

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)

Maxim, L.L.C.)
6440 SW Golf View Dr.)
Topeka, Kansas 66614)

Respondent)

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

) Docket No. CWA-07-2007-0090

) FINDINGS OF VIOLATION,
) ORDER FOR COMPLIANCE

Preliminary Statement

1. The following Findings of Violation and Order for Compliance (“Order”) are made and issued pursuant to the authority of Section 309(a)(3) of the Clean Water Act (“CWA”), 33 U.S.C. § 1319(a)(3). 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 Maxim, L.L.C., a company incorporated under the laws of Kansas and authorized to conduct business in the State of Kansas.

Statutory and Regulatory Framework

3. 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.

4. 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.

5. 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.

6. 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.

7. 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.

8. 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.

9. 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. The EPA maintains concurrent enforcement authority with delegated states for violations of the CWA.

10. KDHE issued a general permit for the discharge of storm water under the NPDES, Permit No. S-MCST-0110-1. The general permit governs storm water discharges associated with construction or land disturbance activity. The general permit became effective on March 1, 2003 and expired on December 31, 2006.

11. 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

12. Respondent is a “person” as defined by Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

13. At all times relevant to this action, Respondent was owner and/or operator of construction sites known as the Monarch Meadows Subdivision and Monarch Meadows Subdivision 2, located south of SW 41st Street along SW Lincolnshire Road, SW Stonybrook

Drive and SW Shenandoah Road, 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.

14. Storm water, snow melt, surface drainage, and runoff water leaves Respondent’s facility and flows into a tributary of Shunganunga Creek, a tributary of the Kansas River. The runoff and drainage from Respondent’s facility is “storm water” as defined by 40 C.F.R. § 122.26(b)(13).

15. Storm water contains “pollutants” as defined by Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

16. 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).

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

18. 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).

19. 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.

20. Respondent applied for and was issued NPDES permit coverage under the general permit described in paragraph 10 above. KDHE assigned Respondent Permit No. KS72-0043 (Respondent’s Permit), which was issued on August 15, 2003 and expired on December 31, 2006.

21. On April 17 and 18, 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.

Findings of Violation

Count 1

Failure to Maintain Pollution Control Measures

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

23. Part X of the Respondent's permit requires Respondent to maintain, repair, and/or replace all pollution control measures in need of maintenance in a timely manner to avoid discharging sediment-laden storm water runoff.

24. The inspection referenced in paragraph 21 above, revealed that Respondent's pollution control measures, including the detention basin, silt fences and straw bales, were not properly maintained. Specifically, the northern detention basin's discharge pipe was inadequately maintained and allowed a large quantity of sediment to enter the tributary of Shunganunga Creek. Additionally, numerous silt fences and straw bales were undermined.

25. Respondent's failure to properly maintain its pollution control measures 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 Appropriate Best Management Practices

26. The facts stated in paragraphs 12 through 21 above are herein incorporated.

27. Part VII 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 VII of the Respondent's permit also requires sedimentation basins for drainage areas with 10 or more acres disturbed at one time, and where soil disturbing activities are scheduled to be stopped in an area, disturbed areas shall be protected from erosion through appropriate BMPs or stabilization.

28. At the time of the inspection referenced in paragraph 21 above, Respondent had not installed storm water impediment mechanisms to protect storm drain inlets, had not stabilized or installed appropriate BMPs along street curbs, failed to install sedimentation basins as required by Respondent's Permit, and failed to stabilize disturbed areas where construction had ceased .

29. Respondent's failure to install appropriate impediments to sediment movement 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 3

Failure to Perform and Document Site Inspections

30. The facts stated in paragraphs 12 through 21 above are herein incorporated.

31. Part VII 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.

32. The inspection referenced in paragraph 21 above, revealed that Respondent did not perform documented monthly site inspections during construction on the Site, nor did the Respondent perform documented inspections within seven (7) days of significant rain events.

33. Respondent's failure to perform and document site inspections 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 4

Failure to Develop an Adequate Storm Water Pollution Prevention Plan

34. The facts stated in paragraphs 12 through 21 above are herein incorporated.

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

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 BMPs.

Description of Best Management Practices – The SWPPP shall provide a physical description, installation and construction procedures, and operation and maintenance procedures for each BMP which will be used at the site. The

SWPPP shall provide information detailing where the BMP is to be located, when the BMP will be installed, and what conditions must be met before its removal.

Temporary and Permanent Non-Structural BMPs – The SWPPP should specify preservation of existing vegetation, stabilization of areas, stabilized site entrances and exits, and other appropriate BMPs. In addition, where soil disturbing activities are to be stopped in an area, disturbed areas shall be protected from erosion through appropriate BMPs or stabilization.

Temporary and Permanent Structural BMPs – The SWPPP should specify rock check dams, storm drain inlet protection and outlet protection and other appropriate BMPs.

Sedimentation Basins – The SWPPP shall require a sedimentation basin or similar effective BMP for each drainage area with 10 or more acres disturbed at a time. The sedimentation basin must be designed and maintained to provide at least 3,600 cubic feet of storage per acre drained.

Permanent Storm Water Management – The SWPPP shall include a description of the measures that will be installed during construction to control pollutants in storm water runoff that will occur after construction activity has been completed.

Additional Site Management BMPs – The SWPPP shall address other BMPs, as required by site activities, to prevent contamination of storm water runoff.

Inspections – The SWPPP must specify that site inspections by permittee must 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 SWPPP must specify 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.

36. The inspection referenced in paragraph 21 above, revealed that Respondent's SWPPP failed to include a site description, sufficient description of best management practices, a sufficient description of permanent and temporary structural and non-structural BMPs, a description of required sedimentation basins, a permanent storm water management plan, a description of additional site management BMPs, and a description of site inspections.

37. Respondent's failure to develop 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).

Order For Compliance

38. 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)(3) of the CWA, 33 U.S.C. §§ 1318(a) and 1319(a)(3), Respondent is hereby ORDERED to take the actions described in paragraphs 39 through 43.

39. Within thirty (30) days of the effective date of this Order, Respondent 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 the permit.

40. Within thirty (30) days of the effective date of this Order, the Respondent shall submit a written report detailing the specific actions taken to correct the violations cited herein and explaining why such actions are anticipated to be sufficient to prevent recurrence of these or similar violations.

41. In the event that Respondent believes complete correction of the violations cited herein is not possible within thirty (30) days of the effective date of this Order, the Respondent shall, within those thirty (30) days, submit a comprehensive written plan for the elimination of the cited violations. Such plan shall describe in detail the specific corrective actions to be taken and why such actions are sufficient to correct the violations. The plan shall include a detailed schedule for the elimination of the violations within the shortest possible time, as well as measures to prevent these or similar violations from recurring.

Submissions

42. All documents required to be submitted to EPA by this Order, shall be submitted by mail to:

Raju Kakarlapudi
Water, Wetlands and Pesticides Division
U.S. Environmental Protection Agency - Region VII
901 North Fifth Street
Kansas City, Kansas 66101

43. A copy of documents required to be submitted to KDHE by this Order, shall be submitted by mail to:

Mr. Don Carlson
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

44. 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.

45. This Order does not constitute a waiver or a modification of any requirements of the Clean Water Act, 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 of the Act, 33 U.S.C. § 1319, 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 Act for any violation whatsoever.

Access and Requests for Information

46. 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

47. If any provision or authority of this Order, or the application of this Order to Respondent, is held by federal judicial 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.

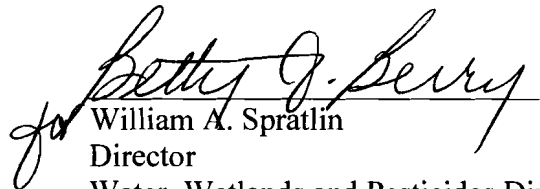
Effective Date

48. The terms of this Order shall be effective and enforceable against Respondent upon the date of its receipt of an executed copy of the Order.

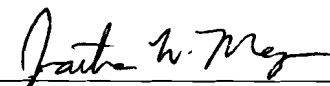
Termination

49. This Order shall remain in effect until a written notice of termination is issued by an authorized representative of the U.S. Environmental Protection Agency. Such notice shall not be given until all of the requirements of this Order have been met.

Issued this 20th day of September, 2007.



William A. Spratlin
Director
Water, Wetlands and Pesticides Division



Jonathan W. Meyer
Assistant Regional Counsel

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 Findings of Violation and Order of Compliance with the Regional Hearing Clerk, Region VII.

I further certify that I sent by certified mail, return receipt requested, a true and correct copy of the signed original Findings of Violation and Order for Compliance together with cover letter and small business assistance information, to the following address:

Mr. Royce Fulmer
Maxim, L.L.C.
6440 SW Golf View Dr.
Topeka, Kansas 66614

I further certify that on the date noted below, I sent by first class mail, a true and correct copy of the signed original Findings of Violation and Order for Compliance to the following representative of the State of Kansas:

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

Esther C. Wachtel

9/26/07
Date