

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION VII  
901 NORTH FIFTH STREET  
KANSAS CITY, KANSAS 66101

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ENVIRONMENTAL PROTECTION  
AGENCY-REGION VII  
REGIONAL HEARING CLERK

BEFORE THE ADMINISTRATOR

IN THE MATTER OF )  
 ) Docket No. CWA-07-2006-0167  
 )  
SOUTH PARK DEVELOPMENT, LLC )  
 )  
Tonganoxie, Kansas )  
 )  
Respondent. )  
 )  
Proceedings under Section 309(g) of the )  
Clean Water Act, 33 U.S.C. § 1319(g) )  
 )

CONSENT AGREEMENT AND FINAL ORDER

The United States Environmental Protection Agency (EPA), Region 7 (Complainant) and South Park Development, LLC, ("South Park")(Respondent) have agreed to a settlement of this action before the filing of a complaint, and thus this action is simultaneously commenced and concluded pursuant to Rules 22.13(b) and 22.18(b)(2) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits (Consolidated Rules), 40 C.F.R. §§ 22.13(b) and 22.18(b)(2).

A. ALLEGATIONS

Jurisdiction

1. This is an administrative action for the assessment of civil penalties instituted pursuant to Section 309(g) of the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act (CWA), 33 U.S.C. § 1319(g), and in accordance with the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/ Termination or Suspension of Permits, 40 C.F.R. Part 22.
2. This Consent Agreement and Final Order serves as notice that the United States Environmental Protection Agency (EPA) has reason to believe that Respondent has violated

Sections 301, 402 and 404 of the CWA, 33 U.S.C. §§ 1311, 1342 and 1344, and regulations promulgated thereunder, and sets forth the terms of settlement of the alleged violations.

### **Parties**

3. The authority to take action under Section 309(g) of the CWA, 33 U.S.C. § 1319(g), is vested in the Administrator of EPA. The Administrator has delegated this authority to the Regional Administrator, EPA Region 7, who in turn has delegated it to the Director of the Water, Wetlands and Pesticides Division of EPA Region 7 (Complainant).

4. South Park Development, LLC (“Respondent”), is a company incorporated under the laws of State of Kansas and authorized to conduct business in the State of Kansas. At all times relevant to this action, Respondent was the owner and/or operator of a construction site known as the Jackson Heights development site located near Tonganoxie, Kansas, at the South East corner of Parallel Road and County Road No. 5 (“the Site”).

5. On or about May 10 and 16, 2005, EPA performed an inspection of the Jackson Heights Site under the authority of Section 308(a) of the CWA, 33 U.S.C. § 1318(a). The purpose of the inspection was to evaluate the treatment and disposal of storm water at the Jackson Heights Site, in accordance with the CWA. At the time of EPA’s inspection, the Site had developed two phases, with a total of 8 phases planned. Following EPA’s inspection, on May 16, 2005, a Notice of Potential Violation (NOPV) was issued to Respondent. On November 2, 2005, EPA issued Respondent an Administrative Compliance Order (“November 2, 2005 Order”) pursuant to the authority of Section 309 of the CWA, 33 U.S.C. § 1318, which ordered Respondent to take specific actions to ensure future compliance with the storm water permitting requirements of the CWA (Docket No. CWA-07-2006-0025). On May 18, 2006, EPA and Respondent consensually entered into an Administrative Order on Consent for Compliance (“May 2006 Order”), whereby Respondent agreed to take certain actions to address the compliance requirements of Section of 404 of the CWA, 33 U.S.C. § 1344 (Docket No. CWA-07-2006-0166).

### **Statutory and Regulatory Framework**

6. Section 301 of the CWA, 33 U.S.C. § 1311, provides that except as in compliance with certain specified provisions of the CWA, the unauthorized discharge of any pollutant into the waters of the United States by any person is unlawful. Section 402 of the CWA, 33 U.S.C. § 1342, provides that pollutants may be discharged only in accordance with the terms of a National Pollutant Discharge Elimination System (NPDES) permit issued pursuant to that Section. Section 404 of the CWA, 33 U.S.C. § 1344, specifically requires a person to obtain a permit from the United States Army Corps of Engineers for any discharge of “dredged or fill material” into the “navigable waters” of the United States.

7. The CWA prohibits the discharge of “pollutants” from a “point source” into a “navigable water” of the United States, as these terms are defined by Section 502 of the CWA, 33 U.S.C. § 1362.
8. Storm water contains “pollutants” as defined by Section 502(6) of the CWA, 33 U.S.C. § 1362(6). Pursuant to Section 502(6) of the CWA, pollutants include fill materials such as “dredged spoil..., rock, sand, [and] cellar dirt.”
9. Section 502(14) of the CWA, 33 U.S.C. § 1362(7), defines the term “point source” as “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.”
10. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines “navigable waters,” in part, as the “waters of the United States,” which are defined at 40 C.F.R. § 232.2 and 33 C.F.R. Part 328.
11. Section 402(p) of the CWA, 33 U.S.C. § 1342(p), sets forth requirements for the issuance of NPDES permits for the discharge of storm water. Section 402(p) of the CWA, 33 U.S.C. § 1342(p), requires, in part, that a discharge of storm water associated with an industrial activity must conform with the requirements of an NPDES permit issued pursuant to Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342.
12. Pursuant to Section 402(p) of the CWA, 33 U.S.C. § 1342(p), EPA promulgated regulations setting forth the NPDES permit requirements for storm water discharges at 40 C.F.R. § 122.26.
13. 40 C.F.R. § 122.26(a)(1)(ii) and 122.26(c) require dischargers of storm water associated with industrial activity to apply for an individual permit or to seek coverage under a promulgated storm water general permit.
14. 40 C.F.R. § 122.26(b)(14)(x) defines “storm water discharge associated with industrial activity,” in part, as construction activity including clearing, grading, and excavation, except operations that result in the disturbance of less than five (5) acres of total land area which are part of a larger common plan of development or sale.
15. The Kansas Department of Health and Environment (KDHE) is the state agency with the authority to administer the federal NPDES program in Kansas pursuant to Section 402 of the CWA, 33 U.S.C. § 1342. EPA maintains concurrent enforcement authority with delegated states for violations of the CWA.
16. The KDHE issued a NPDES General Permit for the discharge of storm water associated with construction activities, Permit No. S-MSCT-0110-1 (the Permit). For purposes of this

action, the Permit was effective on March 1, 2003, and expires on December 31, 2006. The permit governs storm water discharges associated with construction or land disturbance activity (e.g., clearing, grubbing, excavating, grading, and other activity that results in the destruction of the root zone).

#### **Factual Background**

17. Respondent is a "person" as defined by Section 502(5) of the CWA, 33 U.S.C. § 1362(5).
18. The Site occupies at least 65 acres. Construction activities that occurred at the Site included clearing, grading and excavation with earth-moving equipment which disturbed 5 or more acres of total land area or which disturbed less than 5 acres of total land area that was part of a larger common plan of development or sale.
19. Storm water, snow melt, surface drainage and runoff water leaves the Site and goes into the an unnamed tributary of Tonganoxie Creek. The runoff and drainage from Respondent's Site is "storm water" as defined by 40 C.F.R. § 122.26(b)(13).
20. Respondent's storm water runoff is the "discharge of a pollutant" as defined by CWA Section 502(12), 33 U.S.C. § 1362(12).
21. The Site was a "point source" which caused the "discharge of pollutants" as defined by CWA Section 502, 33 U.S.C. § 1362.
22. Respondent discharged pollutants via storm water runoff into an unnamed tributary of Tonganoxie Creek.
23. The unnamed tributary and Tonganoxie Creek are each a "navigable water" as defined by CWA Section 502, 33 U.S.C § 1362.
24. Respondent's discharge of pollutants associated with an industrial activity, as defined by 40 C.F.R. § 122.26(b)(14)(x), required a permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.
25. EPA's May 10 and 16, 2005 inspections of the Site, performed under the authority of Section 308(a) of the CWA, 33 U.S.C. § 1318(a), documented what EPA determined were violations of the CWA. Specifically, EPA determined that Respondent had not obtained the required storm water permit for its construction activities. On or about, May 23, 2005, Respondent filled a Notice of Intent of construction activity with KDHE and obtained authorization for future construction activities under KDHE's general storm water permit (Permit No. S-MSCT-0110-1).
26. During the grading operations described above, Respondent channelized at least 2,800

feet of an unnamed tributary of Tonganoxie Creek within the Site, and discharged quantities of dirt and rocky materials into the tributary. Additionally, Respondent constructed and placed drainage control devices (outfall structures, culverts) into the tributary to redirect its flow. These discharges, channelization and construction activities were accomplished by earthmoving equipment.

27. Respondent's channelization and discharge of dredged and/or fill material and/or placement of drainage control devices within the tributary altered the natural drainage pattern of the tributary.

28. The earth moving machinery referenced in Paragraph 26, above, constitutes a "point source" within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

29. The dredged and/or fill materials and/or drainage control devices discharged by Respondent into the tributary are "pollutants" within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

30. The discharge of the dredged and/or fill material and/or installation of drainage control devices into the waters of the United States described in Paragraphs 26 to 29, above, constitutes the "discharge of a pollutant" within the meaning of Section 501(12) of the CWA, 33 U.S.C. § 1362(12).

### **Findings of Violations**

#### **Discharge without Section 402 Storm Water Permit**

31. The facts stated in Paragraphs 1 through 30, above, are herein incorporated.

32. The State of Kansas' General Permit (Permit No. S-MSCT-0110-1) requires facilities to apply for and obtain a permit authorizing the discharge of storm water runoff to waters of the state of Kansas.

33. The EPA inspection referenced in Paragraph 5, above, revealed that Respondent had not applied for the required Kansas General Permit and therefore, was not authorized to discharge storm water from the site.

34. Respondent's failure to obtain a NPDES permit is a violation of Sections 301(a) and 402(p) of the CWA, 33 U.S.C. § 1311(a) and § 1342(p), and implementing regulations.

35. Pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), EPA proposes that a civil penalty be assessed against Respondent, the amount of which is part of the consolidated penalty set forth in Paragraph 40, below.

### **Failure to Obtain Section 404 Permit for Discharges of Dredged and/or Fill Materials**

36. The facts stated in Paragraphs 1 through 35, above, are herein incorporated.
37. At the time of Respondent's channelization of 2,800 feet of the unnamed tributary and the resulting discharge of dredge and fill materials (i.e. pollutants), as described above, the discharge sites were within the "waters of the United States," within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7), 40 C.F.R. § 232.2 and 33 C.F.R. Part 328.
38. Respondent's discharges of dredged and/or fill material (i.e., pollutants) from a point source into a water of the United States were performed without a permit issued pursuant to 404 of the CWA, 33 U.S.C. § 1344, and therefore these discharges violated Section 301 of the CWA, 33 U.S.C. § 1311.
39. Each day the pollutants discharged by Respondent remain in place constitutes an ongoing violation of Sections 301 and 404 of the CWA, 33 U.S.C. §§ 1311 and 1344.
40. Pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), EPA proposes that a civil penalty of \$43,278 be assessed against Respondent, inclusive of penalties based on Respondent's violations of Sections 301, 402 and 404 of the CWA, as alleged above.

### **B. CONSENT AGREEMENT**

1. Respondent and the EPA agree to the terms of this Consent Agreement/Final Order and Respondent agrees to comply with the terms of the Final Order portion of this Consent Agreement/Final Order.
2. Respondent admits the jurisdictional allegations of this Consent Agreement/Final Order and agrees not to contest the EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of the Final Order portion of this Consent Agreement/Final Order set forth below.
3. Respondent neither admits nor denies the factual allegations and legal conclusions set forth in this Consent Agreement/Final Order.
4. Respondent waives its right to a judicial or administrative hearing on any issue of fact or law set forth above, and its right to appeal the proposed Final Order portion of the Consent Agreement/Final Order.
5. Respondent and Complainant agree to conciliate the matters set forth in this Consent Agreement/Final Order without the necessity of a formal hearing and to bear their respective costs and attorney's fees.

6. Respondent certifies by the signing of this Consent Agreement <sup>WB</sup> that to the best of Respondent's knowledge, it is presently in compliance with the requirements of EPA's Orders for Compliance, dated November 2, 2005 and May 18, 2006 (Docket Nos. CWA-07-2006-0025 and CWA-07-2006-0166), and that every effort is being made to comply with the requirements of Section 301, 402 and 404 of the CWA, 33 U.S.C. § 1311, 1342 and 1344, and the applicable regulations promulgated thereunder. Respondent acknowledges that neither this certification nor compliance with the above referenced Administrative Order excuse future violations of the Orders for Compliance, the CWA and/or its implementing regulations.

7. Nothing contained in the Final Order portion of this Consent Agreement/Final Order shall alter or otherwise affect Respondent's obligation to comply with all applicable federal, state and local environmental statutes and regulations and applicable permits.

8. Respondent agrees that, in settlement of the claims alleged in this Consent Agreement/Final Order, Respondent shall pay a penalty of \$43,278, as set forth in Paragraph A.1 of the Final Order.

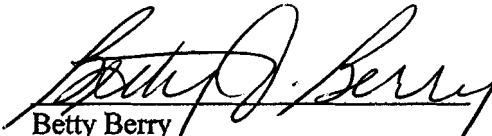
9. Respondent understands that failure to pay any portion of the civil penalty on the date the same is due may result in the commencement of a civil action in Federal District Court to collect said penalty, along with interest thereon at the applicable statutory rate.


10. The undersigned representative of Respondent certifies that he or she is fully authorized to enter the terms and conditions of this Consent Agreement/Final Order and to execute and legally bind Respondent to the terms of the Consent Agreement/Final Order.

**COMPLAINANT:  
U.S. ENVIRONMENTAL PROTECTION AGENCY**

05/23/06  
Date

5/18/06  
Date

  
Betty Berry  
Acting Director  
Water, Wetlands, and Pesticides Division  
U.S. Environmental Protection Agency  
Region VII

  
Howard C. Bunch  
Sr. Assistant Regional Counsel  
Region VII

Signatures continued  
Docket No. CWA-07-2006-0167)

**RESPONDENT:**

South Park Development, LLC.

May 12 2006  
Date

John Curtis  
Name:  
Title: Manager



**C. FINAL ORDER**

Pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), and based upon information contained in the Consent Agreement set forth above, IT IS HEREBY ORDERED THAT:

1. Respondent shall pay a total civil penalty \$43,278, as set forward in Paragraph B.8 of the Consent Agreement, according to the schedule set forth below.

- a. Payment of \$17,310 within 60 days of the effective date of the CAFO, plus;
- b. Payment of an additional \$4,328 no later than 90 days of the effective date of the CAFO, plus;
- c. Payment of an additional \$4,328 no later than 120 days of the effective date of the CAFO, plus;
- d. Payment of an additional \$4,328 no later than 150 days of the effective date of the CAFO, plus;
- e. Payment of an additional \$4,328 no later than 180 days of the effective date of the CAFO, plus;
- f. Payment of an additional \$4,328 no later than 210 days of the effective date of the CAFO, plus;
- g. Payment of an additional \$4,328 no later than 240 days of the effective date of the CAFO.

2. Each penalty payment made pursuant to this Order shall identify the Respondent by name and docket number and shall be by certified or cashiers check made payable to "United States Treasury," and remitted to:

EPA-Region VII  
P.O. Box 371099M  
Pittsburgh, Pennsylvania 15251

3. Copies of the all checks for payment of penalty required pursuant to this Order shall be mailed to:

Howard C. Bunch  
Sr. Assistant Regional Counsel  
U.S. Environmental Protection Agency  
901 North 5th Street  
Kansas City, Kansas 66101

and

Kathy Robinson  
Regional Hearing Clerk  
U.S. Environmental Protection Agency  
901 North 5th Street  
Kansas City, Kansas 66101

4. Pursuant to 40 C.F.R. § 13.18, failure to make any payment according to the above schedule will automatically accelerate the debt which will become due and owing in full, immediately. Interest on any late payment will be assessed at the annual rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717. The interest will be assessed on any overdue amount from the due date through the date of payment. Failure to pay the civil penalty when due may result in the commencement of a civil action in Federal District Court to collect said penalty, together with costs and interest.

5. Respondent and Complainant shall pay their own costs and attorneys' fees incurred as a result of this action.

6. EPA reserves the right to enforce the terms of this Final Order by initiating a judicial or administrative action pursuant to Section 309 of the CWA, 33 U.S.C. § 1319.

7. With respect to matters not addressed in the above Consent Agreement and in this Final Order, EPA reserves the right to take any enforcement action pursuant to the CWA, or any other available legal authority, including without limitation, the right to seek injunctive relief, monetary penalties and for punitive damages.

8. This Final Order shall be effective upon receipt by Respondent of a fully executed copy hereof. All time periods herein shall be calculated therefrom unless otherwise provided in this Final Order.

9. This executed Consent Agreement and Final Order shall be filed with the Regional Hearing Clerk, U.S. Environmental Protection Agency, 901 North 5<sup>th</sup> Street, Kansas City, Kansas 66101.

**IT IS SO ORDERED.**

August 17, 2006  
Date

Robert L. Patrick  
Robert L. Patrick  
Regional Judicial Officer

IN THE MATTER OF South Park Development, LLC, Respondent  
Docket No. CWA-07-2006-0167

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Consent Agreement and Final Order was sent this day in the following manner to the addressees:

Copy hand delivered to:

Howard C. Bunch  
Senior Assistant Regional Counsel  
901 N. 5<sup>th</sup> Street  
Kansas City, Kansas 66101

Copy by Certified Mail Return Receipt to:

Jack Willis, Registered Agent  
South Park Development Company, LLC  
410 Smiley  
P.O. Box 147  
Tonganoxie, Kansas 66068

8/17/06  
Dated

Kathy Robinson  
Hearing Clerk, Region 7