

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 )

N.W. Realty, Inc. )  
2620 West 143<sup>rd</sup> Street )  
Leawood, Kansas 66224 )

Respondent )

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

) Docket No. CWA-07-2009-0061

) CONSENT AGREEMENT/  
) FINAL ORDER

The United States Environmental Protection Agency (EPA), Region 7 (Complainant) and N.W. Realty, Inc., (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 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 N.W. Realty, Inc., 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. KDHE issued a general permit for the discharge of stormwater under the NPDES, Permit No. S-MCST-0701-1. The general permit governs stormwater discharges associated with construction or land disturbance activity. The general permit became effective January 2, 2007 and expires on December 31, 2011.

#### 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 the Daybreak Ridge Development located near the southeast intersection of 151<sup>st</sup> Street and Quivira Road, Overland Park, Kansas ("Site"). 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 Tomahawk 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 No. KSR104019, which was authorized on March 6, 2007.

22. On May 29, 2008, EPA inspectors 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 management of stormwater at the site in accordance with the CWA.

### Findings of Violation

#### Count 1

##### **Failure to Install Best Management Practices (BMPs)**

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

24. Part 7.1 of Respondent's permit requires that all stormwater runoff which leaves Respondent's site pass through an appropriate impediment to sediment movement, such as a sedimentation basin, sediment trap, or silt fence, prior to leaving the construction site.

25. The EPA inspection referenced in paragraph 22 above, revealed that Respondent failed to install portions of silt fencing and failed to designate an area for concrete washout.

26. Respondent's failure to properly install BMPs is a violation of Respondent's 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 2

##### **Failure to Properly Maintain Best Management Practices (BMPs)**

27. The facts stated in paragraphs 13 through 22 above are herein incorporated.

28. Part 10.1 of the Proper Operation and Maintenance section of Respondent's permit requires that the Respondent shall at all times effectively operate and maintain all pollution control measures and systems in good order. All BMPs which require maintenance shall be maintained, repaired, or replaced in a timely manner to avoid discharging sediment-laden stormwater runoff.

29. The EPA inspection referenced in paragraph 22 above, revealed that Respondent had not adequately maintained portions of silt fencing. Specifically, silt fences were not properly installed, and numerous silt fences were undermined, overrun, or filled with sediment.

30. Respondent's failure to properly maintain BMPs is a violation of Respondent's 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 Comply with Water Quality Standards**

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

32. Part 3.4 of the Respondent's permit states that stormwater runoff discharges associated with construction activities shall not violate the Kansas Surface Water Quality Standards which state, in part, that waters shall be free of deposits of sludge or fine solids and from the harmful effects of substances that produce any public health hazard, nuisance condition, or impairment of a designated use.

33. The EPA inspection referenced in paragraph 22 above, revealed significant deposition of sediment in tributary water approximately 50 feet downstream from Respondent's site.

34. Respondent's failure to comply with Kansas Surface Water Quality Standards is a violation of Respondent's 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 Stormwater Pollution Prevention Plan (SWPPP)**

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

36. Part 7 of the Respondent's permit requires that Respondent develop a SWPPP specific to the construction activities to be employed by Respondent. An adequate SWPPP is required to include descriptions of the site, best management practices, and stormwater management practices.

37. The inspection referenced in paragraph 22 above, revealed that Respondent's SWPPP failed to adequately describe best management practices and stormwater management practices by failing to identify sources of pollution, discharge points and temporary and permanent stabilization methods. Additionally, Respondent's SWPPP failed to provide adequate site descriptions because approved site plans did not correlate to the site layout at the time of inspection.

38. Respondent's failure to adequately develop the SWPPP is a violation of Respondent's 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 5**

**Failure to Perform and Document Site Inspections**

39. The facts stated in paragraphs 13 through 22 above are herein incorporated.

40. Part 7.2.8 of the Respondent's permit requires that regular inspections be performed at a minimum of once per month and within twenty four (24) hours of the end of a rain event which results in precipitation of 0.5 inches or greater. In addition, it requires that any deficiencies be noted in a report and corrected within seven calendar days of the inspection. The report is to be kept at a site which is readily available until final stabilization is achieved.

41. The EPA inspection referenced in paragraph 22 above, revealed that Respondent did not perform documented site inspections at a minimum of once per month, as required by Respondent's permit.

42. The EPA inspection referenced in paragraph 22 above, revealed that Respondent did not perform documented inspections in response to heavy rain events.

43. Respondent's failure to perform and document site inspections is a violation of Respondent's 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).

44. Based on the foregoing Findings of Violation, and pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), EPA, Region 7 hereby proposes to issue a Final Order assessing an administrative penalty against the Respondent for the violations cited above, in the amount of \$28,375.

**CONSENT AGREEMENT**

45. 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.

46. 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.

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

48. 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.

49. 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.

50. 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.

51. 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.

52. 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.

53. 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.

54. The effect of settlement described in paragraph 52 above is conditional upon the accuracy of the Respondent's representations to EPA, as memorialized in paragraph 53 above, of this CAFO.

55. Respondent agrees that, in settlement of the claims alleged in this CAFO, Respondent shall pay a penalty of \$28,375 as set forth in paragraph 1 of the Final Order.

56. 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 civil penalty of Twenty-Eight Thousand Three Hundred Seventy-Five Dollars (\$28,375) plus interest of Three Hundred Ninety-Seven Dollars and Eighteen Cents (\$397.18), for a total payment of Twenty-Eight Thousand Seven Hundred Seventy-Two Dollars and Eighteen Cents (\$28,772.18). The total civil penalty of Twenty-Eight Thousand Seven Hundred Seventy-Two Dollars and Eighteen Cents (\$28,772.18) shall be paid in three installment payments. The first payment of Fourteen Thousand One Hundred Eighty-Seven Dollars and Fifty Cents (\$14,187.50) is due within thirty (30) days of the effective date of this CAFO. Respondent shall make a second installment payment of Seven Thousand Ninety-Three Dollars and Seventy-Five Cents (\$7,093.75) within 180 days of the effective date of this CAFO. Respondent shall make a third and final installment payment of Seven Thousand, Four

Hundred and Ninety Dollars and Ninety-Three Cents (\$7,490.93) within 365 days of the effective date of this CAFO. These installment payments shall result in the total payment of Twenty-Eight Thousand Three Hundred Seventy-Five Dollars (\$28,375), plus interest, to be paid in full no later than 365 days after the effective date of this CAFO.

2. 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.

3. 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-07-2009-0061.

Copies of the check shall be mailed to:

Kristen Nazar  
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.

4. 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**

5. 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**

6. 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.

7. 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.

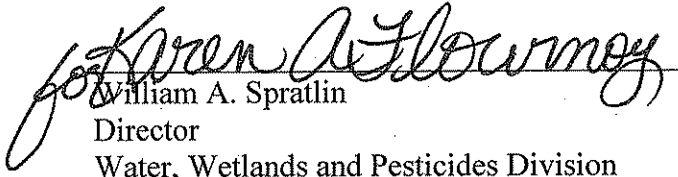
8. This Order shall be entered and become effective only after the conclusion of the period of public notice and comment required pursuant to Section 309(g)(4) of the CWA, 33 U.S.C. § 1319(g)(4), and 40 C.F.R. § 22.45. Unless otherwise stated, all time periods stated herein shall be calculated in calendar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

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

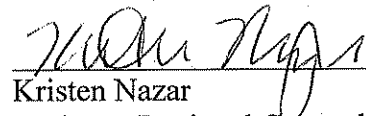
10. The headings in this CAFO are for convenience of reference only and shall not affect interpretation of this CAFO.

COMPLAINANT:  
U.S. ENVIRONMENTAL PROTECTION AGENCY

6-3-09  
Date

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

6/1/2009  
Date

  
\_\_\_\_\_  
Kristen Nazar  
Assistant Regional Counsel  
U.S. Environmental Protection Agency  
Region 7

RESPONDENT:  
N.W. REALTY, INC.

4-13-09  
Date

Kenneth E. Nichols

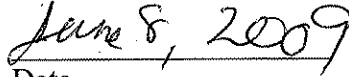
Name (Print) Kenneth E. Nichols

Title President

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



Robert Patrick  
Regional Judicial Officer



Date

IN THE MATTER OF N.W. Realty, Respondent  
Docket No. CWA-07-2009-0061

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  
Attorney for Complainant:

Kristen Nazar  
Assistant Regional Counsel  
Region VII  
United States Environmental Protection Agency  
901 N. 5<sup>th</sup> Street  
Kansas City, Kansas 66101

Copy by Certified Mail Return Receipt to:

Kenneth E. Nichols, President  
N.W. Realty, Inc.  
2620 West 143<sup>rd</sup> Street  
Leawood, Kansas 66224

Dated: 6/10/09

  
Kathy Robinson  
Hearing Clerk, Region 7