

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 7

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)

Price Brothers Construction Company)
12721 Metcalf Avenue, Suite 200)
Overland Park, Kansas 66213)

Respondent)

Proceedings under Section 309(g) of the)
Clean Water Act, 33 U.S.C. § 1319(g))

Docket No. CWA-07-2009-0044

CONSENT AGREEMENT/
FINAL ORDER

The United States Environmental Protection Agency (EPA), Region 7 (Complainant) and Price Brothers Construction Company, (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).

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 (CAFO) serves as notice that EPA has reason to believe that Respondent has violated Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342, and the regulations promulgated thereunder.

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. Respondent is Price Brothers Construction Company, a company registered under the laws of Kansas and authorized to conduct business in the State of Kansas.

Statutory and Regulatory Framework

5. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants except in compliance with, inter alia, Section 402 of the CWA, 33 U.S.C. § 1342. 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.

6. 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.

7. 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.

8. 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.

9. 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.

10. 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 not part of a larger common plan of development or sale.

11. 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 authorized states for violations of the CWA.

12. Effective January 1, 2007, KDHE authorized a General Permit for the discharge of storm water under the NPDES Permit No. S-MCST-0701-1, to expire on December 31, 2011. On January 24, 2006, KDHE issued Respondent Permit No. MO-14-0104, authorizing Respondent to operate under the General Permit, expiring on July 28, 2008. The General 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

13. Respondent is a “person” as defined by Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

14. At all times relevant to this action, Respondent was the owner and/or operator of a construction site known as Avignon Villas Phase II (Site) located near Hagan Street and 117th Street in Olathe, Kansas. Construction activities occurred at the Site including clearing, grading, and excavation which disturbed five (5) or more acres of total land area or which disturbed less than five (5) acres of total land area that was part of a larger common plan of development or sale.

15. Storm water, snow melt, surface drainage, and runoff water from Respondent’s facility goes into an unnamed tributary of Indian Creek. The runoff and drainage from Respondent’s facility is “storm water” as defined by 40 C.F.R. § 122.26(b)(13).

16. Storm water contains “pollutants” as defined by Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

17. The Site has “storm water discharge associated with industrial activity” as defined by 40 C.F.R. § 122.26(b)(14)(x), and is a “point source” as defined by Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

18. Respondent discharged pollutants into “navigable waters” as defined by CWA Section 502, 33 U.S.C § 1362.

19. Storm water runoff from Respondent’s construction site results in the addition of pollutants from a point source to navigable waters, and thus is the “discharge of a pollutant” as defined by CWA Section 502(12), 33 U.S.C. § 1362(12).

20. Respondent's discharge of pollutants associated with an industrial activity, as defined by 40 C.F.R. § 122.26(b)(14)(x), requires a permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

21. Respondent applied for and was issued NPDES permit coverage under the General Permit described in Paragraph 12 above. KDHE assigned Respondent permit number MO-14-0104, which was issued on July 24, 2006.

22. On May 20, 2008, through May 21, 2008, an EPA inspector performed an inspection of the 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 Respondent's compliance with the CWA.

Findings of Violation

Count 1

Failure to Install Appropriate Best Management Practices (BMPs)

23. The facts stated in Paragraphs 13 through 22 above are herein incorporated.

24. Part 7 of the Respondent's permit states in part that the permittee shall develop a storm water pollution prevention plan (SWPPP) which is specific to the construction activities which are to be employed at the site authorized by this general permit to discharge storm water runoff.

25. Part 7 of Respondent's permit additionally states that the permittee shall fully implement the provisions of the SWPPP required under this part as a condition of this general permit throughout the term of the construction project. Those provisions include but are not limited to the following:

- a. Part 7.1 states that storm water runoff from disturbed areas which leave the site shall pass through an appropriate impediment to sediment movement, such as a sedimentation basin, sediment trap, silt fence, etc., prior to leaving the construction site.
- b. Part 7.2.4 of Respondent's permit identifies examples of structural BMPs which the permittee should consider specifying in the SWPPP plan. Those structural BMPs include but are not limited to silt fences, sediment traps, storm drain inlet protection and outlet protection, and other appropriate BMPs.
- c. Part 7.2.5 of Respondent's permit requires the SWPPP provide for a sedimentation basin for each drainage area with 10 or more acres disturbed at one time.
- d. Part 7.2.3 of Respondent's permit states the permittee's SWPPP shall require existing vegetation to be preserved where practical, and the time period for soil areas to be without vegetative cover is to be minimized to the extent practical. This part additionally

describes examples of non-structural BMPs which should be considered in the SWPPP such as temporary seeding, sod stabilization, mulching, etc.

- e. Part 7.2.7 of Respondent's permit states that the permittee's SWPPP shall address other BMPs to prevent contamination of storm water runoff, including but not limited to providing trash containers and regular site clean up for proper disposal of solid waste such as scrap building material, product/material shipping waste, food containers and cups; and providing containers and proper disposal for waste paints, solvents, and cleaning compounds, etc.

26. The EPA inspection referenced above revealed that not all silt fences called for in the SWPPP were installed at all locations for storm water to pass through prior to leaving the Site. Additionally, at least three areas existed where silt fence was needed but not designated in the SWPPP nor installed.

27. The EPA inspection referenced above revealed that the Respondent failed to properly install and operate a sedimentation basin for the drainage area with 10 or more acres of disturbed land.

28. The EPA inspection referenced above revealed that the Respondent failed to properly implement SWPPP provisions pertaining to phased grading and stabilizing disturbed areas.

29. The EPA inspection referenced above revealed construction debris in the receiving tributary at the Site and at numerous construction lots.

30. Respondent's failure to fully implement the provisions of the SWPPP by failing to install appropriate BMPs is a violation of Respondent's General Permit, and as such, is a violation of Section 301(a) and 402(p) of the CWA, 33 U.S.C. § 1311(a) and §1342(p).

Count 2

Failure to Maintain Pollution Control Systems

31. The facts stated in Paragraphs 13 through 22 above are herein incorporated.

32. Part 10.1 of Respondent's permit states that the permittee shall effectively operate and maintain all pollution control measures and systems necessary to achieve compliance with the terms and conditions of this general permit at all times. Part 10.1 additionally states that pollution control systems, erosion control measures or best management practices which require maintenance shall be maintained, repaired or replaced in a timely manner to avoid discharging storm water runoff laden with pollutants or sediment which adversely impacts water quality.

33. The EPA inspection referenced above revealed that Respondent's pollution control systems, including curb inlet filter socks and silt fences, were not properly maintained.

Specifically, all of the curb inlet filter socks were filled with sediment and silt fencing was not adequately maintained.

34. Respondent's failure to properly maintain its pollution control systems is a violation of Respondent's General Permit, and as such, is a violation of Sections 301(a) and 402(p) of the CWA, 33 U.S.C. § 1311(a) and § 1342(p).

Count 3
Failure to Perform and Document Site Inspections

35. The facts stated in Paragraphs 13 through 22 above are herein incorporated.

36. Part 7 of Respondent's permit requires Respondent to fully implement the provisions of the SWPPP.

37. Part 7.2.8 of Respondent's permit requires documented site inspections at a minimum of once per month, and an increase in the frequency of inspections when construction activity increases. The SWPPP requires weekly documented inspections of the Site. In addition, the General Permit requires that any deficiencies be noted in a report and corrected within seven calendar days of the inspection. The report is to be kept on-site or at the records storage location identified in the Notice of Intent (NOI).

38. The EPA inspection referenced above revealed that Respondent did not perform or document all the required weekly or monthly inspections of the Site. Specifically, Respondent conducted some but not all required documented inspections from January 2007 until September 2007, and conducted no documented inspections from September 2007 through the date of the EPA inspection. In addition, Respondent did not note deficiencies in the reports, correct the deficiencies within seven calendar days of the inspection, or keep the reports on-site or at the records storage location.

39. Part 7.2.8 of Respondent's permit requires documented inspections of the construction site within twenty-four (24) hours of the end of a precipitation event which results in precipitation of 0.5 inches or greater.

40. The EPA inspection referenced above revealed that Respondent did not perform documented inspections required within twenty-four (24) hours of all precipitation events which resulted in precipitation of 0.5 inches or greater. Specifically, Respondent conducted some but not all required inspections from January 2007 until September 2007, and conducted no documented inspections from September 2007 through the date of the EPA inspection.

41. Part 7.2.8 of Respondent's permit requires that the inspection report be signed by the person performing the inspection.

42. The EPA inspection referenced above revealed that the inspection reports were not signed by the person who performed the inspection.

43. Respondent's failure to perform and document site inspections is a violation of Respondent's General Permit, and as such, is a violation of Sections 301(a) and 402(p) of the CWA, 33 U.S.C. § 1311(a) and § 1342(p).

Count 4
Failure to Develop an Adequate SWPPP

44. The facts stated in Paragraphs 13 through 22 above are herein incorporated.

45. Part 7 of the Requirements and Guidelines section of Respondent's permit states that the purpose of the SWPPP is to ensure the design, implementation, management, and maintenance of BMPs in order to minimize erosion; reduce the amount of sediment and other pollutants in storm water runoff from construction activities; comply with the Kansas Surface Water Quality Standards; and ensure compliance with the terms and conditions of the General Permit.

46. The EPA inspection referenced above revealed that the SWPPP did not provide for adequate BMPs necessary to minimize erosion and reduce the amount of sediment and other pollutants in storm water runoff from construction activities at the Site.

47. Part 7 of Respondent's permit requires in part that the SWPPP include, *inter alia*, the following items:

- 7.1 Operator/contractor certification statements: Respondent shall have each contractor sign a KDHE Contractor Certification form.
- 7.1 Include changes to site BMPs: The SWPPP shall be amended whenever there is a change in design, operation, or maintenance of BMPs.
- 7.2.1 Site description: The SWPPP shall include all of the information provided in the NOI.
- 7.2.5 Sedimentation basin: The SWPPP shall require a sedimentation basin for each drainage area with more than 10 acres disturbed at one time.
- 7.2.7 Additional site management BMPs: The SWPPP shall address other BMPs, as required by site activities, to prevent contamination of storm water runoff.

48. The EPA inspection referenced above revealed that the SWPPP did not address the requirements contained in Part 7 of Respondent's permit, referenced in Paragraph 47 above.

49. Respondent's failure to develop an adequate SWPPP is a violation of Respondent's General Permit, and as such, is a violation of Sections 301(a) and 402(p) of the CWA, 33 U.S.C. § 1311(a) and § 1342(p).

CONSENT AGREEMENT

50. Respondent and EPA agree to the terms of this CAFO and Respondent agrees to comply with the terms of the Final Order portion of this CAFO.

51. Respondent admits the jurisdictional allegations of this CAFO and agrees not to contest EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of the Final Order portion of this CAFO.

52. Respondent neither admits nor denies the factual allegations set forth above.

53. 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 Final Order portion of this CAFO.

54. Respondent and Complainant agree to conciliate the matters set forth in this CAFO without the necessity of a formal hearing and agree to bear their own costs and attorney's fees incurred as a result of this action.

55. The undersigned representative of Respondent certifies that he or she is fully authorized to enter the terms and conditions of this CAFO and to execute and legally bind Respondent to it.

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

57. This CAFO addresses all civil and administrative claims for the CWA violations identified above. Complainant reserves the right to take any enforcement action with respect to any other violations of the CWA or any other applicable law.

58. Respondent certifies by the signing of this CAFO that to the best of its knowledge, Respondent's facility is in compliance with all requirements of Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342.

59. The effect of settlement described in Paragraph 57 above is conditional upon the accuracy of the Respondent's representations to EPA, as memorialized in Paragraph 58 above, of this CAFO.

60. Respondent agrees that, in settlement of the claims alleged in this CAFO, Respondent shall pay a penalty of Forty-Nine Thousand Eight Hundred Dollars (\$49,800) as set forth in Paragraph 1 of the Final Order.

61. 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.

FINAL ORDER

Payment Procedures

Pursuant to the authority of Section 309(g) of the CWA, 33 U.S.C. § 1319(g), and according to terms of this CAFO, IT IS HEREBY ORDERED THAT:

1. Respondent shall pay a mitigated civil penalty of Forty-Nine Thousand Eight Hundred Dollars (\$49,800) within thirty (30) days of the effective date of this Final Order.
2. Payment of the penalty shall be by cashier or certified check made payable to the "United States Treasury" and remitted to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, Missouri 63197-9000

This payment shall reference docket number CWA-07-2009-0044.

Copies of the check shall be mailed to:

Kelley Catlin
Assistant Regional Counsel
U.S. Environmental Protection Agency - Region 7
901 North 5th Street
Kansas City, Kansas 66101

and to

Kathy Robinson
Regional Hearing Clerk
U.S. Environmental Protection Agency - Region 7
901 North 5th Street
Kansas City, Kansas 66101.

3. No portion of the civil penalty or interest paid by Respondent pursuant to the requirements of this CAFO shall be claimed by Respondent as a deduction for federal, state, or local income tax purposes.

Parties Bound

4. This Final Order portion of this CAFO shall apply to and be binding upon Respondent and Respondent's agents, successors and/or assigns. Respondent shall ensure that all contractors, employees, consultants, firms or other persons or entities acting for Respondent with respect to matters included herein comply with the terms of this CAFO.

General Provisions

5. Notwithstanding any other provision of this CAFO, EPA reserves the right to enforce the terms of the Final Order portion of this CAFO by initiating a judicial or administrative action pursuant to Section 309 of the CWA, 33 U.S.C. § 1319, and to seek penalties against Respondent or to seek any other remedy allowed by law.

6. Complainant reserves the right to take enforcement action against Respondent for any future violations of the CWA and its implementing regulations and to enforce the terms and conditions of this CAFO.

7. This Order shall be entered and become effective only after the conclusion of the period of public notice and comment required pursuant to Section 309(g)(4) of the CWA, 33 U.S.C. § 1319(g)(4), and 40 C.F.R. § 22.45. Unless otherwise stated, all time periods stated herein shall be calculated in calendar days from such date.

8. Respondent and Complainant shall bear their respective costs and attorney's fees.

9. The headings in this CAFO are for convenience of reference only and shall not affect interpretation of this CAFO.

COMPLAINANT:
U.S. ENVIRONMENTAL PROTECTION AGENCY

5-28-09

Date

Karen A. Flourney

for William A. Spratlin
Director
Water, Wetlands and Pesticides Division
U.S. Environmental Protection Agency
Region 7

5/28/09

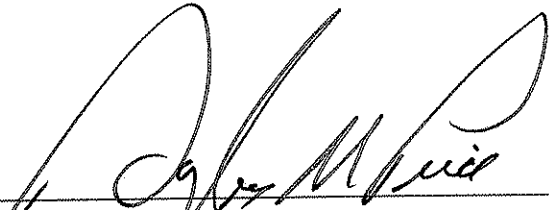
Date

Kelley Catlin

Kelley Catlin
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region 7

RESPONDENT:
Price Brothers Construction Company

4/8/09
Date


Signature

Douglas M. Price
Name (Print)

President
Title

IT IS SO ORDERED. This Final Order shall become effective immediately.



Robert Patrick
Regional Judicial Officer

June 2, 2009
Date

I certify that a true and correct copy of the foregoing CAFO was sent this day in the following manner to:

Copy hand delivered to
Attorney for Complainant:

Kelley Catlin
Assistant Regional Counsel
United States Environmental Protection Agency
901 North 5th Street
Kansas City, Kansas 66101

Copy by Certified Mail Return Receipt to:

Mr. Doug Clements
Price Brothers Construction Company
12721 Metcalf Avenue, Suite 200
Overland Park, Kansas 66213

Sent via first class mail to:

Mr. Scott A. Young, Esq.
Polsinelli, Shalton, Flanigan, Suelthaus, PC
6201 College Boulevard, Suite 500
Overland Park, Kansas 66211

Mr. Karl Mueldener, Director
Bureau of Water
Kansas Department of Health and Environment
1000 S.W. Jackson Street, Suite 420
Topeka, Kansas 66612

David Hibbs
Assistant Branch Chief/Kansas City Area Program Manager
U.S. Army Corps of Engineers
700 Federal Building
601 E. 12th Street
Attn: OD-R, Room 706
Kansas City, Missouri 64106

6/2/09
Date

Kathy Robinson
Signature