

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VII
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)
)
)
Gunnett, LLC) Docket No. CWA-07-2006-0068
)
) COMPLAINT AND
Town & Country Village Development) CONSENT AGREEMENT /
2455 Jackson Street, Ozark, Missouri) FINAL ORDER
)
)
Respondent)
)
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, 40 C.F.R. Part 22.

2. This Complaint serves as notice that the United States Environmental Protection Agency (EPA) alleges 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 VII, who in turn has delegated it to the Director of the Water, Wetlands and Pesticides Division of EPA, Region VII (Complainant).

4. Respondent is Gunnett, LLC, a company created under the laws of Missouri and authorized to conduct business in the State of Missouri.

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 Missouri Department of Natural Resources (MDNR) is the state agency with the authority to administer the federal NPDES program in Missouri pursuant to Section 402 of the CWA, 33 U.S.C. § 1342. EPA maintains concurrent enforcement authority with delegated states for violations of the CWA.

12. The MDNR issued a NPDES General Permit for the discharge of storm water associated with construction activities, Permit No. MO-R109B82 (the Permit). The permit became effective on March 23, 2004 and expires on March 7, 2007. The permit governs storm

water discharges associated with construction or land disturbance activity (e.g., clearing, grubbing, excavating, grading, and other activity that results in the destruction of the root zone). The permit also applies to land disturbance activities near valuable resource waters.

Factual Background

In this action, the Complainant asserts the following factual allegations:

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 Town & Country Village located at 2455 Jackson Street, Ozark, Missouri (the Site). Construction activities occurred at the Site including clearing, grading and excavation which disturbed five (5) or more acres of total land area.

15. Storm water, snow melt, surface drainage and runoff water leaves Respondent’s facility and goes into an unnamed tributary of Finley 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. Respondent’s storm water runoff is the “discharge of a pollutant” as defined by CWA Section 502(12), 33 U.S.C. § 1362(12).

18. The Site was a “point source” which caused the “discharge of pollutants” as defined by CWA Section 502, 33 U.S.C. § 1362.

19. Respondent discharged pollutants into an unnamed tributary of Finley Creek. This tributary draining into Finley Creek is a “water of the United States” and therefore “navigable water” as defined by CWA Section 502, 33 U.S.C § 1362.

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. MDNR assigned Respondent Permit No. MO-109B82. The Permit was issued on March 23, 2004.

22. On October 19, 2004, EPA 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 Respondents compliance with the Permit and the CWA. On November 29, 2004, MDNR performed an inspection of the Site.

Findings of Violation

In this action, the Complainant alleges the following violations:

Count 1 – Inadequate Stormwater Pollution Prevention Plan

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

24. Part 7 of the Requirements and Guidelines section of Missouri State Operating Permit number MO-R109B82 (“Permit”) requires that a Storm Water Pollution Prevention Plan (“SWPPP”) be developed and implemented before removing any site vegetation, disturbing earth, or submitting a permit application.

25. Part 8 of the Requirements and Guidelines Section of the Permit lists the information and practices that shall be provided for in the SWPPP.

26. At the time of the October 19, 2004 inspection, Respondent had developed a Site Grading Plan that contained some elements of a SWPPP. However, the plan did not include certain elements required by the Permit.

27. Part 9 of the Requirements and Guidelines section of the Permit requires that the permittee amend and update the SWPPP as appropriate during the term of the land disturbance activity. Such amendments must occur, at a minimum, whenever the design, operation, or maintenance of Best Management Practices (“BMP”) is changed; whenever inspections indicate deficiencies in the SWPPP or any BMP, or whenever the SWPPP is determined to be ineffective in significantly minimizing or controlling erosion or sedimentation.

28. Based upon review of Respondent’s Site Grading Plan, Respondent did not adequately update the Grading Plan to reflect changes at the site as required by the Permit.

29. Respondent’s failure to adequately develop and update a SWPPP resulted in the off-site migration of sediment into waters of the United States. Respondent’s failure to adequately develop and update a SWPPP to reflect changes at the site is a violation of Parts 7 through 9 of the Requirements and Guidelines section 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).

30. 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 68 below.

Count 2 - Failure to Properly Install Appropriate Best Management Practices

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

32. A sedimentation basin is a BMP required by the Respondent's Permit to control erosion and limit sediment transport to waters of the U.S. Respondent's Permit specifies that a sedimentation basin shall be required for each drainage area with 10 or more acres disturbed at one time.

33. At the time of the October 19, 2004 inspection, EPA inspectors observed that approximately 35 acres were disturbed, that the majority of the 35 acres made up a single drainage area, and that the Site did not contain a sedimentation basin for this drainage area as required by Respondent's Permit.

34. Respondent's Permit states that stabilization measures to control erosion and sediment shall be initiated on all disturbed areas where soil disturbing activities cease in an area for more than 14 days. The Permit further states that stabilization measures to control erosion and sediment shall be initiated on all disturbed areas where soil disturbing activities cease in an area for more than 7 days if there is a significant slope.

35. During the October 19, 2004 inspection, EPA inspectors observed that a majority of the Site was disturbed and only sporadic vegetation was present. Inspectors observed that Respondent had failed to adequately implement stabilization measures at the Site despite the passing of a significant period of time since the last activity had occurred at the disturbed area of the Site.

36. Part 7 of the Requirements and Guidelines section of the Permit requires the Permittee to select, install, use, operate and maintain Best Management Practices in order to reduce the amount of sediment and other pollutants in storm water discharges associated with any land disturbance activities and ensure compliance with the terms and conditions of the Permit.

37. Part 8e of the Requirements and Guidelines section of the Permit requires that the Permittee ensure that the BMPs are properly installed at the locations and relative times specified in the SWPPP. Furthermore, storm water discharges 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.

38. Respondent's failure to properly install appropriate impediments to sediment movement is a violation of Parts 7 and 8 of the Requirements and Guidelines section of Respondent's General 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).

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 68 below.

Count 3 - Failure to Maintain Pollution Control and Stabilization Measures

40. Part 7 of the Requirements and Guidelines section of the Permit requires the Permittee to design, implement, manage and maintain all Best Management Practices in order to reduce the amount of sediment and other pollutants in storm water discharges associated with the land disturbance activities and ensure compliance with the terms and conditions of the Permit.

41. Part 11 of the Requirements and Guidelines section of the Permit requires the Permittee at all times to maintain pollution control measures and systems in good order to achieve compliance with the terms of the Permit.

42. The October 19, 2004, and the November 29, 2004 inspections, identified that Respondent did not properly maintain certain BMPs present at the Site.

43. At the time of the October 19, 2004 inspection, sedimentation basins at the site were filled with sediment rendering them ineffective.

44. At the time of the inspections, certain silt fences at the site were filled with sediment, undercut, down or otherwise rendered ineffective.

45. At the time of the October 19, 2004 inspection, certain sediment check-dams were filled with sediment, overtopped or otherwise rendered ineffective.

46. At the time of the inspections, certain straw bales intended to restrain the flow of sediment laden storm-water runoff from the site were displaced, undercut or otherwise rendered ineffective.

47. Part 8f of the Requirements and Guidelines section of the Permit requires that the time period be minimized for disturbed areas to be without vegetative cover, to the extent practical. Examples of non-structural Best Management Practices that the Permittee should

consider using includes, but is not limited to, mulching, sodding, temporary seeding, final seeding, stabilization of disturbed areas. If such activities were implemented, Respondent failed to maintain these BMPs because, at the time of the inspection, the Site was devoid of vegetative cover or other soil stabilization strategy.

48. Respondent's failure to properly maintain certain of its Best Management Practices resulted in the migration sediment from the site into waters of the United States and is a violation of Parts 7 and 11 of Respondent's General 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).

49. 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 68 below.

Count 4 – Disturbance of Areas within 50 Feet of a defined Drainage Course

50. The factual allegations stated in paragraphs 13 through 22 above are herein incorporated.

51. Section 8(b) of Respondent's Permit states that clearing and grubbing within 50 feet of a defined drainage course should be avoided. The Permit further states that areas within 50 feet of defined drainage ways must be revegetated, seeded, or otherwise protected within 5 working days after grading has ceased.

52. During the October 19, 2004 inspection, EPA inspectors observed that Respondent's contractor(s) had disturbed areas within 50 feet of a tributary to Finley Creek along the entire eastern boundary of the Site. The tributary is a defined drainage course. Furthermore, inspectors observed that Respondent's contractor(s) had failed to revegetate, seed or otherwise control this disturbed area within 5 days after the grading had ceased. Based on statements made by the Respondent and observations of the maturity of the vegetation that was present, a significant period of time had passed since the last grading activity had occurred within 50 feet of the drainage way.

53. Respondent's contractor's failure to revegetate, seed or otherwise control the disturbed area within 5 days after the grading had ceased is a violation of Part 8 of the Requirements and Guidelines section of Respondent's General 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).

54. 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 68 below.

Count 5 – Failure to Document Site Inspections

55. The factual allegations stated in paragraphs 13 through 22 above are herein incorporated.

56. Part 10 of the Requirements and Guidelines section of the Permit requires that the Permittee conduct inspections of the land disturbance site at least once per week. For disturbed areas that have not been finally stabilized, all installed BMPs and other pollution control measures shall be inspected for proper installation, operation and maintenance. Locations where storm water leaves the site shall also be inspected for evidence of erosion or sediment deposition.

57. Furthermore, Part 10 of the Requirements and Guidelines section of the Permit requires that a log of each inspection be kept. Such inspection report is to include the inspector's name, date of inspection, observations relative to the effectiveness of the BMPs, actions taken or necessary to correct deficiencies, and a listing of areas where land disturbance operations have permanently or temporarily stopped. The inspection report shall be signed by the Permittee or by the person performing the inspection if duly authorized to do so.

58. Part 10 of the Requirements and Guidelines section of the Permit also requires that any deficiencies noted in the inspection reports must be corrected within seven calendar days of the inspection.

59. The October 19, 2004 inspection, revealed that Respondent failed to document inspections performed by the Respondent prior to the date of the inspection.

60. Respondent's failure to properly document site inspections is a violation of Part 10 of the Requirements and Guidelines section of Respondent's General 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).

61. 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 68 below.

CONSENT AGREEMENT

62. Respondent admits the jurisdictional allegations of this Complaint and Consent Agreement and Final Order and agrees not to contest EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of the Final Order.

63. Respondent neither admits nor denies the factual allegations or Findings of Violations contained in this Complaint and Consent Agreement and Final Order. The factual allegations and Findings of Violations contained in this Complaint and Consent Agreement and Final Order do not constitute admissions of any unlawful actions or violations by Respondent, and shall not be admissible in any legal or equitable proceeding except an action between Complainant and Respondent to enforce this Consent Agreement and Final Order or alleging future violations by Respondent.

64. Respondent waives its right to contest the allegations and its right to appeal this Consent Agreement and the accompanying proposed Final Order, in order to avoid the cost and inconvenience of litigation or formal adjudication.

65. Respondent and Complainant each agree to bear their own costs and attorney's fees incurred as a result of this action.

66. This Consent Agreement and Final Order shall not relieve Respondent of its obligation to comply with all applicable provisions of federal, state or local law, nor shall it be construed to be a ruling on, or determination of, any issue related to any federal, state or local permit.

67. Solely for the purpose of settling this matter and thereby avoiding the expense and uncertainties involved in a formal adjudication, Respondent consents to the issuance of the Final Order hereinafter recited and consents to the payment of the civil penalty as set forth in the Final Order.

68. Respondent consents to the issuance of the Final Order and consents to the payment of a civil penalty of Thirty-three Thousand Five Hundred Thirty-two dollars (\$33,532.00.) plus interest.

A. Respondent shall pay the penalty in quarterly installments of Eight Thousand Four Hundred Eighty-eight Dollars and Five Cents (\$8,488.05) that include principal and accrued interest for a period of one (1) year beginning thirty (30) days after the effective date of this Consent Agreement and Final Order.

B. Respondent agrees that interest shall accrue on the outstanding balance at the rate determined by the Secretary of the Treasury (currently two percent per annum for the period January 1, 2006, through December 31, 2006).

C. Respondent agrees that a failure to submit any of the required payments by the respective due date will result in the entire remaining balance becoming immediately due and payable, along with any costs, handling charges, penalties, and accumulated interest.

69. The penalty payment made by Respondent pursuant to this Complaint and Consent Agreement and Final Order is payment of a civil penalty and shall not be deductible for purposes of federal, state, or local income taxes.

70. Each signatory to this Agreement certifies that he or she is fully authorized to enter into the terms and conditions of this Complaint and Consent Agreement and Final Order.

71. 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 rate of five percent (5%) per annum. A late payment handling charge of Fifteen Dollars (\$15) will be imposed for payments received thirty (30) days after any date of payments, and an additional Fifteen Dollars (\$15) will be charged for each subsequent thirty (30) day period.

72. EPA reserves the right to enforce the terms of this Consent Agreement and Final Order by initiating a judicial or administrative action pursuant to Section 309 of the CWA, 33 U.S.C. § 1319.

73. This Complaint and Consent Agreement and Final Order resolves all matters alleged in the Complaint. With respect to matters not addressed in this Complaint and Consent Agreement and Final Order, EPA reserves the right to take any enforcement action pursuant to the CWA, or any other available legal authority, including without limitation, the right to seek injunctive relief, monetary penalties and punitive damages.

FINAL ORDER

Pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), and based upon information contained in this Consent Agreement, IT IS HEREBY ORDERED THAT:

1. Respondent shall pay the administrative penalty in installments pursuant to the schedule described in paragraph 71 of the Consent Agreement.

2. Installment payments 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 Region VII
P.O. Box 371099M
Pittsburgh, Pennsylvania 15251.

The installment payments shall identify the Respondent by name and docket number (CWA-07-2006-0068). Copies of the check shall be mailed to:

J. Daniel Breedlove
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region VII
901 North 5th Street
Kansas City, Kansas 66101

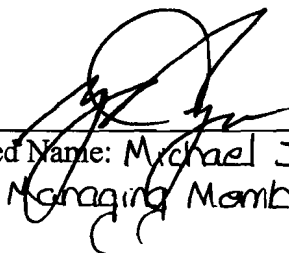
and

Kathy Robinson
Regional Hearing Clerk
U.S. Environmental Protection Agency
Region VII
901 North 5th Street
Kansas City, Kansas 66101.

3. This Final Order shall be effective upon receipt by Respondent of a fully executed copy. All time periods herein shall be calculated therefrom unless otherwise provided.

4. This executed Complaint and Consent Agreement and Final Order shall be filed with the Regional Hearing Clerk, U.S. Environmental Protection Agency, Region VII, 901 North 5th Street, Kansas City, Kansas 66101.

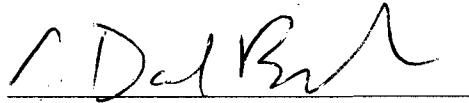
For the Respondent:


Printed Name: Michael J. Helva
Title: Managing Member

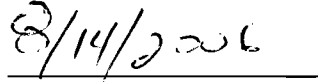
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For the Complainant:

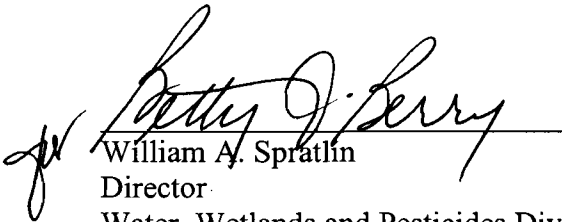
The United States Environmental Protection Agency



J. Daniel Breedlove
Assistant Regional Counsel



Date



William A. Spratlin
Director
Water, Wetlands and Pesticides Division

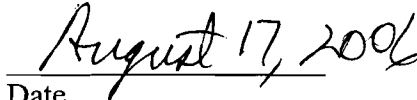


Date

IT IS SO ORDERED.



Robert Patrick
Regional Judicial Officer



Date

IN THE MATTER OF Gunnett, LLC; Town & Country Village Development, Respondent
Docket No. CWA-07-2006-0068

CERTIFICATE OF SERVICE

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

Copy hand delivered to:

J. Daniel Breedlove
Assistant Regional Counsel
901 N. 5th Street
Kansas City, Kansas 66101

Copy by Certified Mail Return Receipt to:

John Price
Carnahan Evans Cantwell & Brown P.C.
2805 S. Ingram Road
P.O. Box 10009
Springfield, Missouri 65808-009

8/17/06
Dated

Kathy Rouen
Hearing Clerk, Region 7