**STATE OF TENNESSEE**
**DEPARTMENT OF ENVIRONMENT AND CONSERVATION**

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| **IN THE MATTER OF:** | ) | **DIVISION OF WATER POLLUTION CONTROL** |
| | ) | |
| **BRYCE POWERS;** | ) | |
| **JAMES MICHAEL ATKINS;** | ) | |
| **and** | ) | |
| **ROBERT POWERS** | ) | |
| | ) | |
| | ) | |
| **RESPONDENTS** | ) | **CASE NO. WPC08-0107** |

## DIRECTOR'S ORDER AND ASSESSMENT

NOW COMES Paul E. Davis, Director of the Tennessee Division of Water Pollution Control, and states:

## PARTIES

### I.

Paul E. Davis is the duly appointed Director of the Tennessee Division of Water Pollution Control (hereinafter the "Division") by the Commissioner of the Tennessee Department of Environment and Conservation (hereinafter the "Department").

### II.

Bryce Powers (hereinafter the "Respondent Bryce Powers") is doing business as Hearthstone Partners and is an owner/developer of a 31.7 acre property known as Terraces of Hearthstone (hereinafter the "site") located on Oakland Road in Montgomery County, Tennessee. Service of process may be made on Respondent Bryce Powers at 2515 Wilma

Rudolph Boulevard, Clarksville, Tennessee 37040.

**III.**

James Michael Atkins (hereinafter the "Respondent Atkins") is doing business as Hearthstone Partners and an owner/developer of the site. Service of process may be made on Respondent Atkins at 3580 Vickers Road, Palmyra, Tennessee 37142.

**IV.**

Robert Powers (hereinafter the "Respondent Robert Powers") is doing business as Hearthstone Partners and is an owner/developer of the site. Service of process may be made on Respondent Robert Powers at 2515 Wilma Rudolph Boulevard, Clarksville, Tennessee 37040.

## JURISDICTION

**V.**

Whenever the Commissioner has reason to believe that a violation of Tennessee Code Annotated (T.C.A.) § 69-3-101 et seq., the Water Quality Control Act, (hereinafter the "Act") has occurred, or is about to occur, the Commissioner may issue a complaint to the violator, and may order corrective action be taken pursuant to T.C.A. § 69-3-109(a) of the Act. Further, the Commissioner has authority to assess civil penalties against any violator of the Act, pursuant to T.C.A. § 69-3-115 of the Act; and has authority to assess damages incurred by the State resulting from the violation, pursuant to T.C.A. § 69-3-116 of the Act. Department rules governing general water quality criteria and use

classifications for surface waters have been promulgated pursuant to T.C.A. § 69-3-105 and are effective as the Official Compilation Rules and Regulations of the State of Tennessee, Chapters 1200-4-3 and 1200-4-4 (hereinafter the "Rule"). Pursuant to T.C.A. § 69-3-107(13), the Commissioner may delegate to the Director of the Division of Water Pollution Control any of the powers, duties, and responsibilities of the Commissioner under the Act.

**VI.**

The Respondents are "persons" as defined at T.C.A. § 69-3-103(20) and, as herein described, have violated the Act.

**VII.**

Tennessee Code Annotated § 69-3-108 requires a person to obtain coverage under a permit from the Department prior to discharging any substances to waters of the state, or to a location from which it is likely that the discharged substance will move into waters of the state. Coverage under the Tennessee Construction General Permit (TNCGP) for storm water discharges associated with construction activity may be obtained by submittal of a Notice of Intent (NOI), a Storm Water Pollution Prevention Plan (SWPPP), and an appropriate fee.

**VIII.**

Spring Creek, referred to herein, is "waters of the state" as defined by T.C.A. § 69-3-103(33). Pursuant to T.C.A. § 69-3-105(a)(1), all waters of the state are classified by the

Tennessee Water Quality Control Board for suitable uses. Department Rule 1200-4-4, "Use Classifications for Surface Waters," is contained in the *Official Compilation of Rules and Regulations for the State of Tennessee*. Accordingly, these waters are classified for the following uses: fish and aquatic life, recreation, irrigation, and livestock watering and wildlife.

## FACTS

### IX.

On March 10, 2008, Respondent Bryce Powers submitted a NOI, SWPPP and appropriate fee requesting coverage under the TNCGP for construction activities at the site to the Nashville Environmental Field Office (NEFO). A primary contractor or contractor otherwise responsible for Erosion Prevention and Sediment Control (ESPC) measures at the site was not identified on the NOI.

### X.

On March 12, 2008, the NEFO received a complaint that sediment was migrating into Spring Creek as a result of inadequate (ESPC) measures at the site.

### XI.

On March 13, 2008, division personnel conducted a complaint investigation at the site and observed that sediment-laden stormwater had migrated into Spring Creek, due to inadequate and un-maintained EPSC measures, resulting in a condition of pollution.

Upon completion of a file review, division personnel determined that the Respondents had not received coverage under the TNCGP prior to commencing land disturbance activities.

**XII.**

Division personnel issued the Respondents a Notice of Violation (NOV) on April 4, 2008, as a result of the violations observed during the aforementioned complaint inspection. In the NOV, the Respondents were cited for failing to obtain permit coverage and were required to immediately stabilize the site and obtain coverage under the TNCGP by completing the NOI submitted to the division on March 10, 2008.

**XIII.**

On May 6, 2008, the division issued coverage under the TNCGP to Respondent Robert Powers for construction activities at the site and assigned the coverage tracking number TNR146233.

**XIV.**

During the course of investigating this case, the Division has incurred damages in the amount of ONE HUNDRED FORTY-SIX DOLLARS AND EIGHTY-TWO CENTS ($146.82).

## VIOLATIONS

## XV.

By performing construction activities without coverage under the TNCGP, the Respondents have violated T.C.A. §§ 69-3-108(a)(b), and 114(b), which state in part:

§ 69-3-108(a) states, in part:

> Every person who is or is planning to carry on any of the activities outlined in subsection (b), other than a person who discharges into a publicly owned treatment works or who is a domestic discharger into a privately owned treatment works, or who is regulated under a general permit as described in subsection (j), shall file an application for a permit with the commissioner or, when necessary, for modification of such person's existing permit.

§ 69-3-108(b) states, in part:

> It is unlawful for any person, other than a person who discharges into a publicly owned treatment works or a person who is a domestic discharger into a privately owned treatment works, to carry out any of the following activities, except in accordance with the conditions of a valid permit:
>
> (1) The alteration of the physical, chemical, radiological, biological, or bacteriological properties of any waters of the state;
> (4) The development of a natural resource or the construction, installation, or operation of any establishment or any extension or modification thereof or addition thereto, the operation of which will or is likely to cause an increase in the discharge of wastes into the waters of the state or would otherwise alter the physical, chemical, radiological, biological or bacteriological properties of any waters of the state in any manner not already lawfully authorized;
> (6) The discharge of sewage, industrial wastes, or other wastes into water, or a location from which it is likely that the discharged substances will move into waters;

§ 69-3-114(b) states, in part:

> In addition, it is unlawful for any person to act in a manner or degree which is violative of any provision of this part or of any rule, regulation, or standard of water quality promulgated by the board or of any permits or orders issued pursuant to the provisions of this part; or fail or refuse to file an application for a permit as required in § 69-3-108; or to refuse to furnish, or to falsify any records, information, plans, specifications, or other data required by the board or the Commissioner under this part.

**XVI.**

By causing a condition of pollution in Spring Creek, the Respondents have violated T.C.A. § 69-3-114(a).

§ 69-3-114(a) states, in part:

> It is unlawful for any person to discharge any substance into waters of the state or to place or cause any substance to be placed in any location where such substances, either by themselves or in combination with others, cause any of the damages as defined in Section 69-3-103 (22), unless such discharge shall be due to an unavoidable accident or unless such action has been properly authorized. Any such action is declared to be a public nuisance.

## ORDER AND ASSESSMENT

**XVII.**

WHEREFORE, pursuant to the authority vested by T.C.A. §§ 69-3-107, 69-3-109, 69-3-115, and 69-3-116, I, Paul E. Davis, hereby issue the following ORDER and ASSESSMENT to the Respondents:

1. The Respondents shall implement appropriate EPSC measures designed by a professional engineer or landscape architect to assure that no eroded material leaves

the site and enters waters of the state. Documentation that EPSC measures have been implemented is to be sent within 15 days of receipt of this Order to the manager of the Division of Water Pollution Control located at the Nashville Environmental Field Office (NEFO), located at 711 R.S. Gass Boulevard, Nashville, Tennessee 37243.

2. The Respondents shall maintain appropriate EPSC measures to assure that no additional material leaves the site and enters waters of the state. The EPSC measures shall be maintained until permanent erosion preventive vegetative cover is established.
3. The Respondents are hereby assessed DAMAGES in the amount of ONE HUNDRED FORTY-SIX DOLLARS AND EIGHTY-TWO CENTS ($146.82), payable within 30 days of receipt of this Order.
4. The Respondents shall pay a CIVIL PENALTY of FIVE THOUSAND DOLLARS ($5,000.00) to the Department, hereby assessed, to be paid as follows:
    a. The Respondents shall, within 30 days of receipt of this ORDER, pay a CIVIL PENALTY in the amount of ONE THOUSAND TWO AND FIFTY DOLLARS ($1,250.00).
    b. If, and only if, the Respondents fail to comply with item 1 above in a timely manner, the Respondents shall pay ONE THOUSAND EIGHT HUNDRED AND SEVENTY-FIVE DOLLARS ($1,875.00) to the Division within 30 days of default.
    c. If, and only if, the Respondents fail to comply with item 2 above in a timely manner, the Respondents shall pay ONE THOUSAND EIGHT HUNDRED

AND SEVENTY-FIVE DOLLARS ($1,875.00) to the Division within 30 days of default.

The Respondents shall otherwise conduct business in accordance with the Act and rules promulgated pursuant to the Act.

The Director of the Division of Water Pollution Control may, for good cause shown, extend the compliance dates contained within this Order and Assessment. In order to be eligible for this time extension, the Respondent shall submit a written request to be received a minimum of 30 days in advance of the compliance date. The request must include sufficient detail to justify such an extension and include at a minimum the anticipated length of the delay, the precise cause or causes of the delay, and all preventive measures taken to minimize the delay. Any such extension will be in writing.

Further, the Respondents are advised that the foregoing Order and Assessment is in no way to be construed as a waiver, expressed or implied, of any provision of the law or regulations. However, compliance with the Order and Assessment will be one factor considered in any decision whether to take enforcement action against the Respondents in the future.

Issued by the Director of the Division of Water Pollution Control on this 28th day of May, 2008.

PAUL E. DAVIS, P.E.
Director, Division of Water Pollution Control

## NOTICE OF RIGHTS

Tennessee Code Annotated §§ 69-3-109, 115, allow the Respondent to secure review (appeal) of this Order and Assessment. To do so, a written petition setting forth the grounds (reasons) for requesting a hearing before the Water Quality Control Board must be RECEIVED by the Department within THIRTY (30) DAYS of the date the Respondent received this Order and Assessment or it will become final (not subject to review).

Artificial Respondents (corporations, limited partnerships, limited liability companies, etc.) cannot carry-on the practice of law. They may secure review (appeal) before the Water Quality Control Board only through an attorney licensed to practice law in Tennessee. Natural Respondents may represent themselves or be represented by an attorney licensed to practice law in Tennessee. Low-income individuals may be eligible for representation at no cost or reduced cost through a local bar association or legal aid organization.

Any hearing of this case before the Board will be a contested case hearing governed by T.C.A. § 4-5-301 *et seq.* (the Uniform Administrative Procedures Act) and the Department of State's Uniform Rules of Procedure for Hearing Contested Cases Before State Administrative Agencies. Such hearings are in the nature of a trial before the Board sitting with an Administrative Law Judge. The Respondent may subpoena witnesses to testify.

At the conclusion of a hearing the Board has the authority to affirm, modify, or deny the Order and Assessment. This includes the authority to modify the penalty within the statutory confines (up to $10,000.00 per day per violation). Furthermore, the Board has the authority to assess additional damages incurred by the Department including, but

not limited to, all docketing expenses associated with the setting of the matter for a hearing and the hourly fees incurred due to the presence of an administrative law judge and a court reporter.

Any petition to appeal which is filed should be sent to: Appeal of an Enforcement Order, TDEC-OGC, 20th Floor L & C Tower, 401 Church Street, Nashville, TN 37243-1548. Payments of the civil penalty shall be made payable to the "Treasurer, State of Tennessee," and sent to the Division of Fiscal Services - Consolidated Fees Section, Tennessee Department of Environment and Conservation, 14th Floor L&C Tower, 401 Church Street, Nashville, Tennessee 37243. All other correspondence shall be sent to Paul E. Davis, Director, Division of Water Pollution Control, Tennessee Department of Environment and Conservation, 6ht Floor Annex, 401 Church Street, Nashville, TN 37243. The case number should be written on all correspondence regarding this matter.