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EPA--REGION 10

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BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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In the Matter of:

SPECIAL INTEREST AUTO WORKS, INC.
and TROY PETERSON, Individual,
Kent, WA

Respondents.

Docket No. CWA-10-2013-0123

ANSWER, AFFIRMATIVE DEFENSES
AND REQUEST FOR HEARING

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Respondents Special Interest Auto Works, Inc. and Troy Peterson, individual,
("Respondents") pursuant to the Consolidated Rules of Practice Governing the Administrative
Assessment of Civil Penalties, Rule 22.15, ("the Rules") hereby answer the Complaint dated
July 11, 2013, filed July 15, 2013 with the Hearing Clerk for the Environmental Protection
Agency, Region 10 and served on Respondents July 18, 2013 ("the Complaint), as follows:

I. AUTHORITIES

(Paragraphs of answer correspondence to Nos. I through VIII in the Complaint)

1.1 Respondents are without knowledge as to the truth of the allegations contained
in Paragraph 1.1 of the Complaint and, therefore, DENY the same. Respondents specifically
DENY that they have violated the Clean Water Act ("CWA") or that there is any factual or
legal basis to impose a civil penalty on them.

ANSWER, AFFIRMATIVE DEFENSES, AND REQUEST
FOR HEARING - 1 of 18
DOCKET NO. CWA-10-2013-0123 [90218-1]

DENNIS D. REYNOLDS LAW OFFICE
200 Winslow Way West, Suite 380
Bainbridge Island, WA 98110
(206) 780-6777
(206) 780-6865 (Facsimile)

ORIGINAL

1 1.2 Respondents ADMIT that the Environmental Protection Agency (“EPA”)
2 proposes in the Complaint the assessment of a civil penalty against themselves for alleged
3 violations of the CWA. Respondents are without knowledge as to the truth of the remaining
4 allegations in Paragraph 1.2 of the Complaint and, therefore, DENY the same.

5 1.3 Respondents ADMIT that the EPA did provide the State of Washington
6 Department of Ecology (“Ecology”) by letter dated July 11, 2013 a notice of the filing of this
7 action. Respondents affirmatively allege that the EPA’s notice to Ecology is insufficient and
8 does not comply with statutory requirements. Respondents are without knowledge as to the
9 truth of the remaining allegations contained in Paragraph 1.3 of the Complaint and, therefore,
10 DENY the same.

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12 **II. STATUTORY AND REGULATORY BACKGROUND**

13 2.1 Paragraph 2.1 of the Complaint recites provisions of the Clean Water Act
14 which require no answer. Respondents affirmatively allege that none of their actions
15 constitute a violation of the CWA.

16 2.2 Paragraph 2.2 of the Complaint recites provisions of the Clean Water Act
17 which require no answer. Respondents affirmatively allege that none of their actions
18 constitute a violation of the CWA.

19 2.3 Paragraph 2.3 of the Complaint recites provisions of the Clean Water Act
20 which require no answer. Respondents affirmatively allege that none of their actions
21 constitute a violation of the CWA.

22 2.4 Paragraph 2.4 of the Complaint recites provisions of the Clean Water Act
23 which require no answer. Respondents affirmatively allege that none of their actions
24 constitute a violation of the CWA.

1 2.5 Paragraph 2.5 of the Complaint recites provisions of the Clean Water Act
2 which require no answer. Respondents affirmatively allege that none of their actions
3 constitute a violation of the CWA.

4 2.6 Paragraph 2.6 of the Complaint recites provisions of the Clean Water Act
5 which require no answer. Respondents affirmatively allege that none of their actions
6 constitute a violation of the CWA.

7 2.7 Paragraph 2.7 of the Complaint recites provisions of the Clean Water Act
8 which requires no answer. Respondents affirmatively allege that none of their actions
9 constitute a violation of the CWA.

10 2.8 Paragraph 2.8 of the Complaint recites provisions of the Clean Water Act
11 which require no answer. Respondents affirmatively allege that none of their actions
12 constitute a violation of the CWA.

13 2.9 Paragraph 2.9 of the Complaint recites provisions of the Clean Water Act
14 which require no answer. Respondents affirmatively allege that none of their actions
15 constitute a violation of the CWA.

16 2.10 Respondents ADMIT that the State of Washington has been authorized by the
17 EPA to administer the National Pollutant Discharge and Elimination (“NPDES”) Program.
18 Respondents are without knowledge as to the truth of the remaining allegations of
19 Paragraph 2.10 of the Complaint and, therefore, DENY the same.

20 2.11 Respondents are without knowledge as to the truth of the allegations contained
21 in Paragraph 2.11 of the Complaint and, therefore, DENY the same. Respondents
22 affirmatively allege that they have coverage under the Washington Industrial Stormwater
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1 General NPDES Permit although their activities do not require coverage. *See* ¶3.7, *infra*.

2 Respondents DENY they propose to discharge (or have discharged) pollutants via stormwater
3 to a surface water body constituting waters of the Unites States including, but not limited to,
4 the Green River.

5 2.12 Respondents are without knowledge as to the truth of the allegations contained
6 in Paragraph 2.12 of the Complaint and, therefore, DENY the same.

7
8 2.13 Respondents are without knowledge as to the truth of the allegations contained
9 in Paragraph 2.13 of the Complaint and, therefore, DENY the same. Respondents
10 affirmatively allege that they have an NPDES permit issued them by the State of Washington
11 Department of Ecology, No. WAR-126144, Troy Peterson /Special Interest Auto Works, Inc,
12 Facility Name: "Special Interest Auto Works, Inc.", located at 25923 7th Avenue South, Kent,
13 Washington, King County.

14
15 2.14 The allegations contained in Paragraph 2.14 of the Complaint are recitations of
16 the law and require no answer. Respondents affirmatively allege that they have an NPDES
17 permit issued by the State of Washington Department of Ecology.

18 2.15 In answer to the allegations contained in Paragraph 2.15 of the Complaint,
19 Respondents ADMIT that the EPA has authority to issue administrative penalties for
20 violations of the CWA. Respondents specifically DENY that any of their activities have
21 violated the CWA or that there is any legal or factual basis to impose administrative penalties
22 against them.

23
24 **III. ALLEGATIONS**

25 3.1 Respondents ADMIT the allegations contained in Paragraph 3.1 of the
26 Complaint.

1 3.2 In response to the allegations contained in Paragraph 3.2 of the Complaint,
2 Respondents ADMIT that they have day-to-day operational control of activities which occur
3 at the Special Interest Auto Wrecking facility site. Respondents DENY that they are releasing
4 (or have released) pollutants to waters of the United States including, but not limited to the
5 Green River, which would necessitate permit coverage. Respondents affirmatively allege that
6 they have an NPDES Permit from the State of Washington Department of Ecology.
7

8 3.3 Respondents ADMIT the allegations contained in Paragraph 3.3 of the
9 Complaint.

10 3.4 Respondents ADMIT the allegations contained in Paragraph 3.4 of the
11 Complaint, except DENY that the site is 6.8 acres in size. The subject site has an area of 3.4
12 acres. Soils on the site are a deep alluvial sandy loam with relatively high infiltration
13 capacity.
14

15 3.5 Respondents DENY the allegations contained in Paragraph 3.5 of the
16 Complaint. Respondents specifically DENY that any surface stormwater discharges have
17 emanated from the site or have reached the Green River or any other water of the United
18 States from their activities.

19 3.6 Respondents ADMIT the allegations contained in Paragraph 3.6 of the
20 Complaint.
21

22 3.7 Respondents DENY the allegations contained in Paragraph 3.7 of the
23 Complaint and affirmatively allege that the State of Washington Department of Ecology
24 issued them an NPDES Permit on or about October 9, 2012, Permit No. WAR-126144. Prior
25 to this time, Respondents operated under the reasonable assumption that all stormwater on the
26

1 site vertically infiltrated into the pervious sandy native soil, thus negating the requirement to
2 attain NPDES coverage.

3 3.8 Respondents ADMIT that they took over the site on August 1, 2008.
4 Automobiles were not stored on the site until January 2009. Respondents specifically DENY
5 that any of their activities have resulted in “discharges of pollutants via stormwater to the
6 Green River.” Respondents ADMIT that they did not have an NPDES Permit until on or
7 about October 9, 2012.
8

9 3.9 Respondents DENY the allegations contained in Paragraph 3.9 of the
10 Complaint.

11 3.10 Respondents DENY that they received a November 2011 EPA mailing.
12 Respondents ADMIT that a site inspection occurred on or about February 24, 2012.
13 Respondents ADMIT the remaining allegations contained in Paragraph 3.10 of the Complaint
14 subject to the qualifications set out in ¶4.3.1.2, *infra*.
15

16 3.11 Respondents DENY the allegations contained in Paragraph 3.11 of the
17 Complaint, except they ADMIT that there was a site inspection on February 24, 2012.

18 3.12 Respondents ADMIT the allegations contained in Paragraph 3.12 of the
19 Complaint, but specifically DENY that stormwater discharges are occurring from the site (or
20 have occurred) which emanate to and discharge into the Green River. *See* Response, ¶3.13
21 and 3.23, *infra*.
22

23 3.13 Respondents ADMIT an analysis of the samples collected on March 29, 2012
24 contain the substances stated in the Complaint. The pollutants observed in EPA’s water
25 quality sample results, including copper, lead, zinc, cadmium, and TPH, are typically present
26

1 in stormwater runoff from roadways, parking lots and other surfaces traveled by vehicles.
2 Their presence in standing water tested from the subject site is not alarming. Of the pollutants
3 observed, only copper and zinc exceeded the benchmark concentrations that have been
4 established in the Industrial Stormwater General Permit. The concentration of zinc in EPA's
5 sample only slightly exceeded the benchmark with an observed value of 127 ug/L versus the
6 benchmark value of 117 ug/L. The Respondents affirmatively DENY any "pollutants" were
7 released in stormwater emanating from their property or were discharged into the Green River
8 as a result of their activities.
9

10 3.14 Respondents ADMIT the allegations at Paragraph 3.14, but affirmatively
11 allege that their operations or activities did not require coverage under the NPDES program.
12

13 3.15 Respondents are without knowledge as to the truth of the allegations contained
14 in Paragraph 3.15 of the Complaint and, therefore, DENY the same.
15

16 **Count 1 (Failure to Apply for a Permit)**

17 3.16 Respondents reallege their responses to Paragraphs 1.1 through 3.4 of the
18 Complaint, which responses are incorporated by reference.
19

20 3.17 Respondents DENY the allegations of Paragraph 3.17 of the Complaint.
21

22 3.18 Respondents DENY the allegations of Paragraph 3.18 of the Complaint.
23

24 3.19 Respondents DENY the allegations of Paragraph 3.19 of the Complaint.
25

26 Respondents ADMIT they did not have an NPDES permit until on or about October 9, 2012.
Respondents affirmatively allege that they were not required to obtain an individual NPDES
permit or seek coverage under the ISGP as the result of their activities conducted on the site.

1 Respondents assessing administrative penalties in any amount, including an amount not to
2 exceed \$177,500.00.

3 4.3.1 *Nature, Circumstances, and Gravity of Violations.* Respondents
4 DENY the allegations of Subparagraph 4.3.1 of the Complaint.

5 4.3.1.1 Respondents are not familiar with the full policies of the
6 NPDES Permitting Program, so lack knowledge as to the truth of the allegations set out in
7 Subparagraph 4.3.1.1 of the Complaint and, therefore, DENY the same.

8 4.3.1.2 Respondents ADMIT that the sample results from the NPDES
9 inspection show certain pollutants found in the stormwater collected from the site. There is no
10 evidence stormwater from the subject site reached a water of the United States, nor are the
11 pollutants in such levels that even if the discharged from the site to the Green River, the
12 discharge would be harmful to human health and aquatic species. This is because (1) any
13 discharge (if any) is occasional at most and (2) except for copper and zinc any discharge
14 would not have exceeded the threshold levels or counts set in Respondent's NPDES Permit.
15 Respondents specifically DENY the "potential for environmental harm" is high as the result
16 of their activities. As to the allegations the Green River is listed on the National Priorities list
17 under the Comprehensive Environmental, Response, Compensation and Liability Act,
18 Respondents have no knowledge of the truth of this particular allegation and, therefore,
19 DENY the same. Respondents specifically DENY that their facility is "one of the many
20 industrial sources contaminating the Duwamish River." Respondents DENY the remaining
21 allegations of 4.3.1.2 of the Complaint, except they ADMIT the Green River has certain
22 beneficial uses for fish and wildlife habitat and use.
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1 4.3.2 *Respondents' Ability to Pay.* Respondents have no knowledge as to
2 exactly what information the Complainant has indicated their responsibility or to their ability
3 to pay a penalty up to the statutory maximum penalty for the stated violations, and therefore,
4 DENY the same. The Respondents acknowledge that the Complainant will consider any
5 information submitted by the Respondents related to their ability to pay a penalty.

6 Respondents respectfully DENY they have violated the CWA or that there is any factual or
7 legal basis to impose civil penalties. Without waiving that position, if any quasi-judicial or
8 judicial officer in his or her wisdom imposes civil penalties, Respondents do not have the
9 ability to pay them. Subject to a protective order to protect the confidentiality of their
10 sensitive proprietary information and private financial worth, Respondents are ready, willing
11 and able to present information supporting the allegation that they do not have the ability to
12 pay a substantial civil penalty, if any. If any civil penalties are imposed (which should not be
13 the case) Respondents request that their fees and costs, including attorney fees and expert
14 engineering consulting fees, plus the amounts set out in 4.3.5, *infra*, be credited towards the
15 penalty.
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17

18 4.3.3 *Respondents' History of Prior Violations.* Respondents are unaware of
19 EPA's knowledge as to history of past violations at the facility that they now operate, and
20 therefore, DENY the same. Respondents affirmatively allege that they have never violated
21 the CWA. However, they have received communication from the State of Washington
22 Department of Ecology regarding minor concerns relating to compliance with their NPDES
23 Permit since that approval was issued in October, 2012.
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1 4.3.4 *Respondents' Degree of Culpability.* Respondents DENY the
2 allegations of Subparagraph 4.3.4 of the Complaint. Respondents affirmatively allege that
3 they sought permit coverage from the Department of Ecology in approximately April of 2012,
4 but Ecology was unable to issue permit coverage until October 9, 2012.

5 4.3.5 *Respondents' Economic Benefit.* Respondents DENY the allegations in
6 Subparagraph 4.3.5 of the Complaint. Respondents affirmatively allege that they have spent,
7 within the last year, approximately \$20,000.00 to assure that their operations and facilities are
8 in compliance with their NPDES permit. The non-expenditure of dollars in prior years has
9 not provided the Respondents an economic benefit.

10 4.3.6 *Other Matters as Justice May Require.*

11 4.3.7 Respondents' affirmatively allege that the EPA's entire approach in this
12 matter is inconsistent with sound public policy. Respondents have come into compliance by
13 securing a NPDES Permit and making changes on their property, including on site infiltration
14 and other best management practices requested by the State of Washington Department of
15 Ecology. The focus of the enforcement program established by the EPA is to secure
16 compliance, not punishment. Under the facts and circumstances, there is no sound basis in
17 law or fact, or public policy, to impose any civil penalties on Respondents.

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20 **V. REQUEST FOR HEARING**

21 5.1 Respondents acknowledge their opportunity to request a hearing pursuant to
22 Part 22 of the Rules in the Administrative Procedures Act, request a hearing as set out below.

23 5.2 Respondents acknowledge the allegations of 5.2 of the Complaint which
24 require no answer.
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VI. FILING AN ANSWER

6.1 Respondents acknowledge the allegations of Paragraph 6.1 of the Complaint which requires no answer, except that according to Part 22 of the Rules, the Answer to the Complaint must be filed within 30 days after service of the Complaint and not 20 days.

6.2 Respondents acknowledge the allegations of Paragraph 6.2 of the Complaint which requires no answer. The Respondents affirmatively allege that in their belief their Answers and Responses submitted herein are in accordance with 40 C.F.R. § 22.15.

VII. INFORMAL SETTLEMENT CONFERENCE

7.1 Respondents acknowledge the allegations of Paragraph 7.1 of the Complaint which requires no answer. Respondents affirmatively advise the hearing officer that they will request an informal Settlement Conference.

7.2 Respondents acknowledge the allegations of Paragraph 7.2 of the Complaint which requires no answer. Respondents affirmatively allege that there is a 30 day time period to file a written Answer according to the Rules.

7.3 Respondents acknowledge the allegations of Paragraph 7.3 of the Complaint which requires no answer. Respondents do not intend and will not engage in any ex parte (unilateral) discussion of the merits of this matter with the administrator, the Environmental Appeals Board, or its members, the Regional Judicial Officer, the Presiding Officer, or any other person likely to advise these officials as to the correct decision to issue of this case.

VIII. RESERVATION

8.1 Respondents acknowledge the allegations of Paragraph 8.1 of the Complaint which requires no answer.

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IX. CONCLUSION
(Summary of Circumstances or Arguments Which Constitute
Grounds of Defenses, Facts Which Respondents Dispute,
Basis for Opposing Proposed) Relief

9.1 Respondents operated under a reasonable belief that obtaining a NPDES Permit for their site was unnecessary since all stormwater was infiltrating vertically and no discharges occurred offsite. While Respondents have accepted a NPDES Permit issued by the State of Washington Department of Ecology, there is no showing that this permit is required based upon their activities and site conditions. Stating as much, Respondents do not object to meeting reasonable government directives. There is no proof that any discharges emanated offsite which reached any waters of the United States, including but not limited to, the Green River. There is no showing of a defined channel that documents any measurable flow emanating offsite from Respondents' facilities to the Green River. The EPA's sole basis for allegations of Clean Water Act violations and imposition of civil penalties is a generic model which, not properly calibrated to take into account onsite conditions, including the highly permeable soils. The validity of the EPA's model can only be tested in an adjudicative hearing with the opportunity to cross-examine witnesses and present evidence. Respondents' dispute all "facts" alleged by EPA, including that their activities require coverage under the General NPDES Permit or that stormwater has emanated offsite from their facility into the Green River or any other water of the United States. Without a violation of law there is no basis to impose civil penalties. In addition, Respondents' activities are now fully in compliance with any requirements. In sum, there is no basis in fact, law, or public policy to impose civil penalties on Respondents.

1 **X. REQUEST FOR ASSIGNMENT OF PRESIDING OFFICER**

2 10.1 Pursuant to the Rule 22.21, Respondents herein request that EPA's Regional
3 Hearing Clerk forward a copy of the Complaint and Answer, Affirmative Defenses and
4 Request for Hearing to the Chief Administrative Law Officer for assignment of a presiding
5 officer to hear this matter.
6

7 **XI. REQUEST FOR HEARING**

8 11.1 Pursuant to Rule 22.21, a Presiding Officer should be appointed. As allowed
9 by Rules, Rule 22.15(c), Respondents request an adjudicative hearing.

10 **XII. LEAVE TO AMEND ANSWER**

11 12.1 Much of the information related to the EPA's enforcement action taken this
12 matter by filing of the Complaint is solely in the possession of that agency. As allowed by the
13 Rules, Rule 22.19(c), Respondents' will request leave to engage in discovery. Once they have
14 received more information from the EPA, Respondents give notice that they may amend this
15 Answer to provide more defenses then set-out herein.
16

17 Having fully answered the Complaint, the Respondents assert the following

18 **AFFIRMATIVE DEFENSES:**

- 19 1. The Complaint fails to state a claim upon which relief can be granted.
- 20 2. The EPA delegated authority to implement all federal and state water pollution
21 control laws and regulations in Washington State to the State Department of Ecology;
22 Ecology did not require Respondents to obtain an individual NPDES permit or seek coverage
23 under the ISGP until the summer of 2012; the EPA waived any and all claims related to
24 Respondents' alleged failure to obtain a permit prior to such date.
25
26

1 3. To the extent the Complaint identifies any violations of the CWA, they are
2 solely the result of Ecology's actions or omissions in administering the NPDES permitting
3 program.

4 4. Respondents' activities have not resulted (and were not a result) in the
5 discharge of pollutants to "waters of the United States."

6 5. The EPA cannot establish that Respondents were the source of any of the
7 pollutants allegedly found in surrounding waters.

8 6. The existence of any wastewater discharges in the vicinity of Respondents'
9 operations have been caused solely by acts of God and/or the acts or omissions of a third
10 party.

11 7. To the extent that Respondent's acts or omissions may, without either so
12 admitting or denying, be in noncompliance with the Clean Water Act, those acts or omissions
13 are *de minimis* in nature, have created no danger to health and public safety or human welfare,
14 or a danger to the environment.

15 8. The EPA fails to state a claim under the CWA because it cannot establish a
16 continuing violation.

17 9. The EPA fails to state a claim under the CWA because Ecology has already
18 enforced permitting requirements in connection with the allegations in the Complaint.

19 10. The allegations in the Complaint are barred by laches and/or waiver.

20 11. The Court lacks subject matter jurisdiction over Respondents because the EPA
21 failed to comply with statutory requirements to provide the State of Washington Department
22 of Ecology with notice of the filing of the Complaint.
23
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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify under penalty of perjury under the laws of the State of Washington, that I am now, and have at all times material hereto been, a resident of the State of Washington, over the age of 18 years, not a party to, nor interested in, the above-entitled action, and competent to be a witness herein.

I caused a true and correct copy of the foregoing pleading to be served this date, in the manner indicated, to the parties listed below:

<u>Original plus one (1) copy to:</u>	
Candace Smith, Regional Hearing Clerk U.S. Environmental Protection Agency, Region 10 1200 Sixth Avenue, #900 / Mail Stop ORC-158 Seattle, WA 98101 (206) 553-6524, tel Smith.candace@epamail.epa.gov , email	<input checked="" type="checkbox"/> Legal Messenger <input type="checkbox"/> Hand Delivered <input type="checkbox"/> Facsimile <input type="checkbox"/> First Class Mail <input type="checkbox"/> Express Mail, Next Day <input checked="" type="checkbox"/> Email
<u>Copies to:</u>	
Edward J. Kowalski, Director Office of Compliance and Enforcement U.S. Environmental Protection Agency 1200 Sixth Avenue, #900 / Mail Code OCE-184 Seattle, WA 98101 (206) 553-6695, tel Kowalski.edward@epamail.epa.gov , email	<input checked="" type="checkbox"/> Legal Messenger <input type="checkbox"/> Hand Delivered <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> First Class Mail <input type="checkbox"/> Express Mail, Next Day <input checked="" type="checkbox"/> Email
Elizabeth McKenna, Office of Regional Counsel U.S. Environmental Protection Agency, Region 10 1200 Sixth Avenue, #900 / Mail Code OCE-133 Seattle, WA 98101-3140 (206) 553-0016, tel Mckenna.Elizabeth@epamail.epa.gov , email	<input checked="" type="checkbox"/> Legal Messenger <input type="checkbox"/> Hand Delivered <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> First Class Mail <input type="checkbox"/> Express Mail, Next Day <input checked="" type="checkbox"/> Email

DATED at Bainbridge Island, Washington, this 31 day of July, 2013.



Karen Kimzey
Legal Assistant