

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 )  
 )  
The City of Fremont, Nebraska ) Docket No. CWA-07-2009-0109  
 )  
Respondent ) FINDINGS OF VIOLATION AND  
 ) 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 VII and further delegated to the Director of Region VII’s Water, Wetlands and Pesticides Division.

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

**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 storm water discharges. Section 402(p)(2) requires permits for five categories of storm water discharges. Section 402(p)(6) of the CWA, 33 U.S.C. § 1342(p)(6), requires permitting for additional categories of storm water 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 storm water regulations”) at 40 C.F.R. Part 122 setting forth the additional categories of storm water 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 storm water . . . operators shall be required to obtain a NPDES permit . . . if the discharge is from a small municipal separate storm sewer (“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).

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:

(i) 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, storm water, or other wastes [ . . . ];

(ii) 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:

(1) the small MS4 is located in an urbanized area as determined by the latest Decennial Census by the Bureau of the Census; or

(2) 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 Nebraska Department of Environmental Quality (“NDEQ”) is the 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 discharges from regulated small municipal separate storm sewer systems under the NPDES, Permit No. NER300000. This General Permit became effective on July 1, 2005, and expires June 30, 2010. This permit was administratively extended on August 1, 2009.

**Factual Background**

13. Respondent is a municipality chartered under the laws of the State of Nebraska, 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.

14. Respondent operates a storm water 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).

15. At all times relevant to this Order, Respondent owned and/or operated a municipal separate storm sewer system, 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).

16. Respondent's small MS4 has been designated by NDEQ, the NPDES permitting authority in Nebraska, and therefore, at all times relevant to this Order, Respondent's small MS4 is subject to regulation.

17. Respondent's small MS4 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 Section 502(7) of the CWA, 33 U.S.C. § 1362(7).

19. Discharges from Respondent's small MS4 results in the addition of pollutants from a point source to navigable waters, and thus is the "discharge of a pollutant" as defined by Section 502(12) of the CWA, 33 U.S.C. § 1362(12).

20. Respondent's discharge from a small MS4, requires a permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342, and 40 C.F.R. § 122.32.

21. Respondent applied for and was issued NPDES permit coverage under the General Permit described in paragraph 12, above. NDEQ assigned Respondent permit number NER300001, which was issued on January 1, 2006.

**Finding of Violation**

22. The facts stated in paragraphs 13 through 21 above are herein incorporated.

23. Part VI(A) of Respondent's General Permit requires that the Respondent shall submit annual reports to NDEQ by April 1 of each calendar year of the permit term.

24. To date, Respondent has failed to submit its annual report to NDEQ as required by the Respondent's General Permit for calendar year 2008, due April 1, 2009.

25. Respondent's failure to submit the required annual report is a violation of Respondent's General 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**

26. 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.

27. No later than thirty (30) calendar days following the receipt of this Order, Respondent shall submit a complete annual report for calendar year 2008 to the addressees in paragraph 28 and 29 below. The report must include all of the information required by Part VI(A) of the General Permit. A copy of the General Permit is included for your convenience.

### **Submissions**

28. All documents required to be submitted to EPA pursuant to Paragraph 27 of this Order shall be submitted by mail to:

Ms. Cynthia Sans  
Water, Wetlands and Pesticides Division  
U.S. Environmental Protection Agency – Region VII  
901 North Fifth Street  
Kansas City, Kansas 66101.

29. All documents required to be submitted to NDEQ pursuant to Paragraph 27 of this Order shall be submitted by mail to:

Mr. Steve Goans  
Nebraska Department of Environmental Quality  
P.O. Box 98922  
Lincoln, Nebraska 68509-8922.

### **General Provisions**

#### **Effect of Compliance with the Terms of this Order for Compliance**

30. 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.

31. 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. The 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**

32. 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**

33. 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**

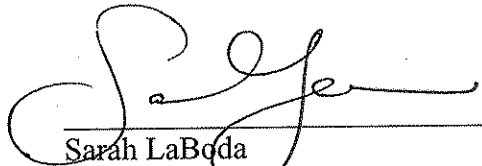
34. The terms of this Order shall be effective and enforceable against Respondent on the Effective Date, which is the date this Order is signed by EPA.

#### **Termination**

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

Issued this 28th day of August, 2009.

  
William A. Spratlin  
Director  
Water, Wetlands and Pesticides Division  
U.S. Environmental Protection Agency  
Region VII  
901 North Fifth Street  
Kansas City, Kansas 66101

  
Sarah LaBoda  
Office of Regional Counsel  
U.S. Environmental Protection Agency  
Region VII  
901 North Fifth Street  
Kansas City, Kansas 66101

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:

The Honorable Donald B. Edwards  
Mayor, City of Fremont  
400 E Military Ave  
Fremont, Nebraska 68026; and


Mr. Clark Boschult  
Department of Public Works  
400 E Military Ave  
Fremont, Nebraska 68026.

And via first class mail to:

Mr. Pat Rice  
Assistant Director, Water Quality Division  
Nebraska Department of Environmental Quality  
P.O. Box 98922  
Lincoln, Nebraska 68509-8922.

**AUG 28 2009**

\_\_\_\_\_  
Date

  
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Signature