IV. PROPOSED PENALTY

16 4.1. Based on the foregoing allegations, and pursuant to the authority of Section
17 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), EPA proposes that an administrative
18 penalty of \$125,000 be assessed against Respondents.

19 4.2. EPA proposes this penalty amount after considering the applicable penalty factors
20 in Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3). These statutory penalty factors are as
21 follows: the nature, circumstances, extent, and gravity of the violation or violations, and, with
22 respect to Respondents, ability to pay, any prior history of such violations, the degree of
23 culpability, economic benefit or savings (if any) resulting from the violation, and such other
24 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, unpermitted discharges, and a
3 failure to comply with the CGP requirements are serious violations which resulted in harm to the
4 environment. Operating without a permit significantly undermines the CWA's regulatory
5 scheme. The gravity of the violation is high because Respondents commenced construction on
6 steep slopes with highly-erodible soils adjacent to creeks without having applied for or received
7 coverage under the CGP, and Respondents' actions resulted in the discharge of large volumes of
8 sediment to the UNTs of the North Fork of the Payette River. The North Fork of the Payette
9 River is listed as impaired for sediment. Respondents failed to implement adequate best
10 management practices ("BMPs") and structural controls to minimize the adverse environmental
11 effects of storm water discharges.

12 4.4. Respondents' History of Prior Violations: EPA is unaware any history of prior
13 violations of the CWA by Respondents.

14 4.5. Respondents' Degree of Culpability: The proposed penalty reflects a high degree
15 of culpability. JJS and Gallucci started construction on a large housing development in 2005
16 without an NPDES permit, and without taking steps to minimize erosion or sediment discharges
17 to the UNTs. In 2008, Respondents were told by IDEQ that there were significant erosion and
18 storm water runoff issues at the Subdivision. Moreover, in August 2008, IDEQ wrote a letter to
19 Respondents stating that NPDES construction general permit coverage would be required for the
20 construction in the Subdivision. EPA also informed Whitehawk and Gallucci of the NPDES
21 CGP Permit requirements. Nevertheless, Respondents never successfully obtained coverage
22 under the CGP. Respondents' construction activities at the Subdivision resulted in the discharge
23 of pollutants into waters of the United States in violation of Section 301(a) of the CWA, 33
24 U.S.C. § 1311(a) for more than four years.
25

1 4.6. Respondents' Economic Benefit: Respondents enjoyed an economic benefit as a
2 result of their unpermitted activities described above. This economic benefit includes the
3 delayed cost associated with timely preparing and submitting a Notice of Intent, the delayed
4 costs associated with preparing and implementing a storm water pollution prevention plan
5 ("SWPPP"), the avoided costs of installing appropriate BMPs and structural controls, the
6 avoided costs of conducting weekly inspections, and the avoided costs of maintaining
7 appropriate BMPs and structural controls.

8 4.7. Ability to Pay: Based on the information available to EPA regarding
9 Respondents' financial condition, Respondents appear able to pay the civil penalty proposed in
10 this Complaint. Should Respondents submit information substantiating an inability to pay this
11 amount, the proposed penalty may be reduced accordingly.

12 4.8. Other Matters as Justice May Require: Complainant is not aware of any facts that
13 would require the application of the "other matters" factor.

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

15 5.1. Respondents have the right to file an Answer requesting a hearing on any material
16 fact contained in this Amended Complaint or on the appropriateness of the penalty proposed
17 herein. Upon request, the Presiding Officer may hold a hearing for the assessment of these civil
18 penalties, conducted in accordance with the provisions of the Part 22 Rules and the
19 Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* A copy of the Part 22 Rules accompanies
20 this Amended Complaint.

21 5.2. Respondents' Answers, including any request for hearing, must be in writing and
22 must be filed with:

23 Regional Hearing Clerk
24 U.S. Environmental Protection Agency, Region 10
25 1200 Sixth Avenue, Suite 900, Mail Stop ORC-158
 Seattle, Washington 98101

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

2 6.1. To avoid a default order being entered pursuant to 40 C.F.R. § 22.17,
3 Respondents must file a written Answer to this Complaint with the Regional Hearing Clerk
4 within thirty (30) days after service of this Complaint.

5 6.2. In accordance with 40 C.F.R. § 22.15, Respondents' Answers must clearly and
6 directly admit, deny, or explain each of the factual allegations contained in this Complaint with
7 regard to which Respondents have any knowledge. Respondents' Answer must also state: (1) the
8 circumstances or arguments which are alleged to constitute the grounds of defense; (2) the facts
9 which Respondents intend to place at issue; and (3) whether a hearing is requested. Failure to
10 admit, deny, or explain any material factual allegation contained herein constitutes an admission
11 of the allegation.

12 **VII. INFORMAL SETTLEMENT CONFERENCE**

13 7.1. Whether or not Respondents request a hearing, Respondents may request an
14 informal settlement conference to discuss the facts of this case, the proposed penalty, and the
15 possibility of settling this matter. To request such a settlement conference, Respondents should
16 contact:

17 Mark Ryan
18 Assistant Regional Counsel
19 U.S. Environmental Protection Agency, Region 10
1435 N. Orchard Street
Boise, ID 83706
(208) 378-5768

20 7.2. Note that a request for an informal settlement conference does not extend the
21 thirty (30) day period of filing a written Answer to this Complaint, nor does it waive
22 Respondents' right to request a hearing.

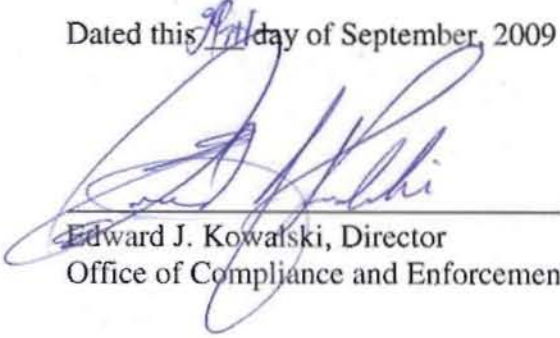
23 7.3. Respondents are advised that, after the Complaint is issued, the Part 22 Rules
24 prohibit any *ex parte* (unilateral) discussion of the merits of these or any other factually related
25

1 proceedings with the Administrator, the Environmental Appeals Board or its members, the
2 Regional Judicial Officer, the Presiding Officer, or any other person who is likely to advise these
3 officials in the decision of this case.

4 **VIII. RESERVATIONS**

5 8.1. Neither assessment nor payment of an administrative civil penalty pursuant to this
6 Complaint shall affect Respondents' continuing obligation to comply with: (1) the CWA and all
7 other environmental statutes; (2) the terms and conditions of all applicable CWA permits; and (3)
8 any Compliance Order issued to Respondents under Section 309(a) of the CWA, 33 U.S.C.
9 § 1319(a), concerning the violations alleged herein.

10
11 Dated this 7th day of September, 2009

12
13 
14 Edward J. Kowalski, Director
15 Office of Compliance and Enforcement
16
17
18
19
20
21
22
23
24
25

CERTIFICATE OF SERVICE

I certify that the foregoing "Complaint" was sent to the following persons, in the manner specified, on the date below:

Original and one copy, hand-delivered:

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

A true and correct copy, together with a copy of the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties," 40 C.F.R Part 22, by certified mail, return receipt requested:

Sal Gallucci
Whitehawk Land Development Company
JJS Southwest LLC
2041 San Elijo Avenue
Cardiff, CA 92007

Dated:

9/30/09

Shawn Eng

ORC-158

U.S. EPA Region 10