

BEFORE THE
OHIO ENVIRONMENTAL PROTECTION AGENCY

OHIO E.P.A.

APR 15 2010

ENTERED DIRECTOR'S JOURNAL

In the Matter of:

Ernst Development Company, Inc.
3584 East Salinas Circle
Dayton, Ohio 45440

Director's Final Findings
and Orders

and

EDCI II Partnership
1367 Soaring Heights Dr.
Dayton, Ohio 45440

I certify this to be a true and accurate copy of the
official documents as filed in the records of the Ohio
Environmental Protection Agency.

Respondents

By: Myra Lassiter Date: 4-15-10

PREAMBLE

It is agreed by the Parties hereto as follows:

I. JURISDICTION

These Director's Final Findings and Orders ("Orders") are issued to Ernst Development Company, Inc. and EDCI II Partnership ("Respondents"), pursuant to the authority vested in the Director of the Ohio Environmental Protection Agency ("Ohio EPA") under Ohio Revised Code (ORC) §§ 6111.03 and 3745.01.

II. PARTIES BOUND

These Orders shall apply to and be binding upon Respondents and successors in interest liable under Ohio law. No change in ownership of Respondents or the Site (as hereinafter defined) shall in any way alter Respondents' obligations under these Orders.

III. DEFINITIONS

Unless otherwise stated, all terms used in these Orders shall have the same meaning as defined in ORC Chapters 6111 and 3745, and the rules promulgated thereunder.

IV. FINDINGS

The Director of Ohio EPA has made the following findings:

1. Respondents are the developers of Traditions at Sugar Creek, Phase One, a 24.5 acre residential development located at 3820 Upper Bellbrook Road, Bellbrook, Greene County, Ohio ("Site").
2. Storm water from the western side of the Site discharges to a tributary of the Little Miami River known as Little Sugar Creek. Storm water from the eastern side of the Site drains to an unnamed tributary of the Little Miami River. The Little Miami River, the unnamed tributary, and Little Sugar Creek constitute "waters of the state," as defined by ORC § 6111.01(H). Sediment contained in the storm water constitutes "other wastes," as defined in ORC § 6111.01(D). Placement of this waste into waters of the state constitutes "pollution," as defined in ORC § 6111.01(A).
3. Ohio Administrative Code (OAC) § 3745-38-02 provides that no person may discharge any pollutant or cause, permit, or allow a discharge of any pollutant from a point source without either applying for and obtaining an Ohio National Pollutant Discharge Elimination System (NPDES) individual permit in accordance with requirements of OAC Chapter 3745-33, complying with the indirect discharge permit program pursuant to OAC Chapter 3745-36 or obtaining authorization to discharge under an Ohio NPDES general permit in accordance with requirements of OAC Chapter 3745-38.
4. ORC § 6111.03(J)(1) authorizes the Director to set the terms and conditions of the permit. That section further provides that any permit terms and conditions set by the director shall be designed to achieve and maintain full compliance with mandatory requirements of the Federal Water Pollution Control Act that are imposed by regulation of the Administrator of the United States Environmental Protection Agency. Pursuant to Section 402(p) of the federal act, the Administrator of USEPA imposed by regulation requirements to regulate storm water discharges. Under 40 C.F.R. 122.26, dischargers of storm water associated with construction activity that disturbs more than one (1) acre of land are required to obtain an individual NPDES permit or coverage under a storm water general permit.
5. On May 22, 2007, Respondent Ernst Development Company ("Ernst") submitted

- a Notice of Intent ("NOI") to obtain coverage under Ohio EPA's NPDES Permit for Storm Water Discharges Associated with Construction Activity ("Storm Water General Permit"). Ohio EPA granted Respondent Ernst coverage under Storm Water General Permit No. 1GC02390*AG on June 12, 2007.
6. Respondent EDCI II Partnership ("EDCI") has not submitted an NOI although Part II.A. of the Storm Water General Permit requires all operators at a site to submit an NOI and obtain coverage as co-permittees.
 7. "Operator" is defined in the Storm Water General Permit, Part VII.O., as any party associated with a construction project that either has operational control over construction plans and specifications, or has day-to-day operational control of the activities at a project which are necessary to ensure compliance with a storm water pollution prevention plan or other permit conditions. Both Respondents are operators at the Site.
 8. Part III of the Storm Water General Permit requires a Storm Water Pollution Prevention Plan ("SWP3") to be developed for the Site in accordance with the requirements set out in the Storm Water General Permit prior to the initiation of construction activities. Respondents did not have an SWP3 for the Site prior to initiating construction activities, and as of this date, do not have an SWP3 which meets the requirements of the Storm Water General Permit.
 9. On October 23, 2007, November 26, 2007, December 28, 2007, January 9, 2008, January 28, 2008, February 6, 2008, April 2, 2008, April 24, 2008, May 15, 2008, June 2, 2008, March 18, 2009, June 3, 2009, and November 3, 2009, Ohio EPA conducted inspections of the Site to determine whether Respondents were in compliance with the conditions of the storm water general permit. Ohio EPA communicated the results of these inspections to Respondent Ernst by transmitting Notices of Violation (NOV), other letters, or email to Respondent Ernst on October 24, 2007, November 26, 2007, November 28, 2007, and January 10, 2008. The NOVs and other letters documented and communicated to Respondent Ernst some of the specific violations of the permit found at the Site and the corrective actions necessary to achieve compliance with major provisions of the Storm Water General Permit. In addition, Ohio EPA held an onsite meeting with Respondent Ernst on December 10, 2007, at which the violations and necessary corrective actions were discussed.
 10. On at least November 2, 2007, November 23, 2007, and November 26, 2007, the Greene County Soil and Water Conservation District conducted inspections of

the Site to determine whether Respondents were in compliance with erosion and sediment control requirements. Results of these inspections were communicated by letter to Respondent Ernst on at least November 2, 2007 and February 25, 2008, by the Greene County Soil and Water Conservation District.

11. Storm water passed over all or part of the disturbed portions of this construction site and picked up dirt and soil which was discharged off site to waters of the state. The discharge, at least in part, was from piles of earth formed by earthmoving equipment and earthmoving activity and/or left the site in discrete conveyances such as drains, ditches, fissures, rills or gullies and/or trenches.
12. Part III.G.2.h. of the NPDES Storm Water General Permit requires that all temporary and permanent control practices be maintained and repaired as needed to ensure continued performance, and that sediment control practices be maintained in a functional condition until all up slope areas they control are permanently stabilized. Respondents failed to install adequate temporary and permanent control practices and sediment control practices, in violation of the permit and ORC § 6111.07.
13. Part III.G.2.i. of the NPDES Storm Water General Permit requires that qualified inspection personnel conduct inspections at least weekly and within 24 hours after any storm event greater than one-half inch of rain per 24-hour period to ensure that the control practices are functional and to evaluate whether the Storm Water Pollution Prevention Plan ("SWP3") is adequate and properly implemented, and to maintain a record summarizing the results of the inspections for three years following the submission of a notice of termination form. Respondents failed to conduct weekly and post-rainfall event inspections and/or to maintain a record of all inspections conducted at the Site, in violation of the permit and ORC § 6111.07.
14. Part III.G.2.b.i. of the NPDES Storm Water General Permit requires that all disturbed areas that will remain dormant for more than twenty-one (21) days, but less than one year, and which are not within fifty (50) feet of a stream be temporarily stabilized within seven (7) days of the most recent disturbance. Respondents failed to implement the required temporary stabilization at the Site, in violation of the permit and ORC § 6111.07.
15. Part III.G.2.c. of the NPDES Storm Water General Permit requires that measures be taken to control the flow of runoff from disturbed areas to prevent erosion from occurring, and that where practicable, runoff be diverted away from disturbed

areas and steep slopes. Respondents failed to take adequate measures to control runoff before it could concentrate and cause significant erosion in fill placed near the Site's western boundary.

16. Part III.G.2.d.i. of the NPDES Storm Water General Permit requires that sediment control structures be functional throughout earth disturbing activity; that sediment settling ponds shall be installed as the first step of grading and within (7) days from the start of grubbing; and that the controls shall continue to function until the upslope development area is restabilized. At the very least, a sediment settling pond should have been installed to capture runoff from the western side of the Site once it became clear that sediment control in the form of silt fence was inadequate. Sediment settling ponds along the western boundary of the Site were not installed as required or necessary, in violation of the permit and ORC § 6111.07.
17. Part III.G.2.d.i. of the NPDES Storm Water General Permit requires that sediment control structures be functional until the upslope development area is restabilized; and that perimeter sediment barriers be implemented as the first step of grading and within 7 days from the start of grubbing. Along the western boundary of the Site, barriers were not installed at the appropriate time, which would have been after filling of the area was completed in preparation for the installation of a new sewer line in that area, in violation of the permit and ORC § 6111.07.
18. Part III.G.2.d.iii. of the NPDES Storm Water General Permit requires that sheet flow runoff from denuded areas be intercepted by sediment barriers, and that the sediment barriers shall protect adjacent properties and water resources from sediment transported by sheet flow. Along the Site's western boundary, Respondents failed to intercept sheet flow runoff from denuded areas by installing sediment barriers at the Site to protect adjacent properties and/or water resources, in violation of the permit and ORC § 6111.07.
19. Part III.G.2.b.i. of the NPDES Storm Water General Permit requires that permanent stabilization be applied to disturbed areas within seven (7) days after final grade is reached on any portion of the site that is not within fifty (50) feet of a stream, or within seven (7) days after the most recent disturbance in any areas that will lie dormant for one year or more. Throughout the Site Respondents failed to initiate permanent stabilization within seven days in areas of the Site which had reached final grade and were not within 50 feet of a stream, or in areas which would remain dormant for one year or more, in violation of the permit

and ORC § 6111.07.

20. Part III.G.2.d. of the NPDES Storm Water General Permit requires that structural practices shall be used to control erosion and trap sediment from a site remaining disturbed for more than fourteen (14) days. Throughout the Site Respondents failed to use structural practices to control erosion and trap sediment from the Site in areas remaining undisturbed for more than fourteen (14) days, in violation of the permit and ORC § 6111.07.
21. Part III.G.2.d.ii. of the NPDES Storm Water General Permit requires that concentrated storm water runoff from disturbed areas flowing at rates which exceed the design capacity of sediment barriers must pass through a sediment settling pond. The western portion of the Site experienced concentrated storm water runoff from disturbed areas flowing at rates which exceeded the design capacity of sediment barriers and Respondents failed to implement a settling pond to pass the storm water runoff through, in violation of the permit and ORC § 6111.07.
22. Part III.G.2.d.ii. of the NPDES Storm Water General Permit requires that a sediment settling pond be constructed to maximize sediment settling. Respondents failed to properly construct a sediment settling pond in the western portion of the Site, in violation of the permit and ORC § 6111.07.
23. Part III.G.2.e. of the NPDES Storm Water General Permit requires that post construction storm water practices provide perpetual management of runoff quality and quantity so that a receiving stream's physical, chemical, and biological characteristics are protected and stream functions are maintained. Respondents' post construction practices have not been identified, in violation of the permit and ORC § 6111.07.
24. Construction activities at the Site ceased during or before January 2008. The site has been stabilized since at least April 2009.
25. Pursuant to ORC § 6111.04, no person to whom a permit has been issued shall place or discharge, or cause to be placed or discharged, in any waters of the state any sewage, sludge, sludge materials, industrial waste, or other wastes in excess of the permissive discharges specified under an existing permit.
26. Pursuant to ORC § 6111.07(A), no person shall violate or fail to perform any duty imposed by ORC §§ 6111.01 to 6111.08 or violate any order, rule, or term or

condition of a permit issued or adopted by the Director of Ohio EPA pursuant to those sections. Each day of violation is a separate offense.

27. Respondents have caused pollution by discharging or placing or causing to be placed other wastes into waters of the state in violation of the NPDES Storm Water General Permit which violates ORC §§ 6111.04 and 6111.07.
28. The Director has given consideration to, and based his determination on, evidence relating to the technical feasibility and economic reasonableness of complying with these Orders and to evidence relating to conditions calculated to result from compliance with these Orders, and its relation to the benefits to the people of the State to be derived from such compliance in accomplishing the purpose of ORC Chapter 6111.

ORDERS

1. Respondents shall not initiate or continue construction activities that disturb more than one acre of land without having first submitted NOIs and obtained coverage under an NPDES Storm Water General Permit and developed and implemented an SWP3 that satisfies all minimum criteria listed in Part III of the NPDES Storm Water General Permit.
2. At least twenty-one (21) days prior to recommencing construction activity at the Site, Respondent EDCI and any other operators, as defined in Part VII.O. of the NPDES Storm Water General Permit, shall submit an NOI for coverage as a co-permittee under NPDES Storm Water General Permit No. 1GC02390*AG.
3. At least thirty (30) days prior to recommencing construction activity at the Site, Respondents shall submit a revised and updated SWP3 for the Site to Ohio EPA for review and approval in accordance with Section X. of these Orders. Respondents shall continue to amend the SWP3 for the Site as required by Part III.D. of the NPDES Storm Water General Permit, and shall submit a copy of any amendments or revisions of the SWP3 to Ohio EPA, in accordance with Section X. of these Orders. Respondents shall include post-construction storm water management in the SWP3. Detail drawings and maintenance plans for all post-construction Best Management Practices ("BMPs") shall be provided by Respondents to the post-construction operator of the Site prior to termination of NPDES Storm Water General Permit coverage.
4. If any SWP3 that is submitted by Respondents pursuant to Order No. 3 is

- deemed deficient by Ohio EPA, Respondents shall revise the SWP3 to incorporate Ohio EPA's recommendations within seven (7) days of receipt of notice of any deficiencies. Respondents shall submit a copy of the revised SWP3 to Ohio EPA in accordance with Section X. of these Orders.
5. Immediately upon recommencing construction activity at the Site, Respondents shall comply with the approved SWP3 for the Site until final stabilization is complete in all disturbed areas of the Site. To be considered complete, the stabilization practices must meet the definition of "final stabilization" under the NPDES Storm Water General Permit.
 6. Respondents shall retain a copy of the SWP3 at the Site during the course of performing any earth disturbing activities as defined in the NPDES Storm Water General Permit, and during the installation, construction, or maintenance of BMPs outlined within the SWP3. A copy of the current SWP3 shall be available at the site at all times during construction until the site reaches final stabilization.
 7. Immediately upon recommencing construction activity at the Site, Respondents shall inform all contractors and sub-contractors who will be involved in the implementation of the SWP3 of the terms and conditions of the NPDES Storm Water General Permit for the Site. Respondents shall retain written documentation that this action has been completed. Respondents shall insure that such contractors and sub-contractors comply with relevant portions of the SWP3.
 8. Within seven (7) days of the effective date of these Orders, Respondents shall assign a qualified employee to conduct the inspections of the sediment and erosion control practices, determine if the sediment and erosion control practices are functional, and determine if the Site's SWP3 is adequate and has been properly implemented, in accordance with Part III.G.2.i. of the NPDES Storm Water General Permit.
 - A. A qualified employee is a person with knowledge and experience in the installation and maintenance of sediment and erosion controls. A qualified inspector must be knowledgeable of the principals of sediment and erosion control, is knowledgeable of the permit conditions, is capable of identifying environmental problems relating to the specific project, and is designated by the permittee and agrees to perform this function.
 - B. The qualified employee shall immediately commence inspections in

- accordance with Part III.G.2.i. of the NPDES Storm Water General Permit.
- C. The qualified employee shall maintain a record of all the inspections conducted at the Site in accordance with Part III.G.2.i. of the NPDES Storm Water General Permit. The inspection record shall be kept at the Site in the same location as the SWP3.
 - D. The inspection log must contain a summary of the results of the inspection, the inspector's name, the date of inspection, the observations relating to the implementation of the SWP3, a certification as to whether the facility is in compliance with the SWP3 and the permit, and identification of incidents of non-compliance. As inspections are required within 24 hours after any storm event greater than 0.5 inch of rain per 24 hour period, a precipitation record is to be included in the site logs to demonstrate compliance. "Observations" in the log should include as much detail as possible about the condition of the control measures, even if they are working properly. Also include observations of areas other than where BMPs are installed. Any problems on the site must be documented. Refer to the site plan or to a sketch to make sure it is clear where the problems are. Along with a narrative inspection log, the inspector is to use a sketch or a reduced photocopy of the site plan showing the location and type of control measures. Problems observed at these locations, or at other locations on the construction site, should be highlighted and any corrective measures undertaken should be drawn in and noted in detail on the front side of the sketch.
 - E. Respondents must ensure there is an effective mechanism in place for the inspector to communicate to the Respondents what corrections need to be made. The SWP3 should describe this mechanism as well as any follow-up procedures.
 - F. Respondents shall maintain the Site's inspection record for a period of three years after the Notice of Termination for the Site has been approved by Ohio EPA.
9. Respondents shall maintain temporary or permanent stabilization of all disturbed areas on the Site that have remained or will remain idle for more than 21 days, as defined by Part III.G.2.b.i. of the NPDES Storm Water General Permit.
 10. Respondents shall pay to the Ohio EPA the amount of eight thousand dollars (\$8,000.00) in settlement of Ohio EPA's claim for civil penalties, which may be

assessed pursuant to ORC Chapter 6111. Six thousand four hundred dollars (\$6,400.00) of the penalty shall be paid by tendering official checks made payable to "Treasurer, State of Ohio" in accordance with the schedule below. The official checks shall be submitted to Brenda Case, or her successor, together with letters identifying the Respondent, to:

Ohio EPA
Office of Fiscal Administration
P.O. Box 1049
Columbus, Ohio 43216-1049

- A. Upon the effective date of these Orders, Respondent shall pay to Ohio EPA the amount of four hundred dollars (\$400.00).
 - B. Within ninety (90) days of the effective date of these Orders, Respondent shall pay to Ohio EPA the amount of two thousand dollars (\$2,000.00).
 - C. Within one hundred eighty (180) days of the effective date of these Orders, Respondent shall pay to Ohio EPA the amount of two thousand dollars (\$2,000.00).
 - D. Within two hundred seventy (270) days of the effective date of these Orders, Respondent shall pay to Ohio EPA the amount of two thousand dollars (\$2,000.00).
11. In lieu of paying the remaining one thousand six hundred dollars (\$1,600.00) of civil penalty, Respondents shall fund a Supplemental Environmental Project (SEP) by making a contribution in the amount of one thousand six hundred dollars (\$1,600.00) to Ohio EPA's Clean Diesel School Bus Fund (Fund 5CD). Respondents shall, upon the effective date of these Orders, tender an official check or checks made payable to "Treasurer, State of Ohio" for a total of one thousand six hundred dollars (\$1,600.00). The official check or checks, together with a letter identifying Respondents and the Site, shall be submitted to Brenda Case, or her successor, at:

Ohio EPA
Office of Fiscal Administration
P.O. Box 1049
Columbus, Ohio 43216-1049

A photocopy of each check shall be sent to Ohio EPA, in accordance with

Section X. of these Orders.

12. Should Respondents fail to fund the SEP within the required time frame set forth in Order No. 11, Respondents shall immediately pay to Ohio EPA one thousand six hundred dollars (\$1,600.00) of the civil penalty in accordance with the procedures in Order No. 10.

VI. TERMINATION

Respondents' obligations under these Orders shall terminate when Respondents certify in writing and demonstrate to the satisfaction of Ohio EPA that Respondents have performed all obligations under these Orders and the Chief of Ohio EPA's Division of Surface Water acknowledges, in writing, the termination of these Orders. If Ohio EPA does not agree that all obligations have been performed, then Ohio EPA will notify Respondents of the obligations that have not been performed, in which case Respondents shall have an opportunity to address any such deficiencies and seek termination as described above.

The certification shall contain the following attestation: "I certify that the information contained in or accompanying this certification is true, accurate and complete."

This certification shall be submitted by Respondents to Ohio EPA and shall be signed by a responsible official of each Respondent. For purposes of these Orders, a responsible official is as defined in OAC Rule 3745-33-03(E).

VII. OTHER CLAIMS

Nothing in these Orders shall constitute or be construed as a release from any claim, cause of action or demand in law or equity against any person, firm, partnership or corporation, not a party to these Orders, for any liability arising from, or related to activities occurring on or at the Site.

VIII. OTHER APPLICABLE LAWS

All actions required to be taken pursuant to these Orders shall be undertaken in accordance with the requirements of all applicable local, state and federal laws and regulations. These Orders do not waive or compromise the applicability and

enforcement of any other statutes or regulations applicable to Respondents or the Site.

IX. MODIFICATIONS

These Orders may be modified by agreement of the parties hereto. Modifications shall be in writing and shall be effective on the date entered in the journal of the Director of Ohio EPA.

X. NOTICE

All documents required to be submitted by Respondents pursuant to these Orders shall be addressed to:

Ohio Environmental Protection Agency
Southwest District Office
Division of Surface Water
Attn: DSW Enforcement Supervisor
401 East Fifth Street
Dayton, Ohio 45402

and to:

Ohio Environmental Protection Agency
Lazarus Government Center
Division of Surface Water
Attn: Manager, Stormwater and Enforcement Section
50 West Town Street, Suite 700
[P.O. Box 1049]
Columbus, Ohio 43215 [43216-1049]

[For mailings use the post office box number and zip code in brackets]

or to such persons and addresses as may hereafter be otherwise specified in writing by Ohio EPA.

XI. RESERVATION OF RIGHTS

Ohio EPA and Respondents each reserve all rights, privileges and causes of action, except as specifically waived in Section XII. of these Orders.

XII. WAIVER

In order to resolve disputed claims, without admission of fact, violation or liability, and in lieu of further enforcement action by Ohio EPA for only the violations specifically cited in these Orders, Respondents consent to the issuance of these Orders and agree to comply with these Orders. Compliance with these Orders shall be a full accord and satisfaction for Respondents' liability for the violations specifically cited herein.

Respondents hereby waive the right to appeal the issuance, terms and conditions, and service of these Orders, and Respondents hereby waive any and all rights Respondents may have to seek administrative or judicial review of these Orders either in law or equity.

Notwithstanding the preceding, Ohio EPA and Respondents agree that if these Orders are appealed by any other party to the Environmental Review Appeals Commission, or any court, Respondents retain the right to intervene and participate in such appeal. In such an event, Respondents shall continue to comply with these Orders notwithstanding such appeal and intervention unless these Orders are stayed, vacated or modified.

XIII. EFFECTIVE DATE

The effective date of these Orders is the date these Orders are entered into the Ohio EPA Director's journal.

XIV. SIGNATORY AUTHORITY

Each undersigned representative of a party to these Orders certifies that he or she is fully authorized to enter into these Orders and to legally bind such party to these Orders.

**IT IS SO ORDERED AND AGREED:
Ohio Environmental Protection Agency**

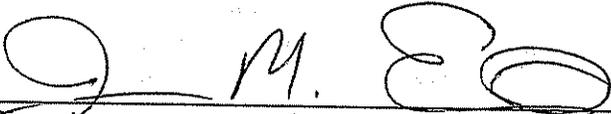


Chris Korleski
Director

4/7/10

Date

IT IS SO AGREED:
Ernst Development Company, Inc.

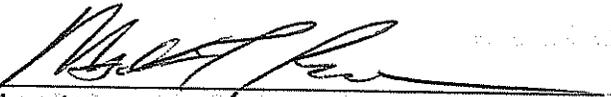

Signature

2/16/10
Date

JAMES M. ERNST
Printed or Typed Name

PRES.
Title

EDCI II Partnership


Signature

2/16/10
Date

MARK P. PRASCIA
Printed or Typed Name

General Partner / Treasurer
Title