

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 7

901 NORTH FIFTH STREET  
KANSAS CITY, KANSAS 66101

BEFORE THE ADMINISTRATOR

10 JAN 15 PM 4:13

ENVIRONMENTAL PROTECTION  
AGENCY-REGION VII  
REGIONAL HEARING CLERK

IN THE MATTER OF )

Michael L. Collins )  
520 21<sup>st</sup> Avenue )  
Council Bluffs, Iowa 51501 )

Respondent )

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

) Docket No. CWA-07-2009-0074

) FIRST AMENDED COMPLAINT,  
) NOTICE OF PROPOSED  
) PENALTY AND NOTICE OF  
) OPPORTUNITY FOR HEARING

**FIRST AMENDED COMPLAINT**

The United States Environmental Protection Agency, ("EPA") by the authority vested in the Administrator of EPA states and alleges as follows:

**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 First Amended Complaint 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 Michael L. Collins, 520 21<sup>st</sup> Avenue, Council Bluffs, Iowa 51501.

### 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.

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 stormwater. Section 402(p) of the CWA requires, in part, that a discharge of stormwater associated with an industrial activity must conform with the requirements of an NPDES permit issued pursuant to Sections 301, 308 and 402 of the CWA, 33 U.S.C. §§ 1311, 1318 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 stormwater 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 stormwater associated with industrial activity to apply for an individual permit or to seek coverage under a promulgated stormwater general permit.

10. 40 C.F.R. § 122.26(b)(14)(x) defines “stormwater 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 Iowa Department of Natural Resources (“IDNR”) is the state agency with the authority to administer the federal NPDES program in Iowa 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. IDNR issued a general permit for the discharge of stormwater under the NPDES, General Permit No. 2. The general permit governs stormwater discharges associated with construction or land disturbance activity. The general permit became effective October 1, 2002, through October 1, 2007. This permit was reissued on October 1, 2007, and expires on October 1, 2012.

### 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 Traceview Estates Subdivision located West of County Road G-66, North of Brush Lane, Council Bluffs, Iowa ("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. Stormwater, snow melt, surface drainage, and runoff water leave Respondent's facility and flow into two unnamed tributaries of Pony Creek. The runoff and drainage from Respondent's facility is "stormwater" as defined by 40 C.F.R. § 122.26(b)(13).

16. Stormwater running off and draining from the Site contains "pollutants" as defined by Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

17. The Site has "stormwater 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 water" as defined by CWA Section 502(7), 33 U.S.C. § 1362(7).

19. Stormwater 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. IDNR assigned Respondent Permit No. IA-8984-8785. Respondent submitted a permit renewal application on April 24, 2006. This renewed permit provided Respondent with NPDES permit coverage through May 1, 2007.

22. In July 2007, Respondent sent a letter to IDNR requesting his permit coverage be terminated. Respondent did not utilize the Notice of Discontinuation form required to terminate permit coverage.

23. On October 12, 2007, 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 inspection observed

violations of the CWA. On July 8, 2008, EPA entered into a settlement agreement with Respondent that included the payment of a penalty, resolving the violations identified by the October 12, 2007 inspection.

24. On April 10, 2008, Respondent filed a Notice of Permit Discontinuation with IDNR. Respondent's NPDES Permit coverage for the Traceview Estates Subdivision was terminated on May 5, 2008.

25. Traceview Estates was issued Notices of Violation from IDNR on June 23, 2008 and September 17, 2008, regarding sediment being discharged offsite while the Site did not have NPDES permit coverage.

26. On November 17-19, 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 if the management of stormwater at the site was in accordance with the CWA.

27. During the November 2008 EPA inspection, an EPA inspector noted that the Site was less than 70% stabilized and land disturbance activity had occurred on Site. The inspector also noted that the Site lacked erosion controls and that stormwater runoff was causing sediment to be discharged offsite into unnamed tributaries of Pony Creek.

#### Findings of Violation

#### Count I

#### **Discharge Without a Permit**

28. The statutory and regulatory framework and facts stated in Paragraphs 5 through 27 above are herein incorporated.

29. The Code of Federal Regulations, 40 CFR-122.26 states that industrial and commercial activities that are classified as having "storm water discharge associated with industrial activity" require NPDES permit coverage.

30. The EPA inspection referenced in Paragraphs 26 and 27 above, revealed that on at least seven days between May 5, 2008 and November 19, 2008, Respondent discharged stormwater associated with an industrial activity from the Site, after the termination of NPDES permit coverage, without obtaining new or continuing NPDES permit coverage.

31. Respondent's discharge of stormwater without NPDES permit coverage is a violation of Sections 301(a) and 402(p) of the CWA, 33 U.S.C. § 1311(a) and § 1342(p).

32. Pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), it is proposed that a civil penalty be assessed against Respondent, the amount of which is consolidated as set forth in Paragraph 34 below.

### Relief

33. Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B) authorizes the Administrator to initiate a civil action for a permanent or temporary injunction and/or for a civil penalty of up to \$10,000 per day, not to exceed a total of \$125,000, for each violation occurring on or before January 30, 1997; \$11,000 per day, not to exceed a total of \$137,500, for each violation occurring between January 31, 1997, and March 15, 2004; \$11,000 per day, not to exceed a total of \$157,500, for each violation occurring between March 16, 2004, and January 12, 2009; and up to \$16,000 per day, not to exceed a total of \$177,500, for each violation occurring after January 12, 2009, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410 § 4, 104 Stat. 890 (1990, 28 U.S.C. § 2461 (as amended)), against any person whenever such person has violated, or is in violation of, Section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of the CWA, or has violated any permit condition or limitation implementing any of such Sections in a permit issued under Section 1342 of the CWA by the Administrator or by a State or in a permit issued under Section 1344 of the CWA by a State, 33 U.S.C. § 309(g).

34. Based on the foregoing Finding of Violations 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 an amount up to the statutory maximum of \$157,500 (One Hundred and Fifty-Seven Thousand Five Hundred Dollars).

35. The proposed penalty is based on the facts stated in this First Amended Complaint, specifically: the nature, circumstances, extent, and gravity of the violation, and with respect to the violator, ability to pay, and prior history of such violation, the degree of culpability, economic benefit, or savings resulting from the violation, and such other matters as justice may require.

36. The penalty proposed in this First Amended Complaint is based on the best information available to EPA at the time that the First Amended Complaint was issued. The penalty may be adjusted if the Respondent establishes bona fide issues of ability to pay, or other defenses relevant to the appropriate amount of the proposed penalty.

37. As required by Section 309(g)(4) of the CWA, 33 U.S.C. § 1319(g)(4), before the assessment of a civil penalty, EPA will provide public notice of the proposed penalty, and reasonable opportunity for the public to comment on the matter, and present evidence in the event a hearing is held.

38. EPA has notified the state of Iowa regarding this proposed action by mailing a copy of this document to the IDNR.

**NOTICE OF OPPORTUNITY TO REQUEST A HEARING**

**Answer and Request for Hearing**

39. Respondent may request a hearing to contest any material fact contained in the First Amended Complaint above or to contest the appropriateness of the proposed penalty set forth therein. Such a hearing will be held and conducted 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, (Consolidated Rules) a copy of which is enclosed herein.

40. To avoid being found in default, which constitutes an admission of all facts alleged in the First Amended Complaint and a waiver of the right to hearing, Respondent must file a written answer and request for hearing within thirty (30) days of service of this First Amended Complaint and Notice of Opportunity for Hearing. The answer shall clearly and directly admit, deny, or explain each factual allegation contained in this First Amended Complaint with respect to which Respondent has any knowledge, or shall clearly state that Respondent has no knowledge as to particular factual allegations in this First Amended Complaint. The answer shall also state (a) the circumstances or arguments which are alleged to constitute the grounds of defense; (b) the facts that Respondent disputes; (c) the basis for opposing any proposed relief; and (d) whether a hearing is requested. Said answer shall be filed with the following:

Regional Hearing Clerk  
United States Environmental Protection Agency, Region 7  
901 North 5<sup>th</sup> Street  
Kansas City, Kansas 66101.

41. Failure to admit, deny, or explain any material factual allegation in this First Amended Complaint constitutes an admission of the allegation.

42. A hearing upon the issues raised by this First Amended Complaint and the answer may be held if requested by Respondent in the answer. If Respondent does not request a hearing, the Presiding Officer may hold a hearing if issues appropriate for adjudication are raised in the answer.

43. In any hearing on the proposed penalty for this First Amended Complaint, members of the public to whom EPA is obligated to give notice of this proposed penalty action, will have the right, under Section 309(g)(4)(B) of the CWA, 33 U.S.C. § 1319(g)(4)(B), to be heard and present evidence on the merits of the proposed CWA penalty assessment. If no hearing is held, EPA will issue a Final Order Assessing Administrative Penalties (Order) pursuant to the CWA, and only members of the public who submitted timely comments on the proposed penalty assessment will have an additional thirty (30) days to petition to set aside the said Order and to hold a hearing thereon. EPA will grant the petition and will hold a hearing only if the petitioners' evidence is material and was not considered by EPA in the issuance of the Order.

44. If Respondent fails to file a written answer within thirty (30) days of service of this First Amended Complaint, Respondent may be found in default. Such default by Respondent constitutes an admission of all facts alleged in the First Amended Complaint and a waiver of Respondent's right to contest such factual allegations. A Default Order may thereafter be issued by the Presiding Officer and the civil penalties proposed herein shall become due and payable unless the record clearly demonstrates that the requested relief is inconsistent with the CWA.

#### **Informal Settlement Conference**

45. Whether or not Respondent requests a hearing, an informal conference may be requested in order to discuss the facts of this case, the proposed penalty, and the possibility of settlement. To request a settlement conference, please contact:

Kristen Nazar  
Assistant Regional Counsel  
United States Environmental Protection Agency  
901 North 5<sup>th</sup> Street  
Kansas City, Kansas 66101  
Telephone: 913-551-7450

46. Please note that a request for informal settlement conference does not extend the thirty (30) day period during which a written answer and request for hearing must be submitted.

47. EPA encourages all parties against whom a civil penalty is proposed to pursue the possibilities of settlement as a result of informal conference. Any settlement which may be reached as a result of such conference shall be embodied in a written Consent Agreement and Final Order ("CA/FO") issued by the Regional Judicial Officer, EPA, Region 7. The issuance of such a CA/FO shall constitute a waiver of Respondent's right to request a hearing on any matter stipulated therein.


48. If Respondent has not filed an answer within the thirty (30) day time period allowed by this Notice, the penalties proposed above may be assessed by the entry of a Default Order.

Effective Date

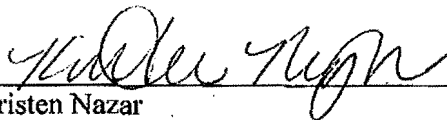
49. This First Amended Complaint, Compliance Order, and Notice of Opportunity for Hearing shall become effective on the date signed by the Director of the Water, Wetlands and Pesticides Division, EPA Region 7.

IT IS SO ISSUED AND ORDERED:

1-15-10  
Date

  
\_\_\_\_\_  
William A. Spratlin  
Director  
Water, Wetlands and Pesticides Division  
U.S. Environmental Protection Agency  
Region 7  
901 North Fifth Street  
Kansas City, Kansas 66101

1/15/10  
Date

  
\_\_\_\_\_  
Kristen Nazar  
Office of Regional Counsel  
U.S. Environmental Protection Agency  
Region 7  
901 North Fifth Street  
Kansas City, Kansas 66101

Attachments: 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