

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

BEFORE THE ADMINISTRATOR

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ENVIRONMENTAL PROTECTION
AGENCY REGION VII
REGIONAL HEARING CLERK

IN THE MATTER OF)

N.W. Realty, Inc.)
2620 West 143rd Street)
Leawood, Kansas 66224)

Respondent)

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

) Docket No. CWA-07-2008-0074

) FINDINGS OF VIOLATION,
) ORDER FOR COMPLIANCE

Preliminary Statement

1. The following Findings of Violation and Order for Compliance (“Order”) are made and issued pursuant to the authority of Section 309(a)(3) of the Clean Water Act (“CWA”), 33 U.S.C. § 1319(a)(3). This authority has been delegated by the Administrator of the United States Environmental Protection Agency (“EPA”) to the Regional Administrator, EPA Region 7 and further delegated to the Director of Region 7’s Water, Wetlands and Pesticides Division.

2. Respondent is N.W. Realty, Inc., a company incorporated under the laws of Kansas and authorized to conduct business in the State of Kansas.

Statutory and Regulatory Framework

3. 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.

4. 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.

5. 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 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342.

6. 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.

7. 40 C.F.R. §§ 122.26(a)(1)(ii) and 122.26(c) requires dischargers of stormwater associated with industrial activity to apply for an individual permit or to seek coverage under a promulgated stormwater general permit.

8. 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.

9. 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.

10. 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

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

12. 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 151st 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.

13. Stormwater, snow melt, surface drainage and runoff water leaves Respondent's facility and flows into an unnamed tributary of Tomahawk Creek. The runoff and drainage from Respondent's facility is "stormwater" as defined by 40 C.F.R. § 122.26(b)(13).

14. Stormwater contains "pollutants" as defined by Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

15. 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).

16. Respondent discharged pollutants into "navigable water" as defined by CWA Section 502(7), 33 U.S.C. § 1362(7).

17. 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).

18. 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.

19. Respondent applied for and was issued NPDES permit coverage under the general permit described in paragraph 10 above. KDHE assigned Respondent Permit No. KSR104019, which was authorized on March 6, 2007.

20. 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)

21. The facts stated in paragraphs 11 through 20 above are herein incorporated.

22. 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.

23. The EPA inspection referenced in paragraph 20 above, revealed that Respondent failed to install over 850 feet of silt fencing and failed to designate an area for concrete washout.

24. 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)

25. The facts stated in paragraphs 11 through 20 above are herein incorporated.

26. 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.

27. The EPA inspection referenced in paragraph 20 above, revealed that Respondent had not adequately maintained silt fencing. Specifically, silt fences were not properly installed, and numerous silt fences were undermined, overrun, or filled with sediment.

28. The EPA inspection referenced in paragraph 20 above, revealed that Respondent had not adequately maintained the sedimentation basin. The sedimentation basin did not conform to design standards for detention time and sediment cleanout.

29. The EPA inspection referenced in paragraph 20 above, revealed that Respondent had not adequately maintained curb inlet protections and storm sewer field inlet protections. Inlet protections were overrun and 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 11 through 20 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 20 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 11 through 20 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 20 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 11 through 20 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 20 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 20 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).

Order For Compliance

44. Based on the Findings of Fact and Findings of Violation set forth above, and pursuant to the authority of Sections 308(a) and 309(a)(3) of the CWA, 33 U.S.C. §§ 1318(a) and 1319(a)(3), Respondent is hereby ORDERED to take the actions described in paragraphs 45 through 47.

45. Within thirty (30) days of the Effective Date, as defined in Paragraph 56 herein, Respondent shall take all corrective action that is necessary to correct the deficiencies, eliminate and prevent recurrence of the violations cited in this Order and to come into compliance with all of the applicable requirements of Respondent's permit.

Submissions

46. Within thirty (30) days of the effective date of this Order, the Respondent shall submit a written report detailing the specific actions taken to correct the violations cited herein and explaining why such actions are anticipated to be sufficient to prevent recurrence of these or similar violations.

47. In the event that Respondent believes complete correction of the violations cited herein is not possible within thirty (30) days of the effective date of this Order, the Respondent shall, within those thirty (30) days, submit a comprehensive written plan for the elimination of the cited violations. Such plan shall describe in detail the specific corrective actions to be taken and why such actions are sufficient to correct the violations. The plan shall include a detailed schedule for the elimination of the violations within the shortest possible time, as well as measures to prevent these or similar violations from recurring.

48. All documents required to be submitted to EPA by this Order shall be submitted by mail to:

Mr. Raju Kakarlapudi
Water, Wetlands and Pesticides Division
U.S. Environmental Protection Agency - Region VII
901 North Fifth Street
Kansas City, Kansas 66101

Approval of Submissions and Incorporation into the Order on Consent

49. Upon receipt, EPA will review all documents submitted by Respondent pursuant to Paragraph 46 or 47, and approve such submittals or require modification and resubmittal of a portion or all of the documents pursuant to Paragraph 50, below. Upon approval, documents submitted under Paragraph 46 or 47, above, or resubmitted pursuant to Paragraph 50, below, shall be deemed incorporated into and become enforceable under this Order on Consent, or at EPA's discretion, shall be incorporated into, and become enforceable under, a separate order issued under the authority of the CWA.

Modification and Resubmission of Documents

50. If required by EPA pursuant to Paragraph 49, above, Respondent shall, within fifteen (15) days of receipt of any written comments from EPA regarding the documents submitted by Respondent pursuant to this Order on Consent, make modifications and changes to such documents as directed by EPA, and resubmit the documents to EPA. The parties may agree, in writing, to a longer period of time for resubmission of such documents.

Certification

51. All submissions made by Respondent to EPA pursuant to the requirements of this Order on Consent shall contain the following certification signed by an authorized official, as described at 40 CFR 122.22:

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing submissions of false information.

General Provisions

Effect of Compliance with the Terms of this Order for Compliance

52. Compliance with the terms of this Order shall not relieve Respondent of liability for, or preclude EPA from, initiating an administrative or judicial enforcement action to recover penalties for any violations of the CWA, or to seek additional injunctive relief, pursuant to Section 309 of the CWA, 33 U.S.C. § 1319.

53. This Order does not constitute a waiver or a modification of any requirements of the CWA, 33 U.S.C. § 1251 *et seq.*, all of which remain in full force and effect. EPA retains the right to seek any and all remedies available under Sections 309 of the CWA, 33 U.S.C. § 1319, for any violation cited in this Order. Issuance of this Order shall not be deemed an election by EPA to forgo any civil or criminal action to seek penalties, fines, or other appropriate relief under the CWA for any violation whatsoever.

Access and Requests for Information

54. Nothing in this Order shall limit EPA's right to obtain access to, and/or to inspect Respondent's facility, and/or to request additional information from Respondent, pursuant to the authority of Section 308 of the CWA, 33 U.S.C. § 1318 and/or any other authority.

Severability

55. If any provision or authority of this Order, or the application of this Order to Respondent, is held by federal judicial authority to be invalid, the application to Respondent of the remainder of this Order shall remain in full force and effect and shall not be affected by such a holding.

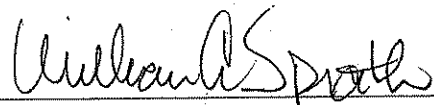
Effective Date

56. The terms of this Order shall be effective and enforceable against Respondent upon the date of its receipt of an executed copy of the Order.

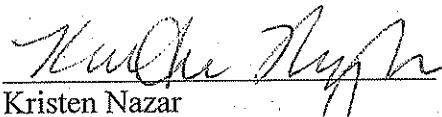
Termination

57. This Order shall remain in effect until a written notice of termination is issued by an authorized representative of the U.S. Environmental Protection Agency. Such notice shall not be given until all of the requirements of this Order have been met.

Issued this 14 day of November, 2008.



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



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

CERTIFICATE OF SERVICE

I certify that on the date noted below I hand delivered the original and one true copy of this Findings of Violation and Administrative Order for Compliance to the Regional Hearing Clerk, United States Environmental Protection Agency, 901 North Fifth Street, Kansas City, Kansas 66101.

I further certify that on the date noted below I sent a copy of the foregoing Order for Compliance by first class certified mail, return receipt requested, to:

Kenneth Nichols
Registered Agent for N.W. Realty, Inc.
2620 West 143rd Street
Leawood, Kansas 66224

Mr. Karl Mueldener, Director
Kansas Department of Health and Environment
Bureau of Water
1000 SW Jackson Street, Suite 420
Topeka, Kansas 66612-1367

11/17/08
Date

