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August 31, 2006

Via Certified Mail - Return Receipt Requested

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James H. Fyke, Commissioner

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Paul E. Davis, Director
Tennessee Dept. of Environment & Conservation - Division of Water Pollution Control
L & C Annex, 6th Floor
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**RE: NOTICE OF INTENT TO FILE SUIT UNDER THE CLEAN WATER ACT—
KNOX COUNTY, TENNESSEE**

Dear Sirs,

I am writing on behalf of the Tennessee Clean Water Network, Inc. (“TCWN”), and on behalf of Mr. Charles S. McMillan and Mr. James A. McMillan et al. (hereinafter, “the McMillans et al.” or “the McMillans”) regarding violations of the Federal Water Pollution Control Act (“Clean Water Act,” or “CWA,” 33 U.S.C. § 1251 et seq.), the Tennessee Water Quality Control Act (“TN WQCA,” T.C.A. § 69-3-101 et seq.), and other applicable federal and state law. You are each placed on notice that Murphy Road Partnership, LLC (“Murphy Road Partnership”) has violated and continues to violate the CWA, the TN WQCA, and the terms and conditions of its National Pollution Discharge Elimination (“NPDES”) Construction General Permit (“CGP”) No. TNR 131644, issued by the Tennessee Department of Environment and Conservation (“TDEC”), by failing to adhere to certain terms and conditions of its permit, by causing pollutants to be discharged into a tributary of Love Creek and Murphy Creek, and by failing to obtain a NPDES CGP for certain construction activity and storm water discharge into impaired waters. This letter provides notice of the violations that have occurred, and continue to occur at or near the construction site, also known as “Washington Square Condominiums” (hereinafter referred to as “Washington Square”). By this letter, you are each placed on notice pursuant to Section 505(a)(1) and (b)(1)(A) of the Federal Clean Water Act (“CWA”), 33 U.S.C. § 1365(a)(1) and (b)(1)(A), that after the expiration of sixty (60) days from the date of this letter, TCWN and the McMillans et al. intend to file suit in federal court against Murphy Road Partnership, LLC under Section 505(a) for violations of the CWA, TN WQCA, and other applicable federal and state laws.

We are legal counsel for TCWN and the McMillans et al. in this action. Any response or correspondence related to this matter should be directed to this law firm at the letterhead address. This letter is to provide you with sixty days’ notice of our clients’ intent to file a citizen suit against Murphy Road Partnership, LLC, under Section 505 of the CWA, 33 U.S.C. § 1365, for the violations described herein.

I. PARTIES

TCWN is a statewide, Tennessee non-profit corporation, domiciled and headquartered in Knox County, Tennessee, 706 Walnut Street, Suite 200, Knoxville, Tennessee 37902. TCWN is composed of approximately 330 individual and organizational members. The stated purpose of TCWN, as recorded in its by-laws, includes the “education and promotion of the protection, restoration and enhancement of Tennessee’s waters and the communities which depend upon them.” TCWN is particularly concerned with and has championed the need for protection and improvement of water quality, habitat restoration, and the health and longevity of threatened and endangered species. Many of TCWN’s members live in Knox County and the City of Knoxville and use and enjoy the local waters that are directly injured by the unauthorized discharge of pollutants to waters of the State and waters of the United States by Murphy Road Partnership, LLC.

Both Charles S. McMillan and his son James A. McMillan are members of TCWN, as well as property owners in Knox County, 4715 McCampbell Drive, Knoxville, Tennessee, (and other nearby properties) that are directly affected by discharges of contaminated storm water and/or un-permitted non-storm water discharges originating from the Washington Square construction site, as under the ownership and direct supervision of Murphy Road Partnership, LLC. The McMillans own 179 acres of farmland, through which Murphy Creek flows, and which is located approximately three-fourths ($\frac{3}{4}$) of a mile directly downstream from the Washington Square construction site. A large portion of their property is frequently inundated by flood waters due to build-up of sediment in Murphy Creek, directly discharging from the Washington Square construction site. The increased flooding has prevented the use of farm land and pasture land, and has presented constant flood hazards, as well as detrimental impacts to the McMillans’ cattle. Furthermore, the sediment-laden waters have not only resulted in an objectionable muddy-orange coloration of the water, but the excess sediment/siltation has rendered the creek water undrinkable for the McMillans’ cattle herd. Murphy Road Partnership, LLC has discharged unauthorized pollutants to waters of the State and waters of the United States, and continues to cause discharge of pollutants, resulting in injury to the McMillans.

Murphy Road Partnership, LLC (I.D. No. 0439864) is a for-profit limited liability company, incorporated in Knox County, principal office located at 108 Stikoia Lane, Suite 103, Knoxville, Tennessee. Murphy Road Partnership is the permit holder of NPDES CGP No. TNR131644, and is the owner/developer of the Washington Square Condominiums development, located on Washington Pike north of the Edmondson Road intersection and south of McCampbell Drive near Murphy Road, in northeast Knox County, Knoxville, Tennessee. Victor Jernigan is listed as the owner/developer responsible for the Washington Square construction site, and R. Scott Elmore is listed as the registered agent of the LLC. According to the Notice of Intent (“NOI”) submitted for coverage under the Tennessee General NPDES Permit for Discharges of Storm Water Associated with Construction Activities (Permit No. TNR100000), and the accompanying Storm Water Pollution Prevention Plan (“SWPPP”), filed with TDEC on October 13, 2005, the Washington Square site consists of 7.6 acres on the east side of Washington Pike in Knoxville, Tennessee. (SWPPP, p. 3). The only receiving water listed on the NOI and described in the SWPPP is an unnamed tributary of Love Creek (Water Basin ID: TN06010104 001-0100).

II. BACKGROUND

On June 12, 2004, James McMillan accompanied TDEC representative, John West, to the Washington Square construction site. Mr. West observed grubbing and grading activity being performed at the site without any issued permits. More than one year passed, and construction activity (mostly in the form of clearing and grading activity) continued on the Washington Square site, without any issued permits or enforcement actions to prevent further construction activity. On July 21, 2005, James McMillan again accompanied TDEC representatives, Paul Schmierbach and Rich Stallard, to the Washington Square site, where un-permitted construction activity and the resultant evidence of erosion and polluted runoff were observed. No enforcement actions were taken. Finally, on October 13, 2005, Victor Jernigan submitted a NOI for coverage under the Tennessee General NPDES Permit for Discharges of Storm Water Associated with Construction Activities (Permit No. TNR100000) (hereinafter, “General Permit”), and SWPPP, on behalf of Murphy Road Partnership, LLC. TDEC issued a Notice of Coverage (“NOC”) granting coverage under the General Permit, in a letter dated November 14, 2005.

Since June 2004, Murphy Road Partnership has caused and has continued to cause conditions of pollution by discharging pollutant-laden storm water runoff from its Washington Square development construction site, to waters of the State and waters of the United States. This violation of the CWA and the TN WQCA has occurred and continues to occur every time it rains as little as 0.1 inch of rain. In over two (2) years of multiple and continuing violations, TDEC has only issued one Notice of Violation (“NOV”), dated May 12, 2006. This lack of enforcement by TDEC, and failure by Murphy Road Partnership to abide by federal and state law, has continued in spite of frequent and multiple complaints by the McMillans et al.

III. LOCATION OF ALLEGED VIOLATIONS

As described above, the Washington Square construction site is located on the east side of Washington Pike, north of Edmondson Road, and south of McCampbell Drive, in northeast Knox County, Knoxville, Tennessee. According to the NOI submitted by Murphy Road Partnership, the property site consists of 7.6 acres of land, which has to-date been almost completely cleared. The majority of the storm water runoff from the cleared construction site and off-site runoff drains to the Washington Pike side of the construction site, and enters an unnamed tributary of Love Creek. The remainder of the storm water runoff from the construction site and the off-site runoff drains toward McCampbell Drive, near the intersection of McCampbell Drive and Murphy Road (near the Weigel’s convenient store), and drains into Murphy Creek, which is located on the north side of McCampbell Drive.

Love Creek is a blueline stream in the Holston River watershed that is listed on TDEC’s current (2004, April 2005 version) 303(d) list for (1) loss of biological integrity due to siltation, and (2) habitat loss due to alteration in stream-side or littoral vegetative cover. TDEC lists the source of pollutant as land development. A large percentage of the storm water runoff from the Washington Square construction site and the off-site runoff is directed into an unnamed tributary of Love Creek (Water Basin ID: TN06010104 001-0100) via a storm pipe that was installed under Washington Pike. The unnamed tributary is located on the west side of Washington Pike,

directly across from the construction site, and runs parallel to Washington Pike. This land (located on the west side of Washington Pike) is slated for future construction by Murphy Road Partnership, and has also been directly impacted by the current construction activity, which has installed (what appears to be) utility and/or sewer lines. This same land is likely a wetlands area, and contains the three – four springheads that form the uppermost waters of Love Creek. At this location, the springs join together to form the unnamed tributary of Love Creek, which flows into Love Creek. Storm water runoff from the construction site is carried from Love Creek, south to the Holston River, and discharges into the Holston just a few feet upstream of where the Fort Loudoun Reservoir begins. Storm water runoff eventually flows into the Tennessee River.

Murphy Creek is a blueline stream in the Fort Loudoun watershed. From the Washington Square construction site, storm water runoff flows through Murphy Creek in a southwesterly direction, flowing through the McMillans' farm, approximately three-fourths ($\frac{3}{4}$) of a mile downstream from the Washington Square construction site. Murphy Creek flows into Whites Creek (Water Basin ID: TN06010201 080-0100), which flows into First Creek (Water Basin ID: TN06010201 080-1000), which flows into the Fort Loudoun Reservoir. Whites Creek is listed on TDEC's current 303(d) list for (1) E. coli, and (2) other anthropogenic habitat alterations. First Creek is listed on TDEC's 303(d) list for (1) nitrates, (2) loss of biological integrity due to siltation, (3) other anthropogenic habitat alterations, and (4) E. coli. A Total Maximum Daily Load ("TMDL") was approved by the United States Environmental Protection Agency ("U.S. EPA") in early 2006 for the Fort Loudoun Lake Watershed (HUC 06010201). Accordingly, the Fort Loudoun TMDL mandates strict adherence to the Construction General Permit, and sets forth Waste Load Allocations ("WLAs") for NPDES-regulated construction activities. Applicable WLAs expressed as the required percent reduction in the estimated average annual sediment loading for impaired subwatersheds have been designated for Whites Creek and First Creek, and are to be achieved through strict implementation of BMPs.

Murphy Road Partnership has engaged in construction activity not covered by their NPDES CGP, has polluted already-impaired streams, has failed to adhere to its permit restrictions and conditions and implementation of its SWPPP and corresponding BMPs, and thus, has violated federal and state law. These violations have occurred and continue to occur (1) at the Washington Square construction site, (2) at the property west of Washington Pike and directly across from the construction site, (3) at the McMillans' property, and (4) in the unnamed tributary to Love Creek, and (5) in Murphy Creek.

IV. ALLEGED VIOLATIONS

The activities set forth in this letter violate Section 301 and Section 402 of the CWA, 33 U.S.C. §§ 1311 and 1342, and the TN WQCA, T.C.A. § 69-3-101 et seq. Section 301 of the CWA prohibits the discharge of pollutants into waters of the United States, except as otherwise expressly authorized by the CWA. Section 402 of the CWA prohibits the discharge of pollutants from a point source into waters of the United States without a NPDES permit or in violation of a NPDES permit. Also, it is an unlawful violation of T.C.A. §§ 69-3-108(a)(b) and 69-3-114(a) and applicable regulations to conduct any activity or to discharge or cause the discharge of any pollutant into waters of the state of Tennessee, which pollutant by itself or in combination with other pollutants causes an "alteration of the physical, chemical, radiological, biological or

bacteriological properties” of such waters without having first applied for and obtained a permit. The above-described water bodies are water of the State of Tennessee and waters of the United States (*see* 33 C.F.R. Part 328, defining “Waters of the United States”), and thus, subject to the Clean Water Act and the Tennessee Water Quality Control Act.

Murphy Road Partnership has discharged and continues to discharge storm water contaminated with pollutants to waters of the State and Waters of United States. Additionally, Murphy Road Partnership has failed to develop and implement an adequate SWPPP and an adequate monitoring and reporting program to ensure the effectiveness of the BMPs described in the SWPPP. Murphy Road Partnership has also failed to abide by the terms and conditions of their NPDES CGP, in the implementation of certain BMPs (in particular, the construction of appropriate sediment basins) and in the construction of the site according to approved plans. These failures and violations have resulted in and continue to result in the discharge of turbid sediment-laden runoff to an unnamed tributary of Love Creek, and to Murphy Creek (into which Murphy Road Partnership does not have a permit to discharge), and causing injury to TCWN and the McMillans et al.

“Storm water runoff is one of the most significant sources of water pollution, at times ‘comparable to, if not greater than, contamination from industrial and sewage sources.’ (Richard G. Cohn-Lee and Diane M. Cameron, ‘Urban Stormwater Runoff Contamination of the Chesapeake Bay: Sources and Mitigation,’ *The Environmental Professional*, Vo. 14, p. 10, at 10 (1992)). In fact, rain water runoff from construction sites has long been recognized as a “pollutant” within the meaning of the CWA. (*See* 33 U.S.C. § 1362(6); 40 CFR § 122.2; *see also* Natural Resources Defense Council, Inc. v. Costle, 568 F.2d 1369, 1377 (D.C.Cir. 1977); 40 CFR 122.2 (defining pollutant)). “Storm water discharges generated during construction activities, in particular, can cause an array of water quality impacts. The interconnected process of erosion, sediment transport and delivery is the primary pathway for introducing key pollutants, such as nutrients, metals and organic compounds into organic systems. (Novotny, V. and Chester, G., ‘Delivery of Sediment and Pollutants, From Non-Point Sources: A Water Quality Perspective,’ *Journal of Soil and Water Conservation* 568-576 (1989)). The U.S. EPA has also reported that “the environmental harm currently caused by discharges from construction activity is well documented and that sediment yields from small construction sites are as high or higher than the 20 to 150 tons/acre/year measured from larger sites.” (EPA, *Report to Congress on the Phase II Storm Water Regulations* (October 1999)).

Murphy Road Partnership has not constructed the Washington Square site according to their submitted SWPPP and accompanying plans. For example, BMPs in the form of silt fences are only in place at the outermost property line of the site, and are not reinforced by any means, and have been proven to be ineffective to hold back or slow down runoff from the construction site; ground cover is absent, and no erosion and sediment controls have been put in place to divert the runoff from undisturbed areas and off-site runoff around disturbed areas and the sediment basins; finally, the two dug-out or rip-rapped areas near Washington Pike that are referred to as “sediment basins” have not been constructed to accommodate runoff from over five (5) acres of land during a five-year twenty-four hour rain event, as is required for discharge into a 303(d) listed impaired stream, and do not resemble any sediment basins described in the Tennessee Erosion and Sediment Control Handbook, 2nd Edition, March 2002 (hereinafter

“Tennessee Handbook”). The resultant contaminated runoff from the Washington Square site has caused and continues to cause pollution to waters of the State and waters of the United States, as well as significant harm to natural habitats and human health, property damage, and destruction of aesthetic value and recreational opportunity.

TCWN and the McMillans et al. have documented over twenty (20) instance of polluted storm water entering the tributary of Love Creek, polluted storm water entering Murphy Creek, and unauthorized construction activity and/or improper implementations of BMPs. This documentation of violations begins on or around June 12, 2004 and continues to the present. Furthermore, and as more fully described below, Murphy Road Partnership has caused and continues to cause a condition of pollution in violation of their NPDES CGP every time it rains more than 0.1 inch of rain. Rainfall data for monitoring sites at First Creek and Love Creek, as maintained by the City of Knoxville, is enclosed, and should serve as notice to Murphy Road Partnership of some, but not necessarily all, of the dates that Murphy Road Partnership has violated federal and state law. Additional and more specific dates will be provided when additional rainfall data can be obtained from the City of Knoxville. This letter serves as notice to Murphy Road Partnership that TCWN and the McMillans et al. intend to file suit in federal district court, at the expiration of the 60-day notice period for each and every violation that has and continues to occur, and for each and every day that the violations have and continue to occur.

A. Discharge in Violation of CWA

Murphy Road Partnership has violated and continues to violate the CWA by discharging pollutants to waters of the United States from the Washington Square development, in violation of their NPDES permit. (33 U.S.C. § 1342). The CWA provides that, absent a permit and subject to certain limitations, “the discharge of any pollutant by any person shall be unlawful.” (33 U.S.C. § 1311(a)). Murphy Road Partnership has failed to install effective sediment and erosion controls at their Washington Square construction site. By these failings, Murphy Road Partnership has in effect allowed and created conduits for contaminated storm water, sediment, and other pollutants to reach the waters of the State and waters of the United States. The storm water runoff from Washington Square construction site delivers unwanted dirt, sediment, silt, debris, and other pollutants to an unnamed tributary of Love Creek, and to Murphy Creek. Contaminated storm water has been discharged from Washington Square to the tributary to Love Creek and/or Murphy Creek since at least July 2004 (the approximate date of ground-breaking and the beginning of clearing and grading activity) and continues to be discharged during every significant rain event, defined by the U.S. EPA as greater than or equal to 0.1 inches of precipitation in a 24-hour period. On every rain event greater than or equal to 0.1 inch, Murphy Road Partnership has been in violation of the above-mentioned federal and state laws, and every day that Murphy Road Partnership has discharged and continues to discharge contaminated storm water and/or un-permitted non-storm water from Washington Square development, constitutes a separate and distinct violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a). The enclosed rainfall data from the City of Knoxville provides a table of rain data reflecting information currently available to us, indicating the dates on which significant rain events occurred from 2004 through February 2006. Additional violation days will be provided as more information becomes available. Specifically, TCWN and the McMillans et al. have recorded and

documented sediment-laden runoff leaving the Washington Square construction site on the following days: April 29, 2005; June 5, 2005; July 7, 2005; July 17, 2005; July 31, 2005; August 13, 2005; January 17, 2006; February 6, 2006; March 4, 2006; March 14, 2006; April 21, 2006; April 22, 2006; April 26, 2006; June 1, 2006; June 24, 2006; July 29, 2006; August 4, 2006; and August 22, 2006. These numerous dates show that Murphy Road Partnership has been and continues to be in violation of the CWA. Whether or not such dates are shown on the enclosed rainfall data, and whether or not such dates have been listed above, we hereby put Murphy Road Partnership on notice that they have committed violations of the CWA on each and every day on which the rainfall at the Washington Square site exceeded 0.1 inch of rainfall, since at least July 2004.

Moreover, Murphy Road Partnership has not submitted a NOI for coverage under Tennessee's NPDES General Permit for discharge of storm water into Murphy Creek. In fact, the NOC issued by TDEC on November 14, 2005, NPDES permit TNR131644, only authorized discharge of storm water to an unnamed tributary to Love Creek. However, Section 402 of the CWA requires that individuals obtain coverage under a NPDES permit before discharging or causing the discharge of any pollutant into waters of the United States. (33 U.S.C. § 1342; *see also* 33 U.S.C. § 1362 (defining "pollution" and "point source")). Since at least July 2004, Murphy Road Partnership has violated the CWA by discharging pollutants to Murphy Creek, without first obtaining a valid NPDES General Permit. This violation has occurred and continues to occur on each and every day on which rainfall at the Washington Square site exceeded 0.1 inch of rain, since at least July 2004, and especially on, but not limited to, the many dates listed in the paragraph above. Additionally, TCWN and the McMillans have amassed evidence showing that Murphy Road Partnership has failed to implement BMPs on the north side of the Washington Square construction site, near the Weigel's convenient store, and at the location where runoff from the construction site has entered and continues to enter Murphy Creek. As of August 23, 2006, there existed considerable evidence of rill erosion, gully erosion, and channel erosion on the Washington Square construction site, as well as an excavated ditch separating the construction site from the Weigel's property, and channeling the sediment-laden runoff off of the construction site, and into Murphy Creek. (*See* 33 U.S.C. § 1362(14) (defining "point source" as any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel . . . from which pollutants are or may be discharged.)). No sediment basin was apparent, neither were other sediment and erosion controls evident that were capable of retaining sediment onsite. Most concerning, and as described above, is the fact that Murphy Creek discharges into Whites Creek and First Creek, all of which are part of the Fort Loudoun Watershed for which the U.S. EPA recently approved a TMDL, and all of which have been assigned specific WLAs expressed as the required percent reduction in the estimated average annual sediment loading for impaired water bodies within the Fort Loudoun Watershed. WLAs are to be achieved through strict implementation of BMPs.

Unlawful discharges from the Washington Square construction site have occurred on a continuous basis since construction activity began in approximately July 2004. These unlawful discharges are ongoing. Each unlawful discharge from the Washington Square site constitutes a separate violation of the CWA. Murphy Road Partnership is subject to penalties for violations of the CWA occurring within the past five (5) years.

B. Discharge in Violation of the Tennessee Water Quality Control Act (TN WQCA)

Under the TN WQCA, it is unlawful to conduct any activity or to discharge or cause the discharge of any pollutant into water of the State of Tennessee, without having first applied for and obtained coverage under a permit. (T.C.A. §§ 69-3-108(a)(b) and 69-3-114(a); *see also* TDEC’s General Permit regulations found at TNR § 1200-4-10-.03(2)(b)). Additionally, “[a] permit is a license to conduct an activity which is regulated under [T.C.A.] § 69-3-108 in strict compliance with the conditions and limitations contained with the permit.” (emphasis added) (TNR § 1200-4-10-.03(1)). As described above (“Discharge in Violation of the CWA”), Murphy Road Partnership has engaged in and continues to engage in certain construction activities resulting in discharge of contaminated runoff from the Washington Square site, in violation of their NPDES CGP. Additionally, Murphy Road Partnership has engaged in and continues to engage in certain construction activities that are not covered under their NPDES CGP, TNR131644. These actions constitute violations of the TN WQCA, and are subject to penalties in accordance with T.C.A. § 69-3-115.

C. Failure to Obtain Permit Coverage

1. Failure to Properly File the NOI

A review of the TDEC – Division of Water Pollution Control’s records indicated that Murphy Road Partnership failed to file a proper NOI, stating the primary contractor, or contractor otherwise responsible for sediment and erosion controls on the construction site. A properly filed NOI will list such a contractor and will bear the signature of the contractor, thus indicating the responsible contractor liable for “knowing violations, and for failure to comply with these permit requirements.” (TDEC Construction Activity-Storm Water Discharges NOI form). As of August 23, 2006, Murphy Road Partnership had failed to properly file an NOI listing a contractor and his signature.

According to the NOC and accompanying letter issued by TDEC on November 14, 2005, “[a] primary contractor, or contractor otherwise responsible for sediment and erosion controls on the construction site, must be identified and must submit an NOI to [TDEC] prior to beginning earth clearing operations on site.” TDEC’s General NPDES Permit for Discharges of Storm Water Associated with Construction Activities (“General Permit”), TNR100000, reiterates this requirement. (General Permit, p. 6-7). Thus, Murphy Road Partnership’s failure to file a second NOI bearing the name and signature of a responsible contractor is in direct violation of a condition and requirement of permit coverage. As such and in accordance with Section 505 of the CWA and T.C.A. § 69-3-108, Murphy Road Partnership has violated and continues to be in violation of the terms and conditions of its NPDES permit, since the first day, and every day thereafter that earth clearing activities commenced at the Washington Square site. (33 U.S.C. § 1365(f)(6); 40 CFR 122.41(a); TNR § 1200-4-10-.03(1)). Furthermore, Murphy Road Partnership will continue to be in violation of the CWA and TN WQCA for every day, until a proper NOI bearing the name and signature of the responsible contractor is filed and accepted for coverage. This letter constitutes notice that Murphy Road Partnership is subject to penalties associated with this violation of the CWA occurring within the past five (5) years.

2. Discharge into Murphy Creek

As discussed above (“Discharge in Violation of the CWA” and “Discharge in Violation of the Tennessee Water Quality Control Act”), Murphy Road Partnership has failed to apply for and obtain a General Permit authorizing discharge of storm water into Murphy Creek, in violation of Section 402 of the CWA, 33 U.S.C. § 1342, and T.C.A. §§ 69-3-108. Thus, discharge of storm water, moreover, polluted storm water to Murphy Creek is not covered under Murphy Road Partnership’s current NPDES CGP, TNR131644.

According to the regulations interpreting the CWA, discharges of storm water from a construction site are specifically identified as discharges requiring a permit. (40 CFR §§ 122.1(b)(2)(iv) and 122.26(b)(14)(x)). Murphy Road Partnership had knowledge or should have had knowledge that storm water runoff from the Washington Square construction site would likely enter Murphy Creek. In fact, a rendering of the planned Washington Square community, available from Murphy Road Partnership’s website, clearly identifies Murphy Creek, in close proximity to, and flowing north of the Washington Square construction site. (*See* <http://www.murphyroadpartnership.com/>). Without the appropriate permit, Murphy Road Partnership’s point source discharge into Murphy Creek violates the CWA. (*See* 33 U.S.C. § 1362(14); *S. Fla. Mgmt. Dist. v. Miccosukee Tribe*, 541 U.S. 95, (2004) (confirming that “point sources” not only include sources that generate pollutants but also the conveyances—such as gullies and ditches—that transfer them to protected waters)).

As specified and alleged above, it is our position that Murphy Road Partnership has violated the CWA and the TN WQCA by discharging un-permitted storm water from its Washington Square construction site, into Murphy Creek. These violations are ongoing—beginning as early as July 2004, and occurring every time it rains as little as 0.1 inch in a 24-hour period.

3. Storm Water Discharge Associated with Un-permitted Construction Activity

Visual observations of the land, and possible wetlands located directly west of the Washington Square construction site and directly across Washington Pike reveal that some construction activity has been completed to (1) install a pipe under Washington Pike to directly connect runoff from the Washington Square construction site to the unnamed tributary of Love Creek, and (2) to install what appears to be sewer and/or utility lines. These construction activities are off-site of the 7.6 acres covered under TNR131644, and are not covered by the NPDES CGP. As of August 23, 2006, no BMPs were in place to contain runoff from the exposed patches of clay in the un-permitted construction area directly west of the Washington Square construction site.

Additionally, there is evidence that the construction activity directly west of the Washington Square construction site across Washington Pike is part of a larger common plan of construction proposed by Murphy Road Partnership. If this allegation is later shown to be true, then Murphy Road Partnership is hereby placed on notice that it is in violation of the General Permit, TNR100000, which requires a correct statement of the total area of the development,

during the life of the entire development project (that may be part of a larger common plan). (See Section 1.4.3 of the General Permit).

D. Discharges in Violation of the Construction General Permit, TNR100000

Section 4.3.1 of the General Permit prohibits the discharge of storm water or other discharges “that would result in a violation of a state water standard (the TDEC Rules, Chapters 1200-4-3, 1200-4-4).” This section of the General Permit provides that “[s]uch discharges constitute a violation of this permit.” Section 4.3.2 of the General Permit further provides that construction activity shall not result in “any discharge that causes a condition in which visible solids, bottom deposits, or turbidity impairs the usefulness of waters of the state for any of the uses designated for that water body by TDEC Rules, Chapter 1200-4-4.” Section 4.3.2 of the General Permit also provides that “storm water discharge must result in no materials in concentrations sufficient to be hazardous or otherwise detrimental to humans, livestock, wildlife, plant life, or fish and aquatic life in the receiving stream.”

As described above and throughout this letter, construction activity at the Washington Square site has caused and continues to cause sediment-laden runoff to escape the Washington Square construction site, and enter water bodies already listed as impaired for loss of biological integrity due to siltation, and habitat loss due to the alteration in stream-side or littoral vegetative cover. (See above discussion of 303(d) listed streams). Murphy Road Partnership has violated its NPDES permit (specifically, Section 4.3), by causing sediment-laden runoff to enter waters of the State and waters of the United States. As discussed above, Murphy Road Partnership has discharged and continues to discharge contaminated storm water during every rain event where rainfall exceeds 0.1 inch at the Washington Square site. This discharge of pollutants is in direct violation of Section 1.3 of the General Permit which specifies that the following discharges are not authorized: discharges threatening water quality; discharges into impaired streams; discharges not protective of federal or state listed threatened and endangered species; and discharges into receiving waters with an approved TMDL, “unless measures or controls that are consistent with the assumptions and requirements of such TMDL are incorporated into the SWPPP.”

TCWN and the McMillans et al. have documented on multiple days, muddy-orange runoff escaping from the Washington Square construction site and entering the unnamed tributary to Love Creek and Murphy Creek, in violation of the above-cited General Permit sections, and in violation of Section 3.5.3.3 of the General Permit prohibiting discharges of water causing “objectionable color contrast with the receiving stream.” (See also Section 4.3.2 of the General Permit, also requiring that “storm water discharge must not cause an objectionable color contrast in the receiving stream.”). Each sediment-laden discharge has caused or has threatened to cause pollution, contamination, and harm to property owners downstream. Additionally, these discharges have adversely impacted human health and the environment, and has caused or contributed to the exceedence of water quality standards. Murphy Road Partnership is hereby placed on notice that each discharge from its Washington Square construction site constitutes a separate violation of the General Permit and the CWA.

E. Failure to Comply with Terms and Conditions of the General Permit

Section 6.1.1 of the General Permit provides that the “permittee must comply with all conditions of this permit,” and any noncompliance constitutes a violation. (*See also* 33 U.S.C. § 1365(f) (violation of an effluent standard occurs when there is a violation of a permit or a condition of a permit—i.e., violations do not necessarily involve the discharge of pollutants)).

The General Permit requires permittees to comply with all terms and conditions of the permit, including but not limited to the development and implementation of a SWPPP; the selection, implementation, and maintenance of erosion prevention and sediment control measures, structural practices, and BMPs; and the development and implementation of a Monitoring and Reporting Program.

Murphy Road Partnership has violated and continues to violate federal and state law, by failing to abide by permit conditions and requirements, or in the alternative, failing to submit revisions to its SWPPP to reflect new or different erosion and sediment controls and other changes not already covered under its NPDES CGP.

1. Storm Water Pollution and Prevention Plan (SWPPP)

Murphy Road Partnership’s SWPPP is incomplete and inadequate. A major oversight of the SWPPP is its failure to identify any stream or wetland on or adjacent to the project, and also to name any and all receiving waters, as required by Section 3.5.1 of the General Permit. These failures constitute violations subject to penalty under the CWA. As discussed above, the permittee failed to name Murphy Creek as a nearby stream or receiving water. The permittee also failed to state that the land directly west of the Washington Square construction site and across Washington Pike, might likely be a wetlands.

The Murphy Road Partnership’s SWPPP is also inadequate as currently submitted, because it does not accurately reflect the actual erosion prevention and sediment controls and other structural practices and BMPs that have been installed and implemented to-date. Section 3.4.1 of the General Permit requires the permittee to modify and update the SWPPP to reflect changes in the scope of the project, or additional or different controls that are needed to protect water quality. Murphy Road Partnership has violated the General Permit requirement to keep the SWPPP current, and has not submitted any amendments to the SWPPP, nor requests for approval of changes to the SWPPP. In particular, Murphy Road Partnership has failed to submit an amended runoff volume calculation (*see* Attachment 4 of their SWPPP), to reflect the fact that they have not installed BMPs to divert runoff from undisturbed areas and off-site runoff from the disturbed construction areas and the sediment basins. (The Tennessee Erosion and Sediment Control Handbook provides that an applicant is permitted to exclude the acreage of the undisturbed area and the off-site area from the runoff area total used to calculate the volume of runoff from the construction site, only if those areas are diverted from the disturbed areas and the sediment basins. Otherwise, those areas must be considered in calculating the volume of runoff from the construction site, for purposes of determining the sediment basin storage capacity requirements). The SWPPP has also not been revised to reflect new requirements for construction activity and discharge from construction sites, based on U.S. EPA’s approval of the Fort Loudoun TMDL. (*See* Section 3.5.10 of the General Permit, requiring documentation

supporting a determination of permit eligibility with regard to waters that have an approved TMDL).

Furthermore, Section 1.4.2 of the General Permit requires that “[t]he SWPPP must be implemented prior to commencement of construction activities.” Murphy Road Partnership failed to meet the requirement of Section 1.4.2, by failing to install, for example, diversion ditches or berms constructed to divert runoff, properly installed silt fences, and adequate sediment basins. Murphy Road Partnership has violated and continues to violate requirements of the CWA and the TN WQCA, requiring the SWPPP to be complete, current, and fully implemented before the commencement of earth moving activity. Additionally, other failings and violations of the SWPPP will be alleged as more information becomes available.

2. Erosion Prevention and Sediment Control Measures, Structural Practices, and Best Management Practices (BMPs)

Murphy Road Partnership has failed to design, install, and maintain adequate erosion prevention and sediment control measures, structural practices, and best management practices (BMPs) for erosion and sediment control. Notably, Section 3.5.3.1 of the General Permit requires that “[e]rosion prevention and sediment control measures must be in place and functional before earth moving operations begin, and must be constructed and maintained throughout the construction period.” Failure to meet the requirements of Section 3.5.3.1 of the General Permit has resulted in, and continues to result in sediment discharges into receiving waters. Accordingly, since approximately July 2004, Love Creek and Murphy Creek have been burdened with excess sediment loading. The turbidity and sedimentation caused by the discharge of storm water from the Washington Square construction site, and complained of herein, is significant and has resulted in and continues to result in serious impairment of water quality, adverse impacts to human health and the environment, and harms to property owners downstream. Because the General Permit requires that all parts of the SWPPP be implemented and/or installed before the commencement of construction activity, Murphy Road Partnership has been and continues to be in violation of their General Permit since the start of earth-moving activity at the Washington Square construction site. Each violation on each day constitutes a separate violation under the CWA, subject to appropriate maximum penalties.

(a) Sediment Basins

For discharges of storm water runoff into impaired waters, the “SWPPP must certify that erosion prevention and sediment controls used at the site are designed to control storm runoff generated by a 5-year, 24-hour storm event.” (Section 4.4.1 of the General Permit). Specifically, “[f]or an outfall in a drainage area of a total of 5 or more acres, a temporary (or permanent) sediment basin that provides storage for a calculated volume of runoff from a 5 year, 24 hour storm and runoff from each acre drained, . . . shall be provided until final stabilization of the site.” (Id.) However, the sediment basin referred to in Murphy Road Partnership’s SWPPP is incapable of accommodating runoff from a 5 year, 24 hour storm. As explained above, in the section entitled “Storm Water Pollution and Prevention Plan (SWPPP),” the total acreage used to calculate runoff volume should have been much larger. Thus, the sediment basin described in the SWPPP is inadequate.

Even assuming that the correct total acreage was used to calculate the runoff volume of the Washington Square site, and the corresponding required sediment basin capacity, Murphy Road Partnership has failed to construct and install a sediment basin(s) meeting the specifications of the SWPPP.

As of August 23, 2006, the only so-called “sediment basins” located on the Washington Square construction site, were two rudimentary catch basins or ditches. Both of these “sediment basins” are little more than excavated areas abutting the construction site boundary, with minimal rip-rap, and with a silt fence functioning as at least one wall of the “sediment basin.” TCWN and the McMillans have documentation that both of these “sediment basins” failed to prevent sediment-laden storm water from entering the unnamed tributary of Love Creek, during as little as a 0.1 inch rain event. According to Section 8 of the General Permit, Murphy Road Partnership should have constructed a sediment basin capable of handling runoff from a 4.0 inch rain event.

The two “sediment basins” are incapable of “retain[ing] mobilized sediment on site,” as required by Section 3.5.3.1 of the General Permit. Furthermore, because the pipe/drain in the “sediment basins” is located at the lowest point of the basin, little-to-none filtering and settling of sediments is possible, and thus, muddy-orange runoff is routinely discharged into the unnamed tributary of Love Creek. (*See* above discussion of violation dates). This is in violation of Section 3.5.3.3 of the General Permit, and a violation of the CWA.

(b) Silt Fences and Ground Cover

Murphy Road Partnership has failed, and continues to fail to install and maintain adequate erosion prevention and sediment controls, to prevent rill erosion, gully erosion, and channel erosion on its Washington Square construction site, and to prevent sediment and siltation from escaping the construction site. Evidence of erosion on the cleared construction areas can be easily seen by offsite observers. Also, evidence of erosion can be observed downstream of the Washington Square construction site, where sediment and siltation accumulate. The Tennessee Erosion & Sediment Control Handbook states that: “[sediment b]asins should always be used in conjunction with primary erosion control and stabilizing practices (as found throughout this manual) such as temporary seeding, mulching, diversion dikes, etc. designed to prevent or reduce the possibility of soil from being eroded in the first place.” (Tennessee Handbook, p. SB-2). The only erosion control and stabilization practices that the Murphy Road Partnership has to-date implemented are the 2 basins mentioned in the preceding paragraphs, and the installation of silt fences around the construction property perimeter. No “upslope” sediment and erosion control measures are in place, to deter runoff from pouring off of the construction site. Nor has vegetative cover or hay bales, etc. been utilized to help stabilize the disturbed construction areas. In fact, Murphy Road Partnership’s SWPPP notes that 2.1 acres of the Washington Square site are to be left undisturbed. As of August 23, 2006, however, barely any grass remained on the construction site. Furthermore, TCWN and the McMillans et al. have gathered evidence showing that the installed silt fences are ineffective to prevent contaminated runoff from escaping the construction site. That same evidence shows water running over, under and around silt fences; gaps in silt fences; and downed silt fences that are not promptly repaired. (*See*

Section 3.5.8.2 of the General Permit, requiring bi-weekly inspection of control measures, and the prompt repair or replacement of damaged or ineffective controls).

Section 3.5.3.1 of the General Permit requires that “[a]ll control measures must be properly selected, installed, and maintained in accordance with the manufacturer’s specifications (where applicable) and good engineering practices. All controls measures must be able to slow runoff so that rill and gully formation is prevented.” Murphy Road Partnership continues to be in daily violation of this permit requirement, and has been in violation of this permit requirement since the commencement of construction activity at the Washington Square site. At the expiration of the 60-day notice period, TCWN and the McMillans et al. intend to file suit in federal district court, seeking maximum penalties for each and every violation that has occurred and continues to occur, and for each and every day that the violations have occurred and continue to occur.

3. Monitoring, Recording, and Reporting Requirements

Section 4.4.1 of the General Permit imposes additional SWPPP requirements for discharges into impaired waters, including but not limited to, twice-weekly inspections of the construction site by the permittee, and certification by the permittee of whether erosion prevention and sediment controls are installed and in working order. Section 5 of the General Permit sets forth record retention and reporting requirements.

A review of the TDEC – Division of Water Pollution Control’s records does not indicate that the Murphy Road Partnership has been complying with the requirements of their General Permit and the inspection and reporting requirements under the CWA. (40 CFR § 122.41(j) – (l)). Repeated and multiple violations of SWPPP requirements strongly indicate that Murphy Road Partnership has failed to abide by applicable monitoring, recording, and reporting requirements. Furthermore, 40 CFR § 122.41(l)(6)(i) requires permittees to “report any noncompliance which may endanger health or the environment.” Murphy Road Partnership, LLC has been in continuous noncompliance with its SWPPP since it first engaged in construction activity in approximately July 2004, or since it received its NOC for coverage under the General Permit, in November 2005. Not once has Murphy Road Partnership self-reported any violations. This letter serves as notice to Murphy Road Partnership that TCWN and the McMillans et al. intend to file suit in federal district court, at the expiration of the 60-day notice period, seeking maximum penalties for each and every violation concerning Murphy Road Partnership’s failure to properly inspect, monitor, record, and report noncompliance with the SWPPP and violations under the CWA, for each and every day that the violations have occurred and continue to occur.

F. Property Damage and Common Law Claims

Section 6.10 of the General Permit provides that:

The issuance of this permit does not convey any property rights of any sort, nor any exclusive privileges, nor does it authorize any injury to private property nor any invasion of personal rights, nor any infringement of federal, state or local

laws or regulations. The issuance of this permit does not authorize trespassing or discharges of storm water or non-storm water across private property.

Thus, in addition to violating the CWA and the TN WQCA, the discharge of sediment into Murphy Creek and onto the McMillans' property constitutes a trespass under Tennessee law and is a violation of the McMillans' riparian rights. The violations of the laws cited above, as well as the violations of applicable state laws and local ordinances also constitute negligence per se. Moreover, the unreasonable interference with the use and enjoyment of the McMillans' property constitutes a nuisance, prohibited by Section 4.3.2 of the General Permit. Accordingly, this letter will serve as the McMillans' request that such nuisance be promptly abated (among other relief requested) by the installation of proper erosion prevention and sediment controls, and by the timely removal of accumulated sediment that has escaped and continues to escape the Washington Square construction site; noting however, that this request does not constitute a grant of right of entry upon the McMillans' property without agreed upon arrangements. The McMillans should be entitled recovery of costs and attorneys' fees, to the fullest extent allowable under the CWA and by Tennessee law. Finally, the conscious disregard demonstrated by the Murphy Road Partnership should result in the imposition of punitive damages.

V. PENALTIES

Pursuant to Section 309(d) of the CWA, 33 U.S.C. § 1319(d), and the Adjustment of Civil Monetary Penalties for Inflation, 40 C.F.R. § 19.4, each separate violation of the CWA subjects Murphy Road Partnership, LLC to penalties of up to \$27,500 per day per violation for all violations occurring between August 20, 2001 and March 15, 2004, and \$32,500 per day per violation for all violations occurring since March 15, 2004, payable to the United States Treasury. The McMillans et al. should also be entitled to any costs already incurred as a result of self-help actions and mitigation measures taken to prevent or lessen damage to their property. In addition to civil penalties, TCWN and the McMillans et al. will seek a declaratory judgment and injunctive relief, requiring and commanding Murphy Road Partnership to comply with all federal and state law and requirements as soon as possible, and requiring and commanding Murphy Road Partnership to abate and remedy all damage to private property that has already been caused; and other relief as permitted by law. Finally, Section 505(d) of the CWA, 33 U.S.C. § 1365(d) permits prevailing parties to recover costs and fees, including attorneys' fees, expert witness fees, and other litigation expenses.

VI. CONCLUSION

Murphy Road Partnership, LLC stands in violation of the CWA and the TN WQCA as specified in this Notice of Intent. The numerous violations, described herein, have occurred and continue to occur, especially because of Murphy Road Partnership's failure to faithfully implement the terms and conditions of its NPDES CGP, as expressed in the provisions and plans of its SWPPP.

TCWN and the McMillans et al. assert that this notice letter sufficiently states grounds for filing suit under the CWA. (40 CFR § 135.3(a)). At the close of the 60-day notice period or

thereafter, said parties intend to file a citizen suit under Section 505(a) of the CWA against Murphy Road Partnership, LLC for the above-referenced violations.

During the 60-day notice period, TCWN and the McMillans et al. are willing to discuss effective remedies for the violations noted in this letter. However, if Murphy Road Partnership wishes to pursue such discussions in the absence of litigation, we suggest that discussions be initiated within the next 20 days so that they may be completed before the end of the 60-day notice period. We do not intend to delay the filing of a complaint in federal court if discussions are continuing when that period ends.

Legal counsel for TCWN and the McMillans et al. in this action is at all times:

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Should you or your legal counsel have any questions about this Notice of Intent or should you wish to discuss any issue or possible solutions to the issues raised, please contact us.

Respectfully Submitted,

Joe W. McCaleb

Emily H. Yao

ENCLOSURE

CC: Mike Ragsdale, Knox County Major
John West, Manager, TDEC-Knoxville EAC
Clients