



STATE OF DELAWARE
DEPARTMENT OF NATURAL RESOURCES
AND ENVIRONMENTAL CONTROL

OFFICE OF THE
SECRETARY

89 KINGS HIGHWAY
DOVER, DELAWARE 19901

PHONE: (302) 739-9000
FAX: (302) 739-6242

**NOTICE OF ADMINISTRATIVE PENALTY ASSESSMENT AND
SECRETARY'S ORDER**

Pursuant to 7 Del. C. Chapters 40 & 60

Order No. 2007-S-0003

*PERSONALLY SERVED BY AN
ENVIRONMENTAL OFFICER*

Issued To:

Capson of Brandywine, LLC
Mr. Joseph Capano
105 Foulk Road
Wilmington, DE 19803

Registered Agent:

Capson of Brandywine, LLC
105 Foulk Road
Wilmington, DE 19803

Dear Sirs:

This is to notify Capson of Brandywine, LLC ("Respondent") that the Secretary of the Department of Natural Resources and Environmental Control ("Department") has found Respondent in violation of 7 Del. C. Chapter 40 & 60. Accordingly, the Department is issuing this Notice of Administrative Penalty Assessment and Secretary's Order ("Notice and/or Order").

BACKGROUND

Respondent is the developer of the Lake Como Woods Development, located in Smyrna, Delaware. Lake Como is a 28.10-acre residential community of 63 single family homes. On September 22, 2005, the Kent Conservation District ("KCD") approved the Sediment and Stormwater Plan ("Approved Plan") for Lake Como Woods. KCD is the Department's delegated agency for implementation of the *Delaware Sediment & Stormwater Regulations* ("the Regulations")¹ within its area of jurisdiction. KCD's jurisdiction includes unincorporated Kent County as well as all incorporated municipalities within Kent County.

On December 19, 2006, KCD referred the project to the Department for enforcement after repeated attempts by KCD to bring this site into compliance failed.

¹ 7 Del. Admin. C. § 5101.

Delaware's Good Nature depends on you!

On January 3, 2007, the Department issued a Notice of Violation ("NOV") to Respondent identifying four (4) specific measures required to bring the site into compliance with the Approved Plan. Respondent was required to

1. provide an "as-built" for both the North and South ponds, because there were some questions whether the ponds were built in accordance with the Approved Plan;
2. clear the sediment out of forebay and stabilize the side slopes of the South Pond. The slopes and adjacent areas of the South Pond were not stabilized, and the slopes were eroding into the pond. The inlet FES and forebay were full of sediment;
3. complete Phase 2 stabilization and E&S controls; and
4. install or repair inlet protection and curb silt fence.

The Respondent provided an as-built submission, which the Department and KCD reviewed. On February 15, 2007, KCD sent Respondent a letter requesting Respondent to address the review comments on the as-built submission.

On May 2, 2007 the Department conducted a site inspection and identified twenty-four (24) issues to be addressed by Respondent. On June 12, 2007, the Department issued a second NOV to Respondent identifying twenty-four (24) specific measures to bring the site into compliance with the Approved Plan. On June 12, 2007, the Department and KCD conducted a site meeting with Respondent, his design engineer, site contractor, and certified construction reviewer to discuss the corrective work required to bring the site into compliance with the Approved Plan. All the parties agreed that the work would be completed by July 12, 2007. The Department advised Respondent in the June 12, 2007 NOV and at the June 12, 2007 meeting that Respondent must submit documentation demonstrating compliance.

On July 12, 2007, the Department received an email from the Respondent's design engineer stating that the site contractor had experienced some delays with meeting the deadline to complete the work associated with the violation. He stated they were delayed at least two (2) weeks. The Department made several attempts to discuss the matter with the Respondent.

On July 16, 2007, the Department conducted another site inspection, which demonstrated that Respondent had done little to comply with the June 12, 2007 NOV. On August 8, 2007, the Department spoke with Respondent's design engineer regarding the June 12, 2007 NOV and the Department's July 16, 2007 site inspection. The Department reiterated that Respondent must provide documentation to demonstrate compliance. Respondent's design engineer advised the Department that it would receive a response to the NOV in a couple days.

On August 27, 2007, the Department performed another site inspection, which revealed that the Respondent had not corrected the items identified in the June 12, 2007 NOV. Accordingly, the Department issued a third NOV to the Respondent, advising that Respondent was in violation of 7 Del. C. §§ 4001-4016 and 6001-6099. The Department further informed

Respondent that it was pursuing enforcement pursuant to 7 Del. C. § 6005 for Respondent's failure to comply with the June 12, 2007 NOV. On August 27, 2007, the Department received a faxed letter from Respondent's design engineer, requesting an onsite meeting to discuss the overall compliance of the site and the NOV. Under cover of the same letter, Respondent sent the Department a response to the June 12, 2007 inspection report.

FINDINGS OF FACT

1. On September 22, 2005, KCD approved Respondent's Sediment and Stormwater Plan.
2. On December 19, 2006, KCD referred site to the Department for enforcement.
3. On January 3, 2007, the Department hand-delivered a Notice of Violation to the Respondent at the site.
4. On May 2, 2007, the Department conducted a site inspection.
5. On June 12, 2007, the Department held a site meeting with the Respondent and hand-delivered a Notice of Violation (NOV) with a deadline of July 12, 2007, for compliance. The Department's May 2, 2007 inspection report was attached to the NOV. The site was reviewed by all the present parties.
6. On July 16, 2007, the Department conducted a site inspection.
7. On August 27, 2007, the Department sent an NOV to Respondent by facsimile and certified mail.
8. On August 27, 2007, the Department received a facsimile from the Respondent's design engineer, acting on the behalf of the developer, indicating they were in receipt of the NOV and requesting an onsite meeting to discuss the overall compliance of the site and the NOV. The Department also received a response to the May 2, 2007 inspection report.
9. On August 27, 2007 the Department conducted a site inspection.

STATUTORY, REGULATORY AND PERMIT REQUIREMENTS

1. 7 Del. C. § 6003(a)(2) states:

No person shall, without first having obtained a permit from the Secretary, undertake any activity: In a way which may cause or contribute to discharge of a pollutant into any surface or ground water...

2. 7 Del. C. § 6010(a) states:

The Secretary may adopt, amend, modify or repeal rules or regulations, or plans, after public hearing, to effectuate the policy and purposes of this chapter.”

Pursuant to this authority, the Secretary of the Department of Natural Resources and Environmental Control adopted the *Regulations Governing the Control of Water Pollution*.

3. Section 6.01(a) of the *Regulations Governing the Control of Water Pollution* states:

The following regulations delineate the authority and general procedures to be followed in connection with the Department’s administration of the National Pollutant Discharge Elimination System (“NPDES”) Program and specifically, the processing of any NPDES permits issued by the Secretary authorizing discharges of pollutants into State waters during the periods that the Secretary authorizing discharges of pollutants into State waters during the periods that the Secretary may be authorized to issue such permits pursuant to Sections 402, 318, and 405 of the Act. During any periods in which the Secretary may not be authorized to issue such permits pursuant to Sections 402, 318, and 405 of the Act, these regulations shall remain in full force and effect with respect to any certificates or permits authorizing discharges of pollutants into State waters issued by the Secretary pursuant to 7 Del. C. Chapter 60.

4. Section 6.01(b) 4 of the *Regulations Governing the Control of Water Pollution* states:

The NPDES Program requires a permit for the discharge of a “pollutant” or combination of pollutants from any “point source” to “State waters”. The terms “pollutant”, “point source” and “State waters” or “waters of the State” are defined in Section 2. The following are point sources and require NPDES permits for any discharge(s) there from:

4. Storm water discharges associated with industrial activities as set forth in Section 9.

5. Section 9.1.02.1.A.1 of the *Regulations Governing the Control of Water Pollution* states:

The following discharges and activities are eligible for NPDES General Industrial Storm Water Permit Coverage under this Part.

1. This Part covers all new and existing storm water discharges that are composed in whole or in part of discharges associated with construction activity [as defined by 40 Code of Federal Regulations (CFR), Section 122.26(b)(14)(x),15; see §9.1.02..0 DEFINITIONS].

2. Discharges from support activities (e.g., concrete or asphalt plants, equipment staging yards, material storage areas, excavated material disposal areas, borrow areas) provided:

c. Appropriate controls and measures are identified in a Sediment and Stormwater Plan covering the discharges from the support activity areas.

6. Section 9.1.02.1.D of the *Regulations Governing the Control of Water Pollution* states:

To be authorized to discharge stormwater under this Part, a person planning a construction activity must submit, in accordance with the requirements of §9.1.02.3, an NOI form prior to commencement of any construction activities. Unless notified by the Secretary to the contrary, persons who submit such notification and have either obtained approved Sediment and Stormwater Plans or have been deemed exempt in accordance with the *Delaware Sediment and Stormwater Law and Regulations*, are authorized to discharge storm water associated with construction activity under the terms and conditions of this Part.

7. Section 9.1.02.2.C. of the *Regulations Governing the Control of Water Pollution* states:

Any person subject to this Subsection shall at all times properly operate and maintain all facilities, systems and practices of pollution control which are installed, or implemented to achieve compliance with the requirements of this Subsection and with the measures of the Sediment and Stormwater Plan.

8. Section 9.1.02.2.I. of the *Regulations Governing the Control of Water Pollution* states:

Any person who violates conditions of this Subsection may be subject to penalties in accordance with 7 *Del. C.* Chapter 60. Violation of this Subsection is also a violation of the Clean Water Act and may be subject to penalties established under that statute.

9. Section 9.1.02.4.B of the *Regulations Governing the Control of Water Pollution* states:

For the purposes of monitoring, persons subject to this Part must:

2. Conduct the following:
 - a. weekly maintenance inspections of erosion and sediment controls, and constructed storm water management measures; and
 - b. inspections of erosion and sediment controls and storm water management practices the next business day after a rainfall event that results in runoff.

10. Section 9.1.02.5.A of the *Regulations Governing the Control of Water Pollution* states:

Persons covered by this Part shall develop, fully implement, and maintain at the site, the approved Sediment and Stormwater Plan (Plan) and any other records that are required in accordance with 7 *Del. C.* Chapter 40 and the *Delaware Sediment and Stormwater Regulations*. The Plan shall cover all site activities from the date of initiation of construction activity to the date of project completion. Pollution prevention measures, in accordance with Delaware Erosion and Sediment Control Handbook standard and specification for Construction Site Pollution Prevention, shall be incorporated into the Plan for construction activity.

CONCLUSIONS

Based on the foregoing facts, the Department has determined that Respondent has violated 7 Del. C. Chapter 40 and 60, the *Regulations Governing the Control of Water Pollution*, and the following permit conditions:

1. Respondent violated permit Section 9.1.02.2.C. by not complying with the measures of the approved Sediment and Stormwater Plan on May 2, 2007, July 12, 2007 and July 16, 2007. Specifically, Respondent failed to complete the South and North

Ponds according to the approved plan, failed to submit the as-builts, and failed to properly stabilize all disturbed areas of the site within 14 calendar days of being disturbed in accordance with Delaware's Erosion and Sediment Control Handbook.

2. Respondent violated his NPDES permit Section 9.1.02.2.C. by not complying with the Standard Detail Notes on the approved Sediment and Stormwater Plan on May 2, 2007, July 12, 2007 and July 16, 2007.
3. Respondent violated his NPDES permit Section 9.1.02.2.C by not complying with the Stormwater Management General Notes on the approved Sediment and Stormwater Plan, on May 2, 2007, July 12, 2007 and July 16, 2007.

ASSESSMENT OF PENALTY AND ORDER

Pursuant to the provisions of 7 Del. C. § 6005(b)(3), this is written notice to Respondent that on the basis of its findings, the Department is assessing Respondent an administrative penalty of \$20,000.00 for the violations identified in this Notice and Order.

Respondent shall submit a check to the Department in the amount of \$20,000.00 within 30 days from the receipt of this Notice of and Order for the aforementioned penalty. The check shall be made payable to the "State of Delaware" and shall be directed to: Kevin P. Maloney, Deputy Attorney General, Department of Justice, Environmental Unit, 102 W. Water Street, 3rd Floor, Dover, Delaware 19904.

PUBLIC HEARING

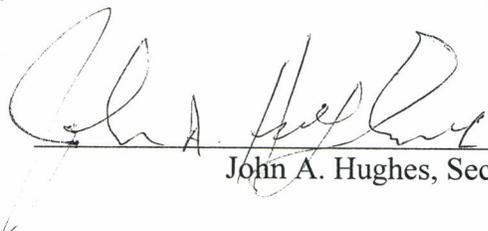
This Notice and Order shall become effective and final unless the Department receives from Respondent, no later than 30 days from the receipt of this Notice, a written request for a public hearing on these matters as provided in 7 Del. C. § 6005(b)(3) and (c). In the event Respondent requests a hearing, the Department reserves the right to withdraw this Notice and Order and take additional enforcement actions regarding these and other violations at Respondent's facility, including but not limited to, the imposition of civil penalties and recovery of the Department's costs and attorney's fees. The Department does not otherwise intend to convene a public hearing on these matters, but reserves the right to do so at its discretion.

PRE-PAYMENT

Respondent may prepay the administrative penalty of \$20,000.00 and the Department's estimated costs of the investigation in the amount of \$3,000.00, in the manner described in the attached Waiver. By doing so, Respondent waives his right to a hearing and the opportunity to appeal or contest this Notice and Order, which shall become a final Order.

If you have any questions, please contact Jamie H. Rutherford at (302) 739-9921.

1-24-08
Date



John A. Hughes, Secretary

JAH:DS:jhr

- cc: Robert S. Baldwin, Director
- Devera B. Scott, Deputy Attorney General
- Frank Piorko, Program Administrator
- Jamie Rutherford, Program Manager
- Cheryl Gmuer, Program Manager
- Jennifer Bothell, Enforcement Coordinator
- David McGuigan, EPA Region III Associate Division Director,
NPDES Permits and Enforcement

WAIVER OF STATUTORY RIGHT TO A HEARING

Capson of Brandywine, LLC hereby waives his right to a hearing and his opportunity to appeal or contest this Notice of Conciliation, Assessment and Order and agrees to the following:

1. **Capson of Brandywine, LLC** will pay the administrative penalty in the amount of \$20,000.00 by sending a check payable to the "State of Delaware" within 30 days of receipt of this Assessment and Order, along with this signed Waiver. The check shall be directed to: Kevin P. Maloney, Deputy Attorney General, Department of Justice, Environmental Unit, 102 W. Water Street, 3rd Floor, Dover, Delaware 19904; and

2. **Capson of Brandywine, LLC** will reimburse the Department in the amount of \$3,000.00, which represents the Department's estimated costs of the investigation pursuant to 7 *Del. C.* § 6005(c). The reimbursement shall be paid within 30 days of receipt of this Assessment and Order. The check shall be made payable to the "State of Delaware" and be directed to Kevin P. Maloney, Deputy Attorney General, Department of Justice, 102 W. Water Street, 3rd Floor, Dover, Delaware 19904.

Capson of Brandywine, LLC

Date: _____

By: _____

Title: _____

STIPULATED SETTLEMENT AGREEMENT

WHEREAS, Capson of Brandywine, LLC, is the developer of Lake Como Woods, a residential subdivision, consisting of 63 single-family homes in Smyrna, Delaware;

WHEREAS, the Department of Natural Resources & Environmental Control (the "Department") delegated to the Kent Conservation District (KCD) the authority to implement the *Delaware Sediment & Stormwater Regulations*.¹

WHEREAS, on January 24, 2008, Secretary John A. Hughes issued a Notice of Administrative Penalty Assessment and Secretary's Order, No. 2007-S-003, which, inter alia, sought to impose an administrative penalty of \$20,000, and investigative costs of \$3,000 on Capson.

WHEREAS, on February 22, 2008, Capson requested a hearing, pursuant to 7 *Del. C.* § 6005(b)(3) on all of the matters addressed in the Notice of Administrative Penalty Assessment and Secretary's Order, No. 2007-S-003;

WHEREAS, the parties agreed to stay the hearing to engage in settlement negotiations;

WHEREAS, on or about July 5, 2009, the parties agreed to resolve the matters raised in the Notice of Administrative Penalty Assessment and Secretary's Order, No. 2007-S-003, without admission of liability by Capson.

IT IS THEREFORE AGREED AS FOLLOWS:

1. Capson shall pay the Department \$10,000 in full and final resolution and satisfaction of any penalty and/or costs sought to be imposed by the Notice of Administrative Penalty Assessment and Secretary's Order, No. 2007-S-003, without admission of liability by Capson.

¹ 7 *Del. Admin. C.* § 5105.

2. Capson shall make monthly installment payments of \$2,500 over the next four months to the Department. The balance must be paid in full by February 28, 2010.

3. Upon Capson's final payment to the Department of the \$10,000 total amount due under this settlement, the Department will dismiss the Notice of Administrative Penalty Assessment and Secretary's Order, No. 2007-S-003, without a determination of violation, and all matters arising or related to the findings of fact in the Notice of Administrative Penalty Assessment and Secretary's Order shall be forever discharged.



Joseph Capano, LLC
Capson of Brandywine, LLC



Collin P. O'Mara, Secretary
Department of Natural Resources &
Environmental Control

Dated: 11/10/09

Dated: 11 January 2010