

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7
11201 RENNER BLVD.
LENEXA, KANSAS 66219

Received by
EPA Region 7
Hearing Clerk

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)	
)	Docket No. CWA-07-2022-0101
Gleneagles IV, LLC)	
)	
and)	
)	
Tomahawk Ridge, LLC)	
)	COMPLAINT AND
Respondents)	CONSENT AGREEMENT/
)	FINAL ORDER
Proceedings under Section 309(g) of the)	
Clean Water Act, 33 U.S.C. § 1319(g))	
_____)	

COMPLAINT

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 (“Consolidated Rules”), 40 C.F.R. Part 22.

2. Complainant, the U.S. Environmental Protection Agency Region 7 (“EPA”) and Respondents, Gleneagles IV, LLC and Tomahawk Ridge, LLC (“Respondents”), 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) and (3) of the Consolidated Rules, 40 C.F.R. §§ 22.13(b) and 22.18(b)(2) and (3).

3. This Complaint and Consent Agreement/Final Order serves as notice that the EPA has reason to believe that the Respondents have violated Section 402 of the CWA, 33 U.S.C. § 1342, and regulations promulgated thereunder.

Parties

4. The authority to take action under Section 309(g) of the CWA, 33 U.S.C. § 1319(g), is vested in the Administrator of the EPA. The Administrator has delegated this authority to the Regional Administrator, EPA Region 7, who in turn has delegated the authority under Section 309(g) to the Director of the Enforcement and Compliance Assurance Division of EPA Region 7 (collectively referred to as the “Complainant”).

5. Respondents are and were at all relevant times limited liability companies under the laws of the state of Kansas.

Statutory and Regulatory Framework

6. 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 provides that pollutants may be discharged in accordance with the terms of a National Pollutant Discharge Elimination System (“NPDES”) permit issued pursuant to that Section.

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. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines “navigable waters” as the “waters of the United States,” which in turn has been defined to include, *inter alia*, all waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, and tributaries to such waters. 40 C.F.R. § 122.2.

9. 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 comply with the requirements of an NPDES permit issued pursuant to Sections 301 and 402 of the CWA.

10. Pursuant to Section 402(p) of the CWA, the EPA promulgated regulations setting forth the NPDES permit requirements for stormwater discharges at 40 C.F.R. § 122.26.

11. 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.

12. 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 acres of total land area which are part of a larger common plan of development or sale.”

13. The Kansas Department of Health and Environment (“KDHE”) is the state agency within the state of Kansas that has been authorized by the EPA to administer the federal NPDES program 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.

EPA's General Allegations

14. Respondents are each a “person,” as defined by Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

15. At all times relevant to this action, Respondents were the owners and/or operators of a residential construction site known as The Estates of Gleneagles, Plats 2, 3, 4, and 5, comprised of approximately 40 acres, and located at the intersection of 143rd Road and Quivira Road in Overland Park, Kansas (“Site”).

16. At the time of the EPA inspection, described below, the Site had active construction activities in various stages of completion such as grading, basement excavation, and finished and sodded homes. In areas of the Site where grading was completed, Respondents had installed streets, curbs, and gutters.

17. Stormwater, snow melt, surface drainage, and runoff water leave Respondents’ Site and discharge into a tributary to Tomahawk Creek and into the Overland Park municipal separate storm sewer system (“MS4”) that drains to Tomahawk Creek.

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

19. Stormwater from the Site contains “pollutants” as defined by Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

20. Tomahawk Creek is a perennial stream and a tributary to Indian Creek, which is a tributary to the Blue River, which is a tributary to the Missouri River, a traditionally navigable water. Tomahawk Creek is a “water of the United States” and therefore a “navigable water” within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7).

21. Tomahawk Creek is listed on the State’s CWA Section 303(d) List as impaired for benthic macroinvertebrates bioassessments, total phosphorus, chloride, and *E. coli*.

22. Stormwater runoff from Respondents’ industrial activity at the 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).

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

24. KDHE issued authorization to Respondent Tomahawk Ridge, LLC, for Plat 2 on February 5, 2018, under Permit Authorization No. KSR113411, and for Plat 3 on October 15, 2019 under Permit Authorization No. KSR114212, and to Respondent Gleneagles IV, LLC, for

Plat 4 on October 15, 2019 under Permit Authorization No. KSR115060 and for Plat 5 on January 7, 2021 under Permit Authorization No. KSR116136, all under the Kansas Construction Stormwater General Permit No. KSR100000 (“Respondents’ NPDES Permit”). The Construction Stormwater General Permit was effective between August 1, 2017 and July 31, 2022. This NPDES General Permit governs Respondents’ stormwater discharges that are associated with industrial activity at the Site, including clearing, grading and excavation.

25. The principal requirement of Respondents’ NPDES Permit is for the permittee to develop and implement a Stormwater Pollution Prevention Plan (“SWP2 Plan”). The purpose of the SWP2 Plan is to ensure the design, implementation, management, and maintenance of Best Management Practices (“BMPs”) in order to eliminate or minimize erosion, sediment; and other pollutants in stormwater runoff from construction activities; comply with the Kansas Surface Water Quality Standards; and ensure compliance with the terms and conditions of the NPDES general permit.

26. On September 21, 2021, EPA personnel, under the authority of Section 308(a) of the CWA, 33 U.S.C. § 1318(a), inspected the Site to determine Respondents’ compliance with the NPDES permit and the CWA (the “EPA Inspection”). During the EPA Inspection, the inspector reviewed and obtained copies of documents related to the Permit, including without limitation, the Site’s SWP2 Plan and self-inspection reports, toured the Site, and photographed various stormwater-related areas.

27. During the EPA Inspection, the inspector observed and documented significant failures to select, install, and maintain BMPs and to take corrective actions when deficiencies were noted during self-inspections, and evidence of sediment leaving the Site and entering the MS4.

28. At the conclusion of the EPA Inspection, the inspector issued Respondents a Notice of Potential Violation (“NOPV”) citing, *inter alia*, Respondents’ failure to maintain controls to minimize offsite sediment deposition to the MS4.

EPA’s Allegations

Count 1

Failure to Properly Select, Install and/or Maintain BMPs

29. The paragraphs above are re-alleged and incorporated herein by reference.

30. Part 7 of Respondents’ NPDES Permit requires that a SWP2 Plan be prepared and fully implemented. Part 7.1 of Respondents’ NPDES Permit further requires that BMPs and/or pollution controls are properly installed and maintained at the locations and relative timeframes specified in the SWP2 Plan and that any stormwater runoff from disturbed areas leaving the site must first pass through an appropriate sediment control.

31. Part 7.2.3 of Respondents’ NPDES Permit requires Respondents to design, install

and maintain BMPs to, among other things, minimize sediment discharges from the site, minimize off-site tracking of soils by utilizing appropriately designed construction entrances and exits and cleaning any off-site track out by the end of the work-day, and provide storm drain inlet protection for inlets down gradient of disturbed project areas that are not fully stabilized.

32. During the EPA Inspection, the inspector observed and documented several areas of the Site that lacked BMPs, including:

- a. Several of the Site's construction entrances/exits had no controls and/or were not appropriately designed and track out was present on the roadway;
- b. The 4th phase of the construction site on the north end of the project did not contain any stormwater controls along the street; and
- c. The stormwater inlet and hillside on the 5th phase of the project did not contain any stormwater controls.

33. During the EPA Inspection, the inspector observed and documented several BMPs on the Site in need of maintenance, including:

- a. Several of the Site's stormwater drain inlets were in need of maintenance or needed to be replaced, including gutter controls full of sediment and/or improperly installed; and
- b. Several lengths of silt fence in need of repair or replacement.

34. Respondents' alleged failure to properly design, install and/or maintain BMPs at the Site and failure to fully implement the provisions of the SWP2 Plan is a violation of the conditions or limitations of the NPDES permit, and as such, is a violation of Section 402(p) of the CWA, 33 U.S.C. § 1342(p).

**Count 2
Failure to Conduct and/or Document Inspections and Timely Take Appropriate
Corrective Actions**

35. The paragraphs above are re-alleged and incorporated herein by reference.

36. Part 7.2.10 of Respondents' NPDES Permit requires regular site inspections and an inspection by the end of the next day following a rain event which results in a rainfall total of 0.5 inches or greater, with certain exceptions not applicable here. A report of each regularly scheduled inspection and required rain event inspection shall be documented.

37. Part 7.2.10 of Respondents' NPDES Permit requires any deficiencies in the operation or maintenance, effectiveness, adequacy or coverage extent of all installed BMPs, temporary stabilization measures and other pollution control measures identified during the inspection to be noted in the inspection report and corrected within seven (7) calendar days of the inspection unless infeasible and, if infeasible, the reason shall be noted in the inspection report with a specific timeframe for completing all needed maintenance and repairs.

38. Based on a review of the Site's self-inspection reports and relevant rainfall data, Respondents did not conduct and/or document required inspections by the end of the next day following rain events of 0.5 inches or greater on multiple occasions in 2020 and 2021.

39. Based on a review of the Site's self-inspection reports, corrective actions were not taken within the required timeframe, including but not limited to, repairing and maintaining storm drain inlets and silt fences.

40. Respondents' alleged failure to conduct and/or document required inspections and take appropriate corrective actions is a violation of the conditions or limitations of the NPDES permit, and as such, is a violation of Section 402(p) of the CWA, 33 U.S.C. § 1342(p).

Penalty

41. As alleged in the preceding Counts 1 and 2, and pursuant to Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), as adjusted pursuant to 40 C.F.R. § 19.4, Respondents are liable for civil penalties of up to \$23,989 per day for each day during which the violation continues, up to a maximum of \$299,857.

CONSENT AGREEMENT

42. Respondents and the EPA agree to the terms of this Consent Agreement/Final Order.

43. Respondents admit the jurisdictional allegations of this Complaint and Consent Agreement/Final Order and agree not to contest the EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of this Consent Agreement/Final Order.

44. Respondents neither admit nor deny the factual allegations asserted by the EPA in this Consent Agreement/Final Order.

45. Respondents waive their right to contest any issue of fact or law set forth above, and their right to appeal this Consent Agreement/Final Order.

46. Respondents and Complainant agree to conciliate the matters set forth in this Consent Agreement/Final Order 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.

47. Respondents consent to receiving the filed Consent Agreement/Final Order electronically at the following email address: matta@kansascityhomes.com.

48. The undersigned representative(s) of Respondents 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 Respondents to it.

49. Respondents understand and agree that this Consent Agreement/Final Order shall apply to and be binding upon Respondents and Respondents' agents, successors and/or assigns. Respondents shall ensure that all contractors, employees, consultants, firms or other persons or entities acting for Respondents with respect to matters included herein comply with the terms of this Consent Agreement/Final Order.

50. Respondents certify by the signing of this Consent Agreement/Final Order that Respondents' Site is in current compliance with NPDES General Permit KSR100000, with Permit Authorization Nos. KSR113411, KSR114212, KSR115060, and KSR116136, and Section 402 of the CWA, 33 U.S.C. § 1342, and applicable regulations.

Penalty Payment

51. Respondents agree that, in settlement of the claims alleged in this Consent Agreement/Final Order, Respondents shall pay a civil penalty of **Twenty-Eight Thousand and Five Hundred Dollars (\$28,500)** pursuant to the authority of Section 309(g) of the CWA, 33 U.S.C. § 1319(g), to be paid in full no later than 30 days after the effective date of this Consent Agreement/Final Order as set forth below.

52. Respondents shall pay the penalty identified above by certified or cashier's check made payable to "Treasurer, United States of America," with a transmittal that identifies the case name, facility address, and docket number CWA-07-2022-0101 to:

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

or by alternate payment method described at <http://www.epa.gov/financial/makepayment>.

53. Respondents shall simultaneously send copies of the transmittal letter and the check, or proof of other form of payment, as directed above, to the following:

Regional Hearing Clerk at: R7_Hearing_Clerk_Filings@epa.gov

Shane McCoin at: mccoin.shane@epa.gov

54. Respondents agree that no portion of the civil penalty or interest paid by Respondents pursuant to the requirements of this Consent Agreement/Final Order shall be claimed by Respondents as a deduction for federal, state, or local income tax purposes.

55. Interest on any late payment will be assessed at the annual interest 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 or interest.

Effect of Settlement and Reservation of Rights

56. Respondents' payment of the entire civil penalty pursuant to this Consent Agreement/Final Order resolves all civil and administrative claims pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), for alleged violations identified in this Complaint and Consent Agreement/Final Order. Complainant reserves the right to take any enforcement action with respect to any other violations of the CWA or any other applicable law.

57. The effect of settlement described above is conditional upon the accuracy of the Respondents' representations to the EPA, as memorialized in this Consent Agreement/Final Order.

58. Nothing contained in this Consent Agreement/Final Order shall alter or otherwise affect Respondents' obligation to comply with all applicable federal, state and local environmental statutes and regulations and applicable permits.

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

60. With respect to matters not addressed in this Consent Agreement/Final Order, the EPA reserves the right to take any enforcement action pursuant to the CWA and its implementing regulations, or any other available legal authority, including without limitation, the right to seek injunctive relief, penalties and damages.

General Provisions

61. The Parties acknowledge that this Consent Agreement/Final Order is subject to the 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.

62. Pursuant to 40 C.F.R. § 22.31(b), this Consent Agreement/Final Order shall be effective after signature by the authorized regional official and upon filing with the Regional Hearing Clerk, U.S. Environmental Protection Agency. All time periods herein shall be calculated therefrom in calendar days unless otherwise provided in this Consent Agreement/Final Order.

63. The state of Kansas has been provided an opportunity to consult with Complainant regarding this matter in accordance with the requirements of 40 C.F.R. § 22.38(b) and Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1).

64. The headings in this Consent Agreement/Final Order are for convenience of reference only and shall not affect interpretation of this Consent Agreement/Final Order.

65. Respondents and Complainant agree that this Consent Agreement/Final Order may be signed in part and counterpart.

For the Complainant, United States Environmental Protection Agency Region 7:

David Cozad
Director
Enforcement and Compliance Assurance Division

Shane McCoin
Assistant Regional Counsel
Office of Regional Counsel

For the Respondent, Gleneagles IV, LLC:


Signature

5-1-23
Date

Matt Adams
Name

Managing Member
Title

For the Respondent, Tomahawk Ridge, LLC:


Signature

5-1-23
Date

Matt Abner
Name

Managing Member
Title

FINAL ORDER

Pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), and 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, the foregoing Consent Agreement resolving this matter is hereby ratified and incorporated by reference into this Final Order.

The Respondents are ORDERED to comply with all of the terms of the Consent Agreement. In accordance with 40 C.F.R. § 22.31(b), the effective date of the foregoing Consent Agreement and this Final Order is the date on which this Final Order is filed with the Regional Hearing Clerk.

IT IS SO ORDERED.

Date

Karina Borromeo
Regional Judicial Officer

CERTIFICATE OF SERVICE

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

Copy emailed to Respondents:

Matthew Adam
Resident Agent, Gleneagles IV, LLC and Tomahawk Ridge, LLC
matta@kansascityhomes.com

Brian Tadtman
Attorney, Woodworth Law Firm
brian@woodworthlawkc.com

Copy emailed to representatives for Complainant:

Shane McCoin
EPA Region 7 Office of Regional Counsel
mccoin.shane@epa.gov

Angela Acord
EPA Region 7 Enforcement and Compliance Assurance Division
acord.angela@epa.gov

Copy emailed to KDHE:

Tom.stiles@ks.gov
Mr. Tom Stiles, Director
Kansas Department of Health and Environment, Bureau of Water

Date

Regional Hearing Clerk