

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 7

901 NORTH FIFTH STREET  
KANSAS CITY, KANSAS 66101

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ENVIRONMENTAL PROTECTION  
AGENCY-REGION VII  
HEARING CLERK

BEFORE THE ADMINISTRATOR

IN THE MATTER OF )

Dial Ridgewood, L.L.C. )  
11506 Nicholas Street, Suite 200 )  
Omaha, Nebraska 68154 )

Respondent )

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

) Docket No. CWA-07-2009-0068

) CONSENT AGREEMENT AND  
) FINAL ORDER

The United States Environmental Protection Agency (EPA), Region 7, (Complainant) and Dial Ridgewood, L.L.C., (Respondent) 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) of the 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 (Consolidated Rules), 40 C.F.R. §§ 22.13(b) and 22.18(b)(2).

ALLEGATIONS

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 Consent Agreement and Final Order (CA/FO) 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 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.

4. Respondent is Dial Ridgewood, L.L.C., a limited liability company registered under the laws of Nebraska and authorized to conduct business in the state of Nebraska.

### 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) 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 Nebraska Department of Environmental Quality (NDEQ) is the state agency with the authority to administer the federal NPDES program in Nebraska 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. NDEQ issued a General Permit for the discharge of storm water under the NPDES, Permit No. NER100000. This General Permit became effective on August 1, 1997, and expired on December 31, 2007. Following the expiration of NER100000, NDEQ issued General Permit NER110000, which became effective on January 1, 2008, and expires on December 31, 2012. The General 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) that are performed in a city, county, or other governmental jurisdiction that has a storm water control program for land disturbance activities.

#### 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 Ridgewood Subdivision (“site”) located between Highway 36, Bennington Road, and 153<sup>rd</sup> Circle Road in Bennington, Nebraska. 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 from Respondent’s site goes into two tributaries of Big Papillion Creek. 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 100000 described in paragraph 12 above. NDEQ assigned Respondent permit number NER104882, which was issued on June 6, 2006. Respondent applied for and was issued NPDES permit coverage under the General Permit 110000 described in paragraph 12 above. NDEQ assigned Respondent permit number NER110195, which was issued on February 26, 2008.

22. On July 23, 2008, through 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 the management of storm water at the site in accordance with the CWA.

#### Findings of Violation

##### Count 1

#### **Failure to Maintain Best Management Practices ("BMPs")**

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

24. Part IV, Section C.1 of Respondent's permit requires that Respondent select, install, implement and maintain BMPs that minimize pollutants in the discharge as to meet applicable water quality standards. Part III, Section E.1 of Respondent's permit requires that all erosion and sediment control measures identified in the Storm Water Pollution Prevention Plan (SWPPP) must be maintained in effective operating condition.

25. The EPA inspection, referenced in paragraph 22 above, revealed that Respondent failed to maintain silt fencing at the site.

26. The EPA inspection, referenced in paragraph 22 above, revealed that Respondent failed to maintain storm water inlet protection at the site.

27. Part III, Section E.3, of the Respondent's permit requires that sediment from sediment traps or sedimentation ponds must be removed when design capacity has been reduced by 50 percent.

28. The EPA inspection, referenced in paragraph 22 above, revealed that Respondent failed to remove sediment from sedimentation basins as required by the permit. Specifically, two basins on the site were filled with sediment. The remaining four basins were overgrown and filled with sediment such that they could not be identified during the EPA inspection.

29. Part IV, Section C.1 of Respondent's permit states that if required site self-inspections identify BMPs that are not operating effectively, maintenance must be performed within seven (7) days and before the next storm event whenever practicable to maintain the continued effectiveness of storm water controls. Part III, Section I.1 of Respondent's permit states that any delay in the replacement or maintenance of non-functional BMPs beyond seven (7) days shall be documented in the SWPPP with sufficient detail as to explain the reason for the delay.

30. Documents gathered during the EPA inspection referenced in paragraph 22 above, revealed that Respondent failed to perform maintenance on ineffective BMPs within seven (7) days. Specifically, Respondent failed to perform maintenance on construction entrances and sedimentation basins at the site within seven (7) days of the self-inspection and failed to document the delay in the SWPPP.

31. Respondent's failure to maintain its 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 Install BMPs**

32. The facts stated in paragraphs 13 through 22 above are herein incorporated.

33. Part IV, Section C.1 of Respondent's permit requires that Respondent select, install, implement and maintain BMPs that minimize pollutants in the discharge as to meet applicable water quality standards.

34. The EPA inspection, referenced in paragraph 22 above, revealed that Respondent failed to install storm drain inlet protections at the site.

35. The EPA inspection, referenced in paragraph 22 above, revealed that Respondent failed to install erosion control measures to prevent sediment-laden storm water from leaving the site via storm water outfalls.

36. Respondent's failure to install BMPs is a violation 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).

**Count 3**

**Failure to Implement Storm Water Pollution Prevention Plan (“SWPPP”)**

37. The facts stated in paragraphs 13 through 22 above are herein incorporated.

38. Part III, Section A.4, of the Respondent’s permit requires that Respondent must implement the SWPPP as written from commencement of construction activity until final stabilization is complete.

39. The General Erosion Control Phasing Notes section of Respondent’s SWPPP requires that Respondent install and maintain the erosion control features listed in the SWPPP. Specifically, Respondent’s SWPPP describes, *inter alia*, requirements for the installation and maintenance of silt fencing and stabilization and maintenance of construction entrances.

40. The EPA inspection, referenced in paragraph 22 above, revealed that Respondent failed to install silt fencing as prescribed in the SWPPP.

41. The EPA inspection, referenced in paragraph 22 above, revealed that Respondent failed to maintain stabilized construction entrances as prescribed in the SWPPP.

42. Respondent’s failure to implement the SWPPP is a violation 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).

**Count 4**

**Failure to Perform and Document Site Inspections**

43. The facts stated in paragraphs 13 through 22 above are herein incorporated.

44. Part III, Sections I.1, I.4, I.6, of the Respondent’s permit require that Respondent conduct documented inspections of all areas of the site disturbed by construction activity and areas used for storage of materials that are exposed to precipitation. Respondent must conduct documented site inspections at least once every fourteen (14) calendar days, and within 24 hours of the end of a storm event of 0.5 inches or greater.

45. The EPA inspection, referenced in paragraph 22 above, revealed that Respondent failed to conduct documented site inspections once every 14 calendar days, and failed to conduct documented site inspections within 24 hours of the end of a storm event of 0.5 inches or greater.

46. Respondent's failure to perform and document site inspections is a violation 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).

**Count 5**

**Failure to Develop an Adequate Storm Water Pollution Prevention Plan ("SWPPP")**

47. The facts stated in paragraphs 13 through 22 above are herein incorporated.

48. Part III of the Respondent's permit requires that the SWPPP include, *inter alia*, the following items:

- B.1 Description of the nature of the construction activity.
- C.2 Description and schedule of the interim and permanent stabilization practices for the site.
- C.3 Records of dates when major grading activities occur, when construction activities temporarily or permanently cease on a portion of the site, and when stabilization measures are initiated.
- C.4 Description of structural practices to divert flows, retain/detain flows, and limit runoff and discharge of pollutants from the site.
- C.5 Description of all post-construction storm water management activities.
- C.6 Description of measures to prevent discharge of solid materials to waters of the state.
- C.8 Description of construction and waste materials stored on site, controls to minimize exposure of materials to storm water, and spill prevention control and countermeasure practices.
- C.9 Description of pollutant sources from areas other than construction and controls and measures that will be implemented to minimize discharges.
- D Identify all allowable sources of non-storm water discharges and ensure the implementation of appropriate pollution prevention measures for the non-storm water component(s) of the discharge.

49. The EPA inspection, referenced in paragraph 22 above, revealed that the Respondent's SWPPP failed to include all of the requirements contained in Part III of the Respondent's permit.

50. Part III, Section K.1, of the Respondent's permit requires that Respondent keep a copy of the SWPPP at the construction site or other location easily accessible during normal business hours.

51. The EPA inspection, referenced in paragraph 22 above, revealed that Respondent failed to keep a copy of the SWPPP at the construction site or other easily accessible location.

52. Part III, Section K.2, of the Respondent's permit requires that Respondent post a sign or other notice conspicuously near the main entrance of the construction site or at a local public building.

53. The EPA inspection, referenced in paragraph 22 above, revealed that Respondent failed to post a sign or other notice conspicuously near the main entrance of the construction site.

54. Respondent's failure to develop and maintain an adequate 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 6**

#### **Failure to Comply with Narrative Water Quality Standards**

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

56. Part VI, Section A.1.b, of the Respondent's permit requires that discharges authorized under the permit shall not contain pollutants at concentrations or levels that produce objectionable films, colors, turbidity, deposits, or noxious odor in the receiving stream or waterway.

57. The EPA inspection, referenced in paragraph 22 above, revealed that discharges from the site contained pollutants at levels that produced sediment deposits in the receiving streams adjacent to the site.

58. Respondent's failure to comply with narrative 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), and implementing regulations.

59. 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 assessing an

administrative penalty against the Respondent for the violations cited above, in the amount of Sixty Thousand Seven Hundred Nine Dollars and Sixty-Eight Cents (\$60,709.68).

CONSENT AGREEMENT

60. Respondent and EPA agree to the terms of this CA/FO and Respondent agrees to comply with the terms of the Final Order portion of this CA/FO.

61. Respondent admits the jurisdictional allegations of this CA/FO and agrees not to contest EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of the Final Order portion of this CA/FO.

62. Respondent neither admits nor denies the factual allegations set forth above.

63. Respondent waives its right to a judicial or administrative hearing on any issue of fact or law set forth above, and its right to appeal the Final Order portion of this CA/FO.

64. Respondent and Complainant agree to conciliate the matters set forth in this CA/FO 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.

65. The undersigned representative of Respondent certifies that he or she is fully authorized to enter the terms and conditions of this CA/FO and to execute and legally bind Respondent to it.

66. Nothing contained in the Final Order portion of this CA/FO shall alter or otherwise affect Respondent's obligation to comply with all applicable federal, state and local environmental statutes and regulations and applicable permits.

67. This CA/FO addresses all civil and administrative claims for the CWA violations identified above. Complainant reserves the right to take any enforcement action with respect to any other violations of the CWA or any other applicable law.

68. Respondent certifies by the signing of this CA/FO that to the best of its knowledge, Respondent's facility is in compliance with all requirements of Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342.

69. The effect of settlement described in paragraph 67 above is conditional upon the accuracy of the Respondent's representations to EPA, as memorialized in paragraph 68 above, of this CA/FO.

70. Respondent agrees that, in settlement of the claims alleged in this CA/FO, Respondent shall pay a penalty of \$60,709.68 as set forth in paragraph 1 of the Final Order.

71. Respondent understands that 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 applicable statutory rate.

**FINAL ORDER**

**Payment Procedures**

Pursuant to the authority of Section 309(g) of the CWA, 33 U.S.C. § 1319(g), and according to terms of this CA/FO, IT IS HEREBY ORDERED THAT:

1. Respondent shall pay a civil penalty of Fifty-Nine Thousand Dollars (\$59,000) plus interest of One Thousand Seven Hundred Nine Dollars and Sixty-Eight Cents (\$1,709.68) over a period of two (2) years for a total payment of \$60,709.68. The total civil penalty of \$60,709.68 shall be paid in twenty-four (24) monthly payments of Two Thousand Five Hundred Twenty-Nine Dollars and Fifty-Seven Cents (\$2,529.57). The first payment of \$2,529.57 is due within thirty (30) days of the effective date of this CA/FO. Respondent shall make monthly payments of \$2,529.57 due every thirty (30) days thereafter, with the total payment of \$60,709.68 to be paid in full no later than 720 days after the effective date of this CA/FO.

2. Pursuant to 40 C.F.R. § 13.18, failure to make any payment according to the above schedule will automatically accelerate the debt which will become due and owing in full, immediately. Interest on any late payment will be assessed at the annual 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 and interest.

3. Payment of the penalty shall be made:

- a) online at [www.pay.gov](http://www.pay.gov) by entering "SFO 1.1" into the "Find Public Forms" search field, and completing the EPA Miscellaneous Payment Form; or
- b) by cashier or certified check made payable to the "United States Treasury" and remitted to:

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

This payment shall reference docket number CWA-07-2009-0068.

Copies of the checks shall be mailed to:

Sarah LaBoda  
Assistant Regional Counsel  
U.S. Environmental Protection Agency - Region 7  
901 North 5th Street  
Kansas City, Kansas 66101

and to:

Kathy Robinson  
Regional Hearing Clerk  
U.S. Environmental Protection Agency - Region 7  
901 North 5th Street  
Kansas City, Kansas 66101.

4. No portion of the civil penalty or interest paid by Respondent pursuant to the requirements of this CA/FO shall be claimed by Respondent as a deduction for federal, state, or local income tax purposes.

#### **Parties Bound**

5. This Final Order portion of this CA/FO shall apply to and be binding upon Respondent and Respondent's agents, successors and/or assigns. Respondent shall ensure that all contractors, employees, consultants, firms, or other persons or entities acting for Respondent with respect to matters included herein comply with the terms of this CA/FO.

#### **General Provisions**

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

7. Complainant reserves the right to take enforcement action against Respondent for any future violations of the CWA and its implementing regulations and to enforce the terms and conditions of this CA/FO.

8. This Order shall be entered and become effective only after the conclusion of the period of public notice and comment required pursuant to Section 309(g)(4) of the CWA, 33

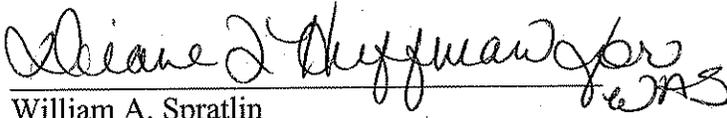
U.S.C. § 1319(g)(4), and 40 C.F.R. § 22.45. Unless otherwise stated, all time periods stated herein shall be calculated in calendar days from such date.

9. Respondent and Complainant shall bear their respective costs and attorney's fees.

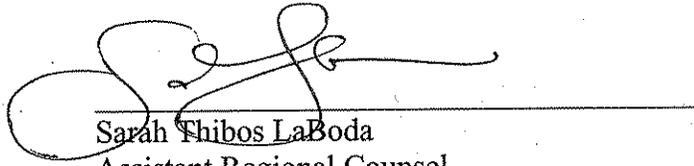
10. The headings in this CA/FO are for convenience of reference only and shall not affect interpretation of this CA/FO.

**COMPLAINANT:  
U.S. ENVIRONMENTAL PROTECTION AGENCY**

7/15/09  
Date

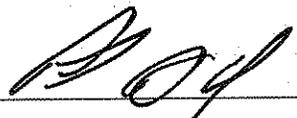
  
\_\_\_\_\_  
William A. Spratlin  
Director  
Water, Wetlands and Pesticides Division  
U.S. Environmental Protection Agency  
Region 7

7/15/09  
Date

  
\_\_\_\_\_  
Sarah Thibos LaBoda  
Assistant Regional Counsel  
U.S. Environmental Protection Agency  
Region 7

**RESPONDENT:  
DIAL RIDGEWOOD, L.L.C.**

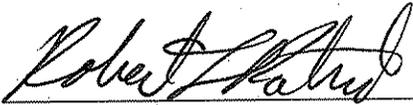
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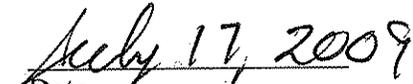
  
\_\_\_\_\_  
Signature

Name (Print) Patrick By

Title mgr.

IT IS SO ORDERED. This Final Order shall become effective immediately.

  
\_\_\_\_\_  
Robert Patrick  
Regional Judicial Officer

  
\_\_\_\_\_  
Date

CERTIFICATE OF SERVICE

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

Copy hand delivered to Attorney for Complainant

Sarah LaBoda  
Assistant Regional Counsel  
United States Environmental Protection Agency  
901 North 5<sup>th</sup> Street  
Kansas City, Kansas 66101

Copy by Certified Mail Return Receipt to:

Mr. Mike Kahre  
Dial Ridgewood, L.L.C.  
11506 Nicholas Street, Suite 200  
Omaha, Nebraska 68154

Sent via first class mail to:

Mr. Pat Rice, Assistant Director  
Water Quality Division  
Nebraska Dept. of Environmental Quality  
1200 "N" Street, Suite 400  
P.O. Box 98922  
Lincoln, Nebraska 68509

7/17/09  
Date

Kathryn Pearson  
Signature