

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 7
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)	
)	Docket No. CWA-07-2011-0006
The City of Hutchinson, Kansas)	
)	FINDINGS OF VIOLATION AND
Respondent)	ORDER FOR COMPLIANCE
)	
Proceedings under Section 309(a) of the)	
Clean Water Act, 33 U.S.C. § 1319(a))	

Preliminary Statement

1. The following Findings of Violation and Order for Compliance (“Order”) are made and issued pursuant to Sections 308(a) and 309(a) of the Clean Water Act (“CWA”), 33 U.S.C. §§ 1318(a) and 1319(a). This Authority has been delegated by the Administrator of the United States Environmental Protection Agency (“EPA”) to the Regional Administrator, EPA Region 7 and further delegated to the Director of Region 7’s Water, Wetlands and Pesticides Division.

2. Respondent is the City of Hutchinson, Kansas (“Respondent” or “the City”), a municipality chartered under the laws of the State of Kansas. Respondent is the owner and/or operator of the Municipal Separate Storm Sewer System (“MS4”), located within the corporate boundary of the City of Hutchinson, Reno County, Kansas.

Statutory and Regulatory Framework

3. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), makes it unlawful for any person to discharge any pollutant from a point source to waters of the United States, except, inter alia, with the authorization of, and in compliance with, a National Pollutant Discharge Elimination System (“NPDES”) permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

4. Section 402(a) of the CWA, 33 U.S.C. § 1342(a), provides that the Administrator of EPA may issue permits under the NPDES program for the discharge of pollutants from point sources to waters of the United States. Any such discharge is subject to all applicable requirements of the CWA, and regulations promulgated thereunder, as expressed in the specific terms and conditions prescribed in the applicable permit.

5. Section 402(p) of the CWA, 33 U.S.C. § 1342(p), sets forth requirements for the issuance of NPDES permits for various categories of stormwater discharges. Section 402(p)(2) requires permits for five categories of stormwater discharges. Section 402(p)(6) of the CWA, 33 U.S.C. § 1342(p)(6), requires permitting for additional categories of stormwater discharges based on the results of studies conducted pursuant to Section 402(p)(5) of the CWA, 33 U.S.C. § 1342(p)(5).

6. Pursuant to Section 402(p)(6) of the CWA, 33 U.S.C. § 1342(p)(6), EPA promulgated regulations (“Phase II stormwater regulations”) at 40 C.F.R. Part 122 setting forth the additional categories of stormwater discharges to be permitted and the requirements of the Phase II program.

7. 40 C.F.R. § 122.26(a)(9)(i)(A) states that on or after October 1, 1994, for discharges composed entirely of stormwater . . . operators shall be required to obtain a NPDES permit . . . if the discharge is from a small municipal separate storm sewer system (“MS4”) required to be regulated pursuant to 40 C.F.R. § 122.32.

8. 40 C.F.R. § 122.26(b)(8) defines “municipal separate storm sewer” as a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains): (i) Owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the CWA that discharges to waters of the United States; (ii) Designed or used for collecting or conveying storm water; (iii) Which is not a combined sewer; and (iv) Which is not part of a Publicly Owned Treatment Works (POTW) as defined at 40 CFR 122.2.

9. 40 C.F.R. § 122.26(b)(16) defines “small municipal separate storm sewer system,” in part, as all separate storm sewers that are:

- a. owned or operated by the United States, a State, city, town, borough, county, parish, district, association, or other public body . . . having jurisdiction over disposal of sewage, industrial wastes, stormwater, or other wastes [. . .];
- b. not defined as “large” or “medium” municipal separate storm sewer systems pursuant to paragraphs (b)(4) and (b)(7), or designated under paragraph (a)(1)(v) of this section.

10. 40 C.F.R. § 122.32(a) provides that a small MS4 is regulated if:

- a. the small MS4 is located in an urbanized area as determined by the latest Decennial Census by the Bureau of the Census; or

- b. the MS4 is designated by the NPDES permitting authority, including where the designation is pursuant to §§123.35(b)(3) and (b)(4), or is based upon a petition under §122.26(f).

11. The Kansas Department of Health and Environment (“KDHE”) is the 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.

Factual Background

12. Respondent is a municipality chartered under the laws of the State of Kansas, and as such, is a “person,” as that term is defined in Section 502(5) of the CWA, 33 U.S.C. § 1362(5), and 40 C.F.R. § 122.2.

13. Respondent operates a stormwater drainage system consisting of, among other things, drain inlets, storm sewers, and outfalls, and as such is a “municipal separate storm sewer” as that term is defined in 40 C.F.R. § 122.26(b)(8).

14. At all times relevant to this Order, Respondent owned and/or operated a MS4, which does not meet the criteria to be a large or medium MS4, and thus is the owner and/or operator of a “small municipal separate storm sewer system,” as defined by 40 C.F.R. § 122.26(b)(4)(i).

15. Respondent’s small MS4 is located in the Hutchinson, Kansas “urbanized area” as defined by the 2000 Census, and therefore, at all times relevant to this Order, Respondent’s small MS4 is subject to regulation.

16. Respondent’s small MS4 is a “point source” as defined by Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

17. Respondent discharged pollutants into “navigable waters” as defined by Section 502(7) of the CWA, 33 U.S.C. § 1362(7).

18. Discharges from Respondent’s small MS4 result in the addition of pollutants from a point source to navigable waters, and thus are the “discharges of a pollutant” as defined by Section 502(12) of the CWA, 33 U.S.C. § 1362(12).

19. Respondent’s discharges from a small MS4 require a permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342, and 40 C.F.R. § 122.32.

20. KDHE issued a Final Permit for discharges from Hutchinson’s small municipal separate storm sewer system under the NPDES, Permit No. KSR044009. This Final Permit was

issued on October 1, 2004, and expired on September 30, 2009. KDHE has administratively extended the permit until a new permit can be issued.

21. On or about September 10-11, 2009, EPA inspectors performed an inspection of the Site under the authority of Section 308(a) of the CWA, 33 U.S.C. § 1318(a). The purpose of the inspection was to evaluate the adequacy of the City's MS4 in accordance with the CWA.

Findings of Violation

22. The facts stated in Paragraphs 12 through 21 above are herein incorporated.

Failure to Develop an Adequate Stormwater Management Program (SWMP)

23. Part II of the City's permit requires the City to have a Stormwater Management Program Document that includes the following information for each of the six Minimum Control Measures: "A. The best management practices (BMPs) that will be implemented by the permittee or a contract service provider and B. The measurable goals for each of the BMPs." Part IV.A.3.a of the permit requires the City to implement a BMP "to detect and eliminate illicit discharges into the MS4." Part IV.A.4.e requires the City to implement a BMP "for receipt and consideration of information submitted by the public" concerning construction site runoff. Part IV.A.4.f requires the City to implement a BMP for "site inspection and enforcement of control measures." Part IV.A.5.d requires the City to implement a BMP for ensuring "adequate long-term operation and maintenance of BMPs" for post-construction stormwater management. Part IV.A.6 requires the City to implement a BMP "to prevent and reduce stormwater pollution from municipal operations activities such as ... fleet and building maintenance ... and stormwater system maintenance." Part VI.A of the permit requires submittal to KDHE of a complete SWMP document by October 1, 2005.

24. The EPA inspection referenced in paragraph 21 above found that the City's SWMP did not contain written procedures for the following: (1) correcting and eliminating illicit discharges under the Illicit Discharge Detection and Elimination control measure; (2) receipt and consideration of information submitted by the public; (3) site inspection and enforcement of control measures at construction sites; (4) ensuring adequate long-term operation and maintenance of post-construction stormwater BMPs; (5) fleet and building maintenance; and (6) stormwater system maintenance. In addition, the SWMP did not contain goals that were measurable for the Construction Runoff Control Program.

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

Pollution Prevention and Good Housekeeping Violations

26. Part VII.N of the City's permit requires the City to "at all times properly implement the six minimum requirements and BMPs as required by this permit and/or identified in the permittee's SWMP" and states that "proper implementation includes effective performance, adequate funding, and adequate operator staffing and training." In addition, Part IV.A.6 requires the City to "develop and implement an operation and maintenance program that includes employee training to prevent and reduce stormwater pollution from municipal operations activities."

27. The EPA inspection referenced in paragraph 21 above found that the City did not have adequate staff time dedicated to the stormwater program to properly implement the six minimum control measures. Information collected during the EPA inspection revealed that city personnel who conduct construction site inspections did not have adequate training to identify deficiencies in erosion and sediment control.

28. The City's failure to dedicate adequate staff time and conduct adequate training to pollution prevention and good housekeeping in the stormwater program are violations of the City's Permit, issued pursuant to Section 402(p) of the CWA, 33 U.S.C. § 1342(p), and as such, are violations of Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

Illicit Discharge Detection and Elimination Violations

29. Part IV.A.3.e of the permit states that "the permittee shall develop and implement a plan to detect and address prohibited non-stormwater discharges, including illegal dumping, to the storm sewer system." Part IV. of the permit states that "the permittee shall develop, implement, and enforce a SWMP designed to reduce the discharge of pollutants from the MS4 to the maximum extent practicable (MEP)" and that "implementation of best management practices consistent with the provisions of the stormwater management program and the provisions of this permit constitutes compliance with the standard of reducing pollutants to the 'maximum extent practicable.'" Section 3.31.a of the City's SWMP document states that the City will conduct annual dry weather flow inspections involving visual inspection of all stormwater outfalls.

30. The EPA inspection referenced in paragraph 21 above found that the City did not conduct any dry weather inspections to detect prohibited non-stormwater discharges in 2008.

31. The City's failure to conduct dry weather inspections during 2008 is a violation of the City's Permit, issued pursuant to Section 402(p) of the CWA, 33 U.S.C. § 1342(p), and as such, is a violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

Construction Site Management Program Violations

32. Part IV.A.4.a of the City's permit requires the City to enact "ordinances or resolutions to require erosion and sediment controls, as well as sanctions to ensure compliance,

to the extent allowable under State and local law.” This authority will allow the City to fully implement its BMP for site inspection and enforcement of control measures.

33. The EPA inspection referenced in paragraph 21 above found that the City’s construction site ordinance did not include sanctions to ensure compliance, which would give the City authority to conduct inspections at construction sites and to take appropriate enforcement against violators.

34. Part IV.A.4.d of the City’s permit requires the City, in its Construction Site Stormwater Runoff Control program, to develop and implement “procedures for site plan review which incorporate consideration of potential water quality impacts.”

35. The EPA inspection referenced in paragraph 21 above found that the City was not consistently reviewing erosion and sediment control plans for construction sites and did not have written procedures for conducting site plan review.

36. The City’s failure to fully develop a construction site management program is a violation of the City’s Permit, issued pursuant to Section 402(p) of the CWA, 33 U.S.C. § 1342(p), and as such, is a violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

Failure to Implement a Post-Construction Stormwater Management Program

37. Part IV.A.5.c of the City’s permit requires the City, as part of its post-construction program, to develop and implement “ordinances or resolutions to address post-construction runoff from new development and redevelopment projects to the extent allowable under State and local law.” Section 3.51.c of the City’s SWMP states that the City will implement and enforce its ordinance starting in 2008.

38. The EPA inspection referenced in paragraph 21 above found that the City had not yet begun preparing an ordinance for this purpose.

39. Part IV.A.5.a of the City’s permit requires the City to “develop, implement, and enforce a program to address post-construction stormwater runoff from new development and redevelopment projects” that includes “BMPs to prevent or minimize adverse water quality impacts.” Section 3.51.a of the City’s SWMP states that the City will implement these BMPs starting in 2008.

40. The EPA inspection referenced in paragraph 21 above documented that the City created a post-construction BMP manual that it has not yet implemented.

41. Part IV.A.5.b of the City’s permit requires the City, as part of its post-construction program, to develop and implement “strategies which include a combination of structural and/or non-structural BMPs appropriate for the municipality.” Section 3.51.b of the

City's SWMP states that the City will implement one or more strategies for this purpose starting in 2008.

42. The EPA inspection referenced in paragraph 21 above documented that the City did not have a single comprehensive strategy for using structural and/or non-structural BMPs.

43. Part IV.A.5.d of the City's permit requires the City, as part of its post-construction program, to "ensure adequate long-term operation and maintenance of BMPs."

44. The EPA inspection referenced in paragraph 21 above documented that the City had not yet developed a BMP for long-term operation and maintenance of its post-construction stormwater BMPs.

45. The City's failure to implement a post-construction stormwater management program is a violation of the City's Permit, issued pursuant to Section 402(p) of the CWA, 33 U.S.C. § 1342(p), and as such, is a violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

Order for Compliance

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

47. Within thirty (30) days of the effective date of this Order, the City shall take whatever corrective action is necessary to correct the deficiencies and eliminate and prevent recurrence of the violations cited above, and to come into compliance with all of the applicable requirements of its MS4 permit.

48. Within sixty (60) days of the effective date of this Order, the City shall provide EPA and KDHE a written description of the actions the City has taken to correct the deficiencies and eliminate and prevent recurrence of the violations cited above.

Submissions

49. All documents required to be submitted to EPA pursuant to Paragraph 48 of this Order shall be submitted by mail to:

Mr. Michael Boeglin
Water, Wetlands and Pesticides Division
U.S. Environmental Protection Agency – Region 7
901 North Fifth Street
Kansas City, Kansas 66101.

50. All documents required to be submitted to KDHE pursuant to Paragraph 48 of this Order shall be submitted by mail to:

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

General Provisions

Effect of Compliance with the Terms of this Order for Compliance

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

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

Access and Requests for Information

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

Severability

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

Effective Date

55. The terms of this Order shall be effective and enforceable against Respondent on the Effective Date, which is the date this Order is signed by EPA.

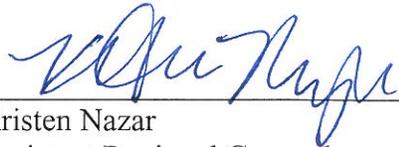
Termination

56. This Order shall remain in effect until a written notice of termination is issued by an authorized representative of the EPA. Such notice shall not be given until all of the requirements of this Order have been met.

Issued this 24th day of November, 2010.



William A. Spratlin
Director
Water, Wetlands and Pesticides Division



Kristen Nazar
Assistant Regional Counsel
Office of Regional Counsel

CERTIFICATE OF SERVICE

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

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

Mayor Cindy Proett
City of Hutchinson, Kansas
P.O. Box 1567
Hutchinson, Kansas 67504-1567

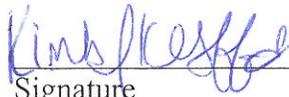
Ms. Mille Reed
Wastewater Treatment Facility Superintendent
P.O. Box 1567
Hutchinson, Kansas 67504-1567

and via first class mail to:

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

11/29/10

Date



Signature