

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7
901 NORTH FIFTH STREET
KANSAS CITY, KANSAS 66101

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
Brainstorm Development Group LLC)
4425 SW Stonybrook Drive)
Topeka, Kansas 66610)
)
Respondent)
)
Proceedings under Section 309(a) of the)
Clean Water Act, 33 U.S.C. § 1319(a))
_____)

Docket No. CWA-07-2009-0089
COMPLAINT, NOTICE OF PROPOSED
PENALTY AND NOTICE OF
OPPORTUNITY FOR HEARING

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ENVIRONMENTAL PROTECTION
AGENCY-REGION
SEVEN
REGIONAL HEARING

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

2. This Complaint serves as notice that the United States Environmental Protection Agency ("EPA") has reason to believe that Respondent has violated Section 301 of the CWA, 33 U.S.C. § 1311, and a permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 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, and further delegated to the Director of Region 7's Water, Wetlands and Pesticides Division.

4. Respondent is Brainstorm Development Group LLC, a company incorporated 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*, a permit issued pursuant to 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) requires 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 storm water under the NPDES, Permit No. S-MCST-0701-1. The general permit governs storm water discharges associated with construction or land disturbance activity. The general permit became effective on 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 owner and/or operator of a construction site known as Lauren's Bay Villas, located south of SW 41st Street along SW Shenandoah Road and SW Stonybrook Drive in Topeka, 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 leaves Respondent's Site and flows into an unnamed lake and an unnamed tributary of Shunganunga Creek, a tributary of the Kansas River. The runoff and drainage from Respondent's Site 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 discharges 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. KS-R103950 (Respondent's Permit), which was issued on February 5, 2007.

22. On April 17, 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 purpose of the inspection was to evaluate compliance with the requirements of the CWA.

23. On March 14, 2008, EPA filed an Administrative Compliance Order ("Order") that ordered Respondent to perform specific activities within thirty days in order to comply with Respondent's Permit. The Order was sent to the Respondent on March 14, 2008, via U.S. Postal Service Certified Mail. The Order was delivered at Respondent's address on March 24, 2008. Respondent failed to comply with the terms of the Order.

24. On June 23 and 24, 2008, and July 24, 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 compliance with the requirements of the CWA.

Findings of Violation

Count 1

Failure to Develop an Adequate Storm Water Pollution Prevention Plan

25. The facts stated in paragraphs 13 through 24 above are herein incorporated.

26. Part 7.2 of the Respondent's Permit requires that the Storm Water Pollution Prevention Plan ("SWPPP") include, *inter alia*, the following items:

7.2.1 Site Description - The SWPPP shall include all information provided in the Notice of Intent (NOI) and shall expand upon the NOI in order for contractors and construction workers to use the SWPPP as a guide for installation and maintenance of Best Management Practices (BMPs).

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.

27. The inspection referenced in paragraphs 22 and 24 above revealed that Respondent's SWPPP failed to include all of the requirements listed in Parts 7.2.1 and 7.2.7 of Respondent's Permit.

28. Part 7.1 of the Respondent's Permit requires that the SWPPP be amended as appropriate during the term of the construction activity and that the SWPPP be amended, at a minimum, whenever there is a change in design, operation, or maintenance of BMPs.

29. The inspection referenced in paragraph 24 above revealed that Respondent failed to amend the SWPPP when there was a change in design, operation, or maintenance of BMPs.

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

31. 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 47 below.

Count 2

Failure to Install Appropriate Best Management Practices

32. The facts stated in paragraphs 13 through 24 above are herein incorporated.

33. Part 7 of the Respondent's Permit states that storm water runoff from disturbed areas which leave the site boundary 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. Part 7 of the Respondent's Permit also states that the permittee shall ensure that BMPs are properly installed at the locations and relative times specified in the SWPPP. In addition, Part 7 of Respondent's Permit requires Respondent to prevent contamination of stormwater runoff.

34. At the time of the inspection referenced in paragraph 22 above, Respondent had not installed silt fences where land had been disturbed by construction activities.

35. At the time of the inspection referenced in paragraph 22 above, Respondent had not installed gravel bags to protect drive openings, as required by Respondent's SWPPP.

36. At the time of the inspection referenced in paragraph 22 above, Respondent had not installed appropriate site management BMPs to prevent contamination of stormwater runoff. Specifically, Respondent failed to control the discharge of wash and/or rinse waters from concrete mixing equipment including ready mix concrete trucks.

37. At the time of the inspection referenced in paragraphs 22 and 24 above, Respondent had not installed hay bale barriers for curb inlet protection, as required by Respondent's SWPPP.

38. Respondent's failure to install appropriate impediments to sediment movement is a violation of Respondent's Permit, and as such, is a violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a), and a permit issued pursuant to Section 402(p) of the CWA, 33 U.S.C. § 1342(p).

39. 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 47 below.

Count 3

Failure to Perform and Document Site Inspections

40. The facts stated in paragraphs 13 through 24 above are herein incorporated.

41. Part 7 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, the Permit requires that reports of

each inspection are to be made and any deficiencies revealed by the inspection are to be noted and corrected within seven (7) calendar days of the inspection. The inspection reports shall include the inspector's name, date of inspection, observations relative to the effectiveness of the BMPs, actions taken or necessary to correct deficiencies, listing of areas where construction operations have permanently or temporarily stopped, and observations of stormwater discharge locations with respect to the effectiveness of the upgradient BMPs. The inspection report shall be signed by the person performing the inspection.

42. The inspection referenced in paragraph 22 above revealed that Respondent did not perform documented monthly site inspections during construction on the Site, from at least January 13, 2007 through May 1, 2007, nor did the Respondent perform documented inspections within 24 hours of significant rain events.

43. The inspection referenced in paragraph 24 above revealed that Respondent did not properly document site inspections from May 1, 2007, through at least July 23, 2008. Specifically, Respondent failed to document on an inspection report the inspector's name, date of inspection, observations relative to the effectiveness of the BMPs, actions taken or necessary to correct deficiencies, listing of areas where construction operations have permanently or temporarily stopped, and observations of stormwater discharge locations with respect to the effectiveness of the upgradient BMPs. In addition, the inspection report was not signed by the person performing the inspection.

44. Respondent's failure to perform documented site inspections and Respondent's failure to properly document site inspections is a violation of Respondent's Permit, and as such, is a violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a), and a permit issued pursuant to Section 402(p) of the CWA, 33 U.S.C. § 1342(p).

45. 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 47 below.

Relief

46. Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), authorizes the administrative assessment of civil penalties in an amount not to exceed \$10,000 per day for each day during which the violation continues, up to a maximum total penalty of \$125,000. Under the Civil Monetary Inflation Rule, 40 C.F.R. Parts 19 and 27, civil administrative penalties are authorized for violations of CWA Section 301, 33 U.S.C. § 1311, and of a permit issued pursuant to CWA Section 402, 33 U.S.C. 1342, of up to \$11,000 per day for each day during which a violation continues, up to a maximum of \$157,500, for violations that occur between March 15, 2004, and January 12, 2009, and up to \$16,000 per day during which a violation continues, up to a maximum of \$177,500, for violations that occur after January 12, 2009.

47. 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 against the Respondent assessing an Administrative Penalty in the amount of \$36,895 for the violations cited above.

48. Pursuant to Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3), the penalty to be assessed in this matter shall be based upon the facts stated in this Complaint, the nature, circumstances, extent, and gravity of the violation, and with respect to the violator, ability to pay, any 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.

49. As required by Section 309(g)(4) of the CWA, 33 U.S.C. § 1319(g)(4), prior to 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.

50. EPA has notified the state of Kansas regarding this proposed action by mailing a copy of this document to the KDHE.

NOTICE OF OPPORTUNITY TO REQUEST A HEARING

Answer and Request for Hearing

51. Respondent may request a hearing to contest any material fact contained in the 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, a copy of which is enclosed herein.

52. To avoid being found in default, which constitutes an admission of all facts alleged in the 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 Complaint and Notice of Opportunity for Hearing. The Answer shall clearly and directly admit, deny, or explain each of the factual allegations contained in this 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 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 5th Street
Kansas City, Kansas 66101.

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

54. A hearing upon the issues raised by this 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.

55. In any hearing on the proposed penalty for this 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 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 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 Final Order.

56. If Respondent fails to file a written answer within thirty (30) days of service of this Complaint and Notice of Opportunity for Hearing, Respondent may be found in default. Such default by Respondent constitutes an admission of all facts alleged in the 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 an appropriate civil penalty shall become due and payable unless the record clearly demonstrates that the requested relief is inconsistent with the CWA.

Informal Settlement Conference

57. 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:

Jonathan W. Meyer
Assistant Regional Counsel
U.S. Environmental Protection Agency Region 7
901 North 5th Street
Kansas City, Kansas 66101
Telephone 913-551-7140.

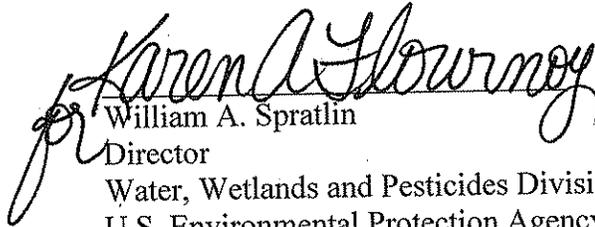
58. Please note that a request for an informal settlement conference does not extend the thirty (30) day period during which a written Answer and Request for a Hearing must be submitted.

59. 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 a 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

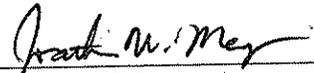
such a CA/FO shall constitute a waiver of Respondent's right to request a hearing on any matter stipulated therein.

60. If Respondent has not filed an Answer within the thirty (30) day time period allowed by this Notice, an appropriate penalty may be assessed by the entry of a Default Order.

7-21-09
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

7-22-09
Date


Jonathan W. Meyer
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region 7
901 North Fifth Street
Kansas City, Kansas 66101

CERTIFICATE OF SERVICE

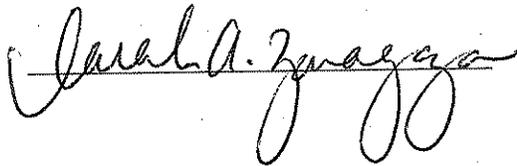
I certify that on the date note below I filed the original and one true and correct copy of the signed original Complaint, Notice of Proposed Penalty and Notice of Opportunity for Hearing with the Regional Hearing Clerk, Region 7.

I further certify that I sent by certified mail, return receipt requested, a true and correct copy of the signed original Complaint, Notice of Proposed Penalty and Notice of Opportunity for Hearing together with cover letter and small business assistance information, to the following address:

Eugene Jani, Jr.
Registered Agent
Brainstorm Development Group LLC
4425 SW Stonybrook Drive
Topeka, Kansas 66610

I further certify that on the date noted below, I sent by first class mail, a true and correct copy of the signed original Complaint, Notice of Proposed Penalty and Notice of Opportunity for Hearing to the following representative of the State of Kansas:

Karl Mueldener
Kansas Department of Health and Environment
Charles Curtis State Office Building
1000 SW Jackson
Topeka, Kansas 66612-1367



7/22/09

Date