

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)
)
The City of Davenport, Iowa) Docket No. CWA-07-2011-0013
)
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 7 and further delegated to the Director of Region 7’s Water, Wetlands and Pesticides Division.

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

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 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 C.F.R. § 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:

- (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, stormwater, 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:

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

- (ii) 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 Iowa Department of Natural Resources (“IDNR”) is the agency with the authority to administer the federal NPDES program in Iowa 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 Iowa, 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 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).

15. Respondent’s small MS4 is located in the Davenport, Iowa “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. IDNR issued a Final MS4 Permit for discharges from Respondent’s small municipal separate storm sewer system under the NPDES, Permit No. IA0078808. This Final Permit was issued on July 22, 2004 and expired on July 21, 2009 (hereafter the “2004 MS4 permit”). A revised permit was reissued on July 21, 2009 (hereafter the “2009 MS4 permit”).

21. On July 20-22, 2009, representatives of EPA conducted a compliance evaluation inspection of Respondent's MS4.

Findings of Violation

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

Construction Site Stormwater Runoff Control Violations

23. Part II.D.2 of the City's 2004 MS4 permit required the City to review and approve a site plan and pollution prevention plan before issuing any City permits for construction activities for which an NPDES permit is required. The permit required the City to implement its review program no later than May 1, 2006. Part II.D.2 of the City's 2009 MS4 permit continues the requirement that the City must implement its review program for the duration of the permit term.

24. The inspection referenced in Paragraph 21 revealed that the City failed to require review and approval of site plans and pollution prevention plans for all projects subject to review by the terms of Part II.D.2 of the permit. Specifically, the City did not require review of non-fixed facility public projects (*i.e.*, public linear and bridge projects).

25. Part II.D.2 of the City's 2004 MS4 permit required the City to develop a construction site inspection program. Through this program, the City was required to conduct inspections of all sites for which coverage under IDNR's Storm Water General Permit No. 2 was required. The City was required to inspect each of these sites at least once each calendar quarter. The permit required the City to implement the inspection program no later than May 1, 2006. Part II.D.2 of the City's 2009 MS4 permit continues the requirement that the City must implement its construction site inspection program.

26. The inspection referenced in Paragraph 21 revealed that the City has not inspected all construction sites requiring NPDES permit coverage at least once each calendar quarter. Specifically, the City failed to complete quarterly inspections of 23 of the 27 city-permitted commercial construction sites between June 1, 2008 and May 31, 2009.

27. The City's failure to fully comply with the construction site stormwater runoff control permit requirements is a violation of the City's permit, and, as such, is a violation of Section 301(a), 33 U.S.C. § 1311(a), and a permit issued pursuant to Section 402(p) of the CWA, 33 U.S.C. § 1342(p).

Pollution Prevention/Good Housekeeping Violations

28. Part II.F.3 of the City's 2004 MS4 permit required the City to develop a program for training municipal employees regarding practices to reduce pollutants in stormwater. The permit required the City to implement the training program no later than May 1, 2005. Part II.F.3 of the City's 2009 MS4 permit continues the requirement that the City must implement the employee training program.

29. The inspection referenced in Paragraph 21 revealed that the City failed to provide training for all employees whose work could affect stormwater quality.

30. Part II.F.4 of the City's 2004 MS4 permit required the City to develop and implement a program to assess BMPs at city facilities to reduce pollutants in stormwater runoff from these facilities. The permit required the City to develop and implement the program no later than May 1, 2006. Part II.F.4 of the City's 2009 MS4 permit continues the requirement that the City must implement its BMP assessment program.

31. The inspection referenced in Paragraph 21 revealed that the City has failed to develop and implement a program to assess BMPs at City facilities.

32. The City's failure to fully comply with the good housekeeping and pollution prevention permit requirements is a violation of the City's permit, and, as such, is a violation of Section 301(a), 33 U.S.C. § 1311(a), and a permit issued pursuant to Section 402(p) of the CWA, 33 U.S.C. § 1342(p).

Order for Compliance

33. 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.

34. 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 requirements of its NPDES permit.

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

36. In the event that the City believes complete correction of the violations cited herein is not possible within thirty (30) days of the effective date of this Order, the City 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. The City shall also submit quarterly progress reports documenting actions taken to correct remaining deficiencies, for as long as those deficiencies remain, with the first report due May 15, 2011.

Submissions

37. Each submission to EPA pursuant to the requirements of this Order shall include a written statement by the City signed by a ranking elected official, or by a duly authorized representative of that person, that contains the following certification:

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

38. All documents required to be submitted to EPA pursuant to Paragraphs 35 and 36 of this Order shall be submitted by mail to:

Ms. Cynthia Sans
Water, Wetlands and Pesticides Division
U.S. Environmental Protection Agency – Region 7
901 North Fifth Street
Kansas City, Kansas 66101.

39. All documents required to be submitted to IDNR pursuant to Paragraph 35 of this Order shall be submitted by mail to:

Mr. Dennis Ostwinkle
Field Office #6
Iowa Department of Natural Resources
1023 W. Madison St.
Washington, Iowa 52353-1623.

General Provisions

Effect of Compliance with the Terms of this Order for Compliance

40. 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.

41. 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.

42. 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

43. 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

44. 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

45. 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

46. 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 25 day of February, 2011.



Karen A. Flournoy
Acting Director
Water, Wetlands and Pesticides Division



Erin Weekley
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:

UPS
The Honorable Bill Gluba
Mayor, City of Davenport
226 West 4th Street
Davenport, Iowa 52801-1308,

and via first class mail to:

Mr. Dennis Ostwinkle
Field Office #6
Iowa Department of Natural Resources
1023 West Madison Street
Washington, Iowa 52353-1623.

2/25/11
Date

[Signature]
Signature