

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 7

901 NORTH FIFTH STREET  
KANSAS CITY, KANSAS 66101

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ENVIRONMENTAL PROTECTION  
AGENCY-REGION VII  
REGIONAL HEARING CLERK

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	Docket No. CWA-07-2006-0030
	)	
PROVIDENCE DEVELOPMENT COMPANY, L.L.C.	)	
	)	
PROVIDENCE ON PEINE DEVELOPMENT	)	
	)	
WENTZVILLE, MISSOURI	)	COMPLAINT, NOTICE OF PROPOSED PENALTY AND NOTICE OF OPPORTUNITY FOR HEARING
	)	
Respondent,	)	
	)	
Proceedings under Section 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g)	)	
	)	

**COMPLAINT**

**Jurisdiction**

1. This is an administrative action for the assessment of civil penalties instituted pursuant to Section 309(g) of the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act ("CWA"), 33 U.S.C. § 1319(g), and in accordance with the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. Part 22.

2. This Complaint serves as notice that the United States Environmental Protection Agency ("EPA") has reason to believe that Respondent has violated Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342, and regulations promulgated thereunder.

**Parties**

3. The authority to take action under Section 309(g) of the CWA, 33 U.S.C. § 1319(g), is vested in the Administrator of EPA. The Administrator has delegated this authority to the Regional Administrator, EPA Region 7, who in turn has delegated it to the Director of the Water, Wetlands and Pesticides Division of EPA Region 7 (“Complainant”).

4. Respondent is Providence Development Company, L.L.C., a business entity authorized to conduct business in the state of Missouri.

**Statutory and Regulatory Framework**

5. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants except in compliance with, inter alia, Section 402 of the CWA, 33 U.S.C. § 1342. Section 402 of the CWA, 33 U.S.C. § 1342, provides that pollutants may be discharged only in accordance with the terms of a National Pollutant Discharge Elimination System (“NPDES”) permit issued pursuant to that Section.

6. The CWA prohibits the discharge of “pollutants” from a “point source” into a “navigable water” of the United States, as these terms are defined by Section 502 of the CWA, 33 U.S.C. § 1362. Section 502 of the CWA states that “navigable waters” means the waters of the United States.

7. Section 402(p) of the CWA, 33 U.S.C. § 1342(p), sets forth requirements for the issuance of NPDES permits for the discharge of storm water. Section 402(p) of the CWA, 33 U.S.C. § 1342(p), requires, in part, that a discharge of storm water associated with an industrial activity must conform with the requirements of an NPDES permit issued pursuant to Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342.

8. Pursuant to Section 402(p) of the CWA, 33 U.S.C. § 1342(p), EPA promulgated regulations setting forth the NPDES permit requirements for storm water discharges at 40 C.F.R. § 122.26.

9. 40 C.F.R. § 122.26(a)(1)(ii) and 122.26(c) requires dischargers of storm water associated with industrial activity to apply for an individual permit or to seek coverage under a promulgated storm water general permit.

10. 40 C.F.R. § 122.26(b)(14)(x) defines “storm water discharge associated with industrial activity,” in part, as construction activity including clearing, grading, and excavation, except operations that result in the disturbance of less than five (5) acres of total land area which are not part of a larger common plan of development or sale.

11. The Missouri Department of Natural Resources (“MDNR”) is the state agency with the authority to administer the federal NPDES program in Missouri pursuant to Section 402 of the CWA, 33 U.S.C. § 1342. The EPA maintains concurrent enforcement authority with delegated states for violations of the CWA.

12. The MDNR issued a Missouri Operating Permit–General Permit to Respondent for the discharge of storm water associated with industrial activity for construction activities, Permit No. MO-R104769 (“Permit”). Respondent’s Permit was issued on May 29, 2002. The Permit governs storm water discharges associated with construction or land disturbance activity (e.g., clearing, grubbing, excavating, grading, and other activity that results in the destruction of the root zone).

### **Factual Background**

13. Respondent is a “person” as defined by Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

14. At all times relevant to this action, Respondent was the owner, operator, or the Permit holder for a construction site known as Providence on Peine development (“Site”) located at 1324 Peine Road in Wentzville, Missouri. Construction activities occurred at the Site including clearing, grading and excavation which disturbed five (5) or more acres of total land area or which disturbed less than five (5) acres of total land area that was part of a larger common plan of development or sale.

15. Storm water, snow melt, surface drainage and/or runoff water leaves Respondent’s facility by discharging directly into Dry Branch or its tributaries. The runoff and drainage from Respondent’s facility is “storm water” as defined by 40 C.F.R. § 122.26(b)(13).

16. Storm water contains “pollutants” as defined by Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

17. Respondent’s storm water runoff is the “discharge of a pollutant” as defined by CWA Section 502(12), 33 U.S.C. § 1362(12).

18. The Site was a “point source” which caused the “discharge of pollutants” as defined by CWA Section 502, 33 U.S.C. § 1362.

19. Respondent discharged pollutants into Dry Branch and its tributaries. Dry Branch and its tributaries are waters of the United States as defined under 40 C.F.R. § 122.2.

20. Respondent's discharge of pollutants associated with an industrial activity, as defined by 40 C.F.R. § 122.26(b)(14)(x), requires a permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

21. Respondent applied for and was issued NPDES permit coverage under the Permit described in paragraph 12 above. Respondent's Permit was issued on May 29, 2002. The development of a Storm Water Pollution Prevention Plan ("SWPPP") by an applicant is required prior to the application for a Permit. Respondent or its agent certified in its application that Respondent had developed a SWPPP for the Site.

22. Respondent's Permit states that the primary requirement of the Permit is the development and implementation of a SWPPP for the Site. The purpose of the SWPPP is to ensure the design, implementation, management, and maintenance of Best Management Practices (BMPs) in order to reduce the amount of sediment and other pollutants in storm water associated with land disturbance activities.

23. On August 11, 2004, EPA performed an inspection of the Site under the authority of Section 308(a) of the CWA, 33 U.S.C. § 1318(a). The purpose of the inspection was to evaluate the Respondent's compliance with the Permit and the SWPPP for the Site and the CWA.

### **Findings of Violation**

#### **Count I**

#### **Failure to Develop and Implement a Storm Water Pollution Prevention Plan ("SWPPP")**

24. The facts stated in paragraphs 13 through 23 above are herein incorporated.

25. Respondent's duty to have a SWPPP for the Site arose at or before the time of the issuance of Respondent's Permit. Respondent's permit was issued on May 29, 2002.

26. During the August 11, 2004, inspection, EPA's inspector requested a copy of the SWPPP for the Site from Respondent's representative. Although the Respondent certified in its Permit application that a SWPPP had been generated, Respondent's representative stated that the Respondent did not have a SWPPP for the Site.

27. Respondent failed to develop and, more importantly, failed to implement BMPs required by its Permit through the SWPPP. As a result of Respondent's failure to develop a SWPPP, Respondent failed to evaluate the pollution controls necessary to protect the receiving waters at the Site. Compounding Respondent's failure to evaluate and design appropriate runoff

controls, Respondent subsequently failed to implement runoff controls required through the SWPPP by its Permit and therefore necessary to comply with the CWA.

28. Respondent's failure to develop and implement a SWPPP resulted in Respondent's failure to evaluate, develop, install and/or maintain BMPs required by the Permit, through the SWPPP, to mitigate the amount of sediment that moved off-Site. Specifically, inspectors observed during the August 11, 2004, inspection that Respondent failed to install or maintain, among others, the following BMPs:

- a. There was severe trackout of soil from disturbed areas onto roadways within the Site without functional curb drain inlet protection onsite. The curb outlets flow to tributaries of Dry Branch.
- b. Runoff from concrete washout areas were not diverted to sedimentation basins but instead discharged directly to storm water drains or curb drain inlets. These drains flow to tributaries of Dry Branch.
- c. At one time silt fence had been installed at portions of the Site, however, the silt fence was ineffective because the silt fence was either down or undercut because of Respondent's failure to maintain the BMP.

Respondent's failures to install or maintain BMPs is attributable to its failure to develop, through a SWPPP, strategies and procedures to ensure the effectiveness of BMPs and therefore limit sediment loss from the Site.

29. During the August 11, 2004, inspection, EPA inspectors observed the off-site migration of a significant amount of sediment from the Site. The inspector observed the accumulation of sediment in Dry Branch. Dry branch and its tributaries are waters of the United States as defined under 40 C.F.R. § 122.2.

30. Respondent's failure to develop and implement a SWPPP is a violation of its Permit, and as such, is a violation of Sections 301 and 402 of the CWA, 33 U.S.C. § 1311 and § 1342.

## **Count 2**

### **Failure to Inspect and Maintain Records**

31. The facts stated in paragraphs 13 through 23 above are herein incorporated.

32. Respondent's Permit requires that the land disturbance site is inspected on a regular schedule (a minimum of at least once a week) and within a reasonable time period (not to exceed 72 hours) following heavy rains. Respondent's permit also requires that a log be kept of all inspections.

33. At the time of the August 11, 2004, inspection, a representative of the Respondent stated that he was not aware of the requirement to conduct regular inspections of the Site and that he did not have an inspection log or inspection reports for the Site.

34. The Permit states that all BMPs and other pollution control measures shall be inspected for proper installation, operation, and maintenance and that all locations where storm water leaves the site shall be inspected for evidence of erosion or sediment deposition. Had inspections been carried out as required by the Permit, Respondent would have identified that significant quantities of sediment/pollutants were migrating off site and into waters of the United States.

35. During the August 11, 2004, inspection, EPA inspectors observed the off-site migration of a significant amount of sediment from the Site. The inspectors observed the accumulation of sediment in Dry Branch. Dry Branch and its tributaries are waters of the United States as defined under 40 C.F.R. § 122.2.

36. The intent of the inspection and record maintenance requirements of the Permit is to ensure that Permittees timely evaluate the runoff from their Sites to limit the impact of pollutants on receiving waters. Respondent's failure to inspect and record as required by the Permit resulted in the degradation of waters of the United States.

37. Respondent's failure to inspect and maintain records is a violation of its Permit, and as such, is a violation of Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342.

### **Relief**

38. Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), authorizes the administrative assessment of civil penalties in an amount not to exceed \$10,000 per day for each day during which the violation continues, up to a maximum total penalty of \$125,000. Pursuant to the Civil Monetary Penalty Inflation Adjustment Rule of 2004, as mandated by the Debt Collection Improvement Act of 1996, and the EPA's implementing regulations at 40 C.F.R. Parts 19 and 27, civil administrative penalties of up to \$11,000 per day for each day during which a violation continues, up to a maximum of \$157,500, may be assessed for violations of CWA Sections 301 and 402, 33 U.S.C. §§ 1311 and 1342, that occur after March 15, 2004.

39. Based on the foregoing Description of Violations, and pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), EPA, Region 7 hereby proposes to issue a Final Order Assessing an Administrative Penalty against the Respondent for the violations cited above, in the

amount of up to \$11,000 per day for each day during which a violation occurred on or after January 31, 1997, up to a maximum of \$137,500, and \$11,000 per day for each day during which a violation occurred on or after March 16, 2004, up to a maximum of \$157,500.

40. The proposed penalty is based upon the facts stated in this Complaint, the nature, circumstances, extent, and gravity of the violation, and with respect to the violator, ability to pay, any prior history of such violation, the degree of culpability, economic benefit or savings resulting from the violation, and such other matters as justice may require.

41. The penalty proposed in this Complaint is based upon the best information available to EPA at the time that the Complaint was issued. The penalty may be adjusted if the Respondent establishes bona fide issues of ability to pay, or other defenses relevant to the appropriate amount of the proposed penalty.

42. As required by Section 309(g)(4) of the CWA, 33 U.S.C. § 1319(g)(4), prior to the assessment of a civil penalty, EPA will provide public notice of the proposed penalty, and reasonable opportunity for the public to comment on the matter, and present evidence in the event a hearing is held.

43. The EPA has notified the state of Missouri regarding this proposed action by mailing a copy of this document to the Missouri Department of Natural Resources.

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

#### **Answer and Request for Hearing**

44. Respondent may request a hearing to contest any material fact contained in the Complaint above or to contest the appropriateness of the proposed penalty set forth therein. Such a hearing will be held and conducted in accordance with the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. Part 22, a copy of which is enclosed herein.

45. To avoid being found in default, which constitutes an admission of all facts alleged in the Complaint and a waiver of the right to hearing, Respondent must file a written answer and request for hearing within thirty (30) days of service of this Complaint and Notice of Opportunity for Hearing. The answer shall clearly and directly admit, deny, or explain each of the factual allegations contained in this Complaint with respect to which Respondent has any knowledge, or shall clearly state that Respondent has no knowledge as to particular factual allegations in this Complaint. The answer shall also state (a) the circumstances or arguments which are alleged to constitute the grounds of defense; (b) the facts that Respondent disputes; (c) the basis for opposing any proposed relief; and (d) whether a hearing is requested. Said answer shall be filed with the following:

Regional Hearing Clerk  
United States Environmental Protection Agency, Region 7  
901 North 5<sup>th</sup> Street  
Kansas City, Kansas 66101

46. Failure to admit, deny or explain any material factual allegation in this Complaint constitutes an admission of the allegation.

47. A hearing upon the issues raised by this Complaint and the answer may be held if requested by Respondent in the answer. If Respondent does not request a hearing, the Presiding Officer may hold a hearing if issues appropriate for adjudication are raised in the answer.

48. In any hearing on the proposed penalty for this Complaint, members of the public to whom EPA is obligated to give notice of this proposed penalty action, will have the right, under Section 309(g)(4)(B) of CWA, 33 U.S.C. § 1319(g)(4)(B), to be heard and present evidence on the merits of the proposed CWA penalty assessment. If no hearing is held, EPA will issue a Final Order Assessing Administrative Penalties pursuant to the CWA, and only members of the public who submitted timely comments on the proposed penalty assessment will have an additional thirty (30) days to petition to set aside the said Order and to hold a hearing thereon. The EPA will grant the petition and will hold a hearing only if the petitioners' evidence is material and was not considered by EPA in the issuance of the Final Order.

49. If Respondent fails to file a written answer within thirty (30) days of service of this Complaint and Notice of Opportunity for Hearing, Respondent may be found in default. Such default by Respondent constitutes an admission of all facts alleged in the Complaint and a waiver of Respondent's right to contest such factual allegations. A Default Order may thereafter be issued by the Presiding Officer and the civil penalties proposed herein shall become due and payable unless the record clearly demonstrates that the requested relief is inconsistent with the CWA.

#### **Informal Settlement Conference**

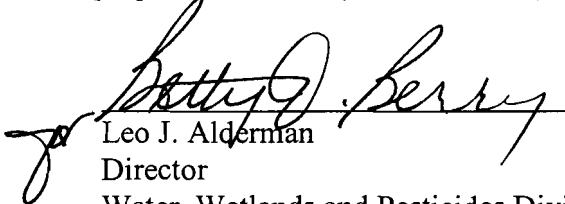
50. Whether or not Respondent requests a hearing, an informal conference may be requested in order to discuss the facts of this case, the proposed penalty, and the possibility of settlement. To request a settlement conference, please contact:



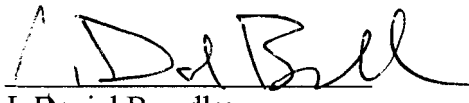
52. THE EPA encourages all parties against whom a civil penalty is proposed to pursue the possibilities of settlement as a result of informal conference. Any settlement which may be reached as a result of such a conference shall be embodied in a written Consent Agreement and Final Order issued by the Regional Judicial Officer, EPA, Region 7. The issuance of such a Consent Agreement and Final Order shall constitute a waiver of Respondent's right to request a hearing on any matter stipulated therein.

53. If Respondent has not filed an answer within the thirty (30) day time period allowed by this Notice, the penalties proposed above may be assessed by the entry of a Default Order.

11/23/05  
Date

  
Leo J. Alderman  
Director  
Water, Wetlands and Pesticides Division

11/23/05  
Date

  
J. Daniel Breedlove  
Assistant Regional Counsel

CERTIFICATE OF SERVICE

I certify that on the date indicated below, I hand delivered the original and one true copy of this Complaint and Notice of Opportunity for Hearing to the Regional Hearing Clerk, United States Environmental Protection Agency, 901 North 5<sup>th</sup> Street, Kansas City, Kansas 66101.

I further certify that on the date noted below I sent by certified mail, return receipt requested, a true and correct copy of the signed original Complaint and Notice of Opportunity for Hearing and a copy of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits, 40 C.F.R. Part 22, and a Small Business Fact Sheet to:

STL Agent Services  
Registered Agent for Providence Development Company L.L.C.  
1720 Lance End  
St. Louis, Missouri 63026

Providence Development Company L.L.C.  
2458 Old Dorsett Road, Suite 300  
Maryland Heights, Missouri 63365

Daniel E. O'Connell, Esq.  
Organizer for Providence Development Company L.L.C.  
100 S. Fourth Street  
Suite 1100  
St. Louis, Missouri 63102

Without copy of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits, 40 C.F.R. Part 22, and a Small Business Fact Sheet to:

Kevin Mohammadi, Chief  
Enforcement Section  
Missouri Department of Natural Resources  
P.O. Box 176  
Jefferson City, Missouri, 65102

Kurt Reibling, Section Chief  
Water and Wastewater Unit  
Missouri Department of Natural Resources  
St. Louis Regional Office  
7545 S. Lindbergh, Suite 210  
St. Louis, Missouri 63125

11/28/05  
Date

Amy O'Connell