

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7
11201 RENNER BOULEVARD
LENEXA, KANSAS 66219

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)	
)	Docket No. CWA-07-2022-0031
)	
FREMONT, NEBRASKA)	
)	
)	FINDINGS OF VIOLATION AND
)	ADMINISTRATIVE ORDER FOR
)	COMPLIANCE ON CONSENT
)	
Respondent,)	
)	
)	
Proceedings under Section)	
309(a)(3) of the Clean Water Act,)	
33 U.S.C. § 1319(a)(3))	
_____)	

I. Preliminary Statement

1. The FINDINGS OF VIOLATION and ORDER ON CONSENT (“Order”) are made and issued pursuant to 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 U.S. Environmental Protection Agency (“EPA”) to the Regional Administrator of EPA Region 7, and further delegated to the Director of Region 7’s Enforcement and Compliance Assurance Division.

2. Respondent is the city of Fremont, Nebraska (“Respondent”) or (“City”) and was at all relevant times a municipality organized under the laws of the state of Nebraska.

3. EPA, together with the City, enter into this Section 309(a)(3) Order for Compliance on Consent for the purpose of carrying out the goals of the CWA, 33 U.S.C. § 1251 *et seq.*, to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”

4. It is the Parties’ intent through entering into this Order to address Respondent’s alleged noncompliance with the CWA and violation of its National Pollutant Discharge Elimination System (“NPDES”) permit. As set forth in this Order on Consent, the Parties have amicably

reached agreement regarding the timeframes for Respondent to attain compliance with the CWA and its NPDES permit.

5. By entering into this Order, Respondent (1) consents to and agrees not to contest EPA's authority or jurisdiction to issue or enforce this Order, (2) consent to personal service by electronic mail, (3) agrees to undertake all actions required by the terms and conditions of this Order, and (4) consents to be bound by the requirements set forth herein. For the purposes of this Order, Respondent waives any and all remedies, claims for relief and otherwise available rights to judicial or administrative review that Respondent may have with respect to any issue of fact or law set forth in this Order, including any right of judicial review under Chapter 7 of the Administrative Procedure Act, 5 U.S.C. §§ 701-706.

6. Respondent neither admits nor denies the factual allegations contained in the Allegations of Violation and Order.

II. Statutory and Regulatory Framework

7. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of "pollutants" from a "point source" into a "navigable water" of the United States, except in compliance with, *inter alia*, Section 402 of the CWA, 33 U.S.C. § 1342, defined by Section 502 of the CWA, 33 U.S.C. § 1362.

8. Section 402 of the CWA provides that pollutants may be discharged only in accordance with the terms of an NPDES permit issued pursuant to that Section. To implement Section 402 of the CWA, EPA promulgated regulations codified at 40 C.F.R. Part 122. Under 40 C.F.R. Part 122.1, an NPDES permit is required for the discharge of pollutants from any point source into waters of the United States.

9. 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 municipal stormwater discharges, including those by the City which are the subject to this Order.

10. 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.

11. 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 an 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.

12. 40 C.F.R. § 122.26(b)(8) defines “municipal separate storm sewer” (“MS4”) 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):

- a. 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, stormwater, 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;
- b. designed or used for collecting or conveying storm water;
- c. which is not a combined sewer; and
- d. which is not part of a POTW as defined at 40 C.F.R. § 122.2.

13. 40 C.F.R. § 122.26(b)(16) defines “small MS4”, 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.

14. 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).

15. The Nebraska Department of Environment and Energy (“NDEE”) 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, the implementing regulations, and a Memorandum of Understanding dated February 7, 2019. EPA maintains concurrent enforcement authority with authorized state programs for violations of the CWA.

16. Section 309(a)(3) of the CWA, 33 U.S.C. § 1319(a)(3), authorizes the EPA to issue administrative orders to require persons to take those actions necessary to comply with the requirements of the CWA.

III. EPA Allegations

Allegations of Fact and Law

17. Respondent is a municipality and as such is a “person” for purposes of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).
18. 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).
19. At all times relevant to this Order, Respondent owned and/or operated a “small municipal separate storm sewer system,” as defined by 40 C.F.R. § 122.26(b)(16).
20. Respondent’s small MS4 is located in the Fremont, Nebraska “urbanized area” as defined by the 2010 Census or use population as determined by 2010 census: 26,397, and therefore, at all times relevant to this Order, Respondent’s small MS4 is subject to regulation pursuant to 40 C.F.R. § 122.32(a)(1).
21. Respondent’s small MS4 is a “point source” as defined by Section 502(14) of the CWA, 33 U.S.C. § 1362(14).
22. Respondent’s small MS4 discharges pollutants into the Elkhorn River and the Platte River, which are “navigable waters” as defined by Section 502(7) of the CWA, 33 U.S.C. § 1362(7).
23. The Elkhorn River is impaired by *E. coli*, for which a Total Maximum Daily Load (“TMDL”) for bacteria was placed and approved in 2009.
24. 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).
25. Respondent’s discharges from a small MS4 required a permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342, and 40 C.F.R. §§ 122.26(a)(9)(i)(A), 122.32.
26. NDEE issued a permit for discharges from Respondent’s small MS4 under NPDES General Permit No. NE-R310000 with authorization number NE-R310001 (“MS4 Permit”). The General Permit is effective from July 1, 2017, to June 30, 2022.
27. On September 21-25, 2020, representatives of the EPA conducted an audit of the City’s MS4 program (hereafter “the MS4 Audit”) under the authority of Section 308(a) of the

CWA, 33 U.S.C. § 1318(a), to evaluate the City's compliance with its MS4 permit and the CWA.

28. As part of the MS4 Audit, the City provided documentation to EPA to review, including its FY19 MS4 Annual Report, Storm Water Management Plan ("SWMP") submitted to NDEE on December 29, 2017, Illicit Discharge Detection and Elimination ("IDDE") Program Manual, and other written procedures to support the implementation of the SWMP.

29. A copy of the MS4 Audit report was provided to the City by electronic mail on November 23, 2020.

EPA's Findings of Violation

Count 1

Failure to Develop and Implement an Adequate IDDE Program

30. The facts stated above are re-alleged and incorporated herein by reference.

31. Part IV of the MS4 Permit requires that the City develop, implement, and enforce a SWMP that shall reduce the pollutant discharge from the MS4 to the maximum extent practicable, protect water quality, and satisfy the water quality requirements of the Clean Water Act.

32. Part IV.B.2.a.1 of the MS4 Permit requires the City to develop, implement, and enforce an IDDE Program to detect, investigate, and eliminate non-storm water discharges, including illegal dumping, into its MS4.

33. Part IV.B.2.a.1(a) of the MS4 Permit further requires the City to develop as part of the IDDE program an enforcement plan or mechanism. The City adopted stormwater discharge control ordinance No. 5163, prohibiting non-storm water discharges to the MS4. The City developed an IDDE program manual in 2019, which includes procedures to investigate, document, and conduct enforcement as appropriate.

34. Part IV.B.2.a.1(d)(ii) of the MS4 Permit requires the City to document all investigations, tracking dates of illicit discharge, results of investigations, any follow up from the investigation, and the date the investigation is closed.

35. Part IV.B.2.a.1(e)(ii) of the MS4 Permit requires the City to document all interactions with potentially responsible parties as well as follow-up investigations to confirm illicit discharges have been removed.

36. The City did not document enforcement of the IDDE Program in accordance with the MS4 Permit nor the City's IDDE Manual during 2019 and 2020 in the following ways:

- a. The City did not consistently document investigations, including specific follow-up actions to the investigation and the date the investigation was closed; and
- b. The City did not implement all initial actions set forth in the IDDE Manual, including ensuring inspection reports were signed by the responsible party to acknowledge receipt and obtaining documentation of corrective actions taken.

37. Part IV.B.2.a.1(b) of the MS4 Permit requires a storm sewer system map showing the location of all outfalls and waters of the state that receive discharges from those outfalls, and delineation of connections and interactions to other MS4 systems.

38. The City's MS4 map failed to delineate interconnections with another MS4 owned by the Nebraska Department of Transportation along State Highway 77 within the City in violation of the MS4 Permit.

39. Part IV.B.2.a.1(c) of the MS4 Permit requires the City to develop and implement outfall field screening procedures and priority locations to investigate for detecting illicit discharges and to document written dry weather field screening and analytical monitoring procedures which are to be used at a number of outfall locations specified in the SWMP each year to detect discharges to the MS4.

40. The City's IDDE Manual provides examples of illicit discharges including dry weather flows that contain pollutants or pathogens and references a Standard Operating Procedure for outfall screening but does not identify a procedure to determine the presence of optical brighteners at outfalls nor sampling criteria for dry weather outfall screening.

41. The City failed to develop and implement an adequate dry weather screening program, including failing to conduct additional sampling or follow up investigation when multiple indications of an illicit discharge, including dry weather flow, algae, odors, and optical brighteners, were noted in the outfall screening log and inspection reports, and failing to develop and implement clear, written sampling protocols.

42. The City's failure to develop and implement an adequate IDDE program, as set forth above, are violations of its MS4 Permit and, as such, are violations of Section 402 of the CWA, 33 U.S.C. § 1342.

Count 2

Failure to Conduct and Document Construction Site Inspections

43. The facts stated above are re-alleged and incorporated herein by reference.

44. Part IV.B.3.a. of the MS4 Permit requires the permittee to develop, implement, and enforce a program to control stormwater pollutant discharges from construction activities.

45. Part IV.B.3.d.1. of the MS4 Permit requires the City to inspect public and private construction activity according to local procedures with a strategy documented in the SWMP.

46. Section 4.3.2 of the City's SWMP states that "every private building lot and land development receive[s] municipal oversight inspection for erosion and sediment control an average of quarterly (routine) during the period of active construction."

47. Throughout 2019 and 2020, the City failed to conduct and document inspections of public and private construction activity for erosion and sediment control an average of quarterly during the period of active construction contrary to the procedures and strategy in the SWMP.

48. The City's failure to adequately implement the required elements of the SWMP, as set forth above, is a violation of the MS4 Permit and, as such, is a violation of Section 402 of the CWA, 33 U.S.C. § 1342.

Count 3

Failure to Develop and Implement an Adequate Municipal Pollution Prevention and Good Housekeeping Plan

49. The facts stated above are re-alleged and incorporated herein by reference.

50. Part IV.B.5.a.1 and Part IV.B.5.a.2 of the MS4 Permit require the City to develop and maintain an inventory of municipally-owned or operated facilities and storm water controls and identify on a map where the municipally-owned or operated facilities are located within the MS4.

51. The City has not developed an inventory or a map of municipally-owned or operated facilities and storm water controls within the MS4.

52. Part IV.B.5.d.1(a) of the MS4 Permit requires the City to develop a strategy to inspect and clean the storm water inlets as needed in the SWMP, and report implementation of this strategy in the City's annual report.

53. The City has not developed a strategy for storm sewer inlet cleaning and system maintenance, and does not adequately document or maintain a schedule of implementation.

54. Part IV.B.5.e of the MS4 Permit requires the City to develop and implement an employee training program for pollution prevention and good housekeeping practices, to identify and track all personnel requiring training, maintain records of such training, and to describe the training program in the SWMP.

55. Section 6.4.1 of the City's SWMP states that municipal good housekeeping training will be given to all City personnel involved in operation and maintenance activities annually.

56. The City does not conduct annual training as stated in the SWMP.

57. The City's failure to develop and implement the required elements of a SWMP, as set forth above, are violations of the MS4 Permit and, as such, are violations of Section 402 of the CWA, 33 U.S.C. § 1342.

**Count 4
Failure to Timely Submit MS4 Annual Reports**

58. The facts stated above are re-alleged and incorporated herein by reference.

59. Part VI.A of the MS4 Permit requires the City to develop and submit an annual report by April 1 of every year.

60. The MS4 annual report for the fiscal year 2018 was not submitted by April 1, 2019.

61. The City's failure to submit its annual report timely, as set forth above, is a violation of its MS4 Permit and, as such, is a violation of Section 402 of the CWA, 33 U.S.C. § 1342.

IV. Section 309(a) Order for Compliance on Consent

Based on the EPA Findings set forth above, and pursuant to Section 309(a)(3) of the CWA, 33 U.S.C. § 1319(a)(3), the EPA hereby ORDERS the Respondent, and the Respondent hereby AGREES to take the actions described below.

62. In accordance with this Order, the City agrees to take all measures necessary to comply with its MS4 permit including revision of the SWMP to address all permit requirements and implementation of all activities required to comply with the MS4 permit by no later than one year from the Effective Date of this Order.

63. Within 30 days of completion of the final scheduled corrective measure, the City shall submit a written certification to EPA, with a copy to NDEE, that all corrective measures required pursuant to this Order have been completed.

64. After review of the certification and any supporting information submitted by the City, EPA may determine that additional information is needed and/or additional corrective measures or deadlines are appropriate, and may modify this Order or initiate a separate

enforcement action, as appropriate. Alternatively, EPA may accept the certification and terminate this Order.

65. The City shall at all times comply with requirements established by the state of Nebraska regarding the operation of facilities associated with the City's MS4, including, but not limited to, any requirements for work to be performed by certified or licensed professional engineers, submission and approval of plans and specifications, and construction and operation permitting. In implementing work required by this Order, the City shall allocate adequate time and resources to comply with applicable state requirements.

V. Reporting

66. *Initial Report:* Within 30 days of the Effective Date of this Order, the City shall submit to EPA, with a copy to NDEE, an initial report providing a description of all steps it has taken since the Inspection to come into compliance with the terms of its MS4 permit and SWMP, including complete copies of any documents such as revised manuals, procedures, and tracking forms.

67. *Semi-Annual Reports:* Until the City completes the corrective measures and submits the written certification required by Paragraph 63 above, the City shall submit to EPA, with a copy to NDEE, semi-annual reports describing the actions the City has taken to comply with the terms of this Order in the prior six months. These reports are due every April 28 and October 28 until termination of this Order pursuant to Paragraph 79 below; the first report is due October 28, 2022. Each report shall include, at a minimum:

- a. MS4 Compliance Progress: A description of all actions taken to comply with the MS4 permit and implement the SWMP;
- b. SWMP Updates: A description of any revisions to the SWMP, including attachments such as plans or maps, associated manuals, and a copy of the updated SWMP;
- c. Inspections: Numbers of construction site inspections and illicit discharge investigations, copies of three construction site inspection reports and three illicit discharge investigations reports conducted during that period, and a summary of corrective actions taken or other follow up actions; and
- d. Copy of any MS4 Annual Report submitted during the reporting period.

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

Angela Acord, or her successor
acord.angela@epa.gov

69. A copy of all documents required to be submitted to NDEE by this Order, shall be submitted by electronic mail to:

Kara Valentine
Nebraska Department of Environmental Quality
kara.valentine@nebraska.gov

VI. General Provisions

70. Failure to comply with the terms of the Section 309(a)(3) Compliance Order may result in liability for statutory civil penalties under Section 309(d) of the Act, 33 U.S.C. § 1319(d), as modified by 40 C.F.R. Part 19. Should EPA commence an action seeking penalties for violations of this Compliance Order, a United States District Court may impose civil penalties if the court determines that you have violated the Act and failed to comply with the terms of the Order.

Reservation of Rights

71. 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. EPA reserves the right to enforce the terms of this Order by initiating a judicial or administrative action pursuant to Section 309 of the CWA, 33 U.S.C. § 1319.

72. With respect to matters not addressed in this Order, EPA reserves the right to take any enforcement action pursuant to the CWA, or any other available legal authority, including without limitation, the right to seek injunctive relief, monetary penalties and/or other legal remedies allowed by law.

73. 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.

74. Subject to the limitations of Paragraph 5, above, Respondent reserves the right to contest liability and any penalty sought in any subsequent action filed by EPA to seek penalties for violation of this Order on Consent, and reserves the right to contest liability and/or penalty in any subsequent action filed by EPA for any violations alleged in the Findings, above.

Access and Requests for Information

75. 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

76. 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.

Modification

77. At EPA's sole discretion, extensions of the compliance schedule/deadlines required by this Order may be made by EPA by written notice to Respondent, without further formal amendment to the Order. All other modifications to this Order may only be made by mutual agreement of the Parties, pursuant to a written amendment signed by each Party.

Effective Date

78. This Order shall be effective upon signature by the authorized Regional official. All time periods herein shall be calculated therefrom in calendar days unless otherwise provided in this Order.

Termination

79. 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 the City has complied with the requirements of Section IV of this Order and demonstrated general compliance as determined by EPA with the terms of its permits.

Signatories

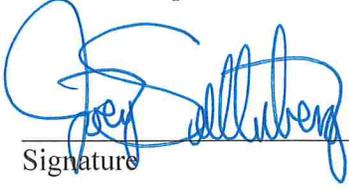
80. The undersigned for each party has the authority to bind each respective Party to the terms and conditions of this Order. The Order may be signed in part and counterpart by each Party.

For the Complainant, United States Environmental Protection Agency, Region 7:

Wendy Lubbe
Acting Director
Enforcement and Compliance Assurance Division
U.S. Environmental Protection Agency – Region 7

Shane McCoin
Assistant Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency – Region 7

For the Respondent, Fremont, Nebraska:



Signature

4/28/2022

Date

Joseph L Spellerberg

Name

Mayor

Title

CERTIFICATE OF SERVICE

I certify that on the date noted below I delivered a true and correct copy of this Findings of Violation and Administrative Order for Compliance on Consent by electronic mail, to:

Regional Hearing Clerk:

R7_Hearing_Clerk_Filings@epa.gov

For Respondent:

The Honorable Joey Spellerberg
Mayor of Fremont, Nebraska

[REDACTED]

Travis Jaycott, Attorney
Adams & Sullivan, P.C., L.L.O.

[REDACTED]

For Complainant, U.S. Environmental Protection Agency Region 7:

Shane McCoin
EPA Region 7 Office of Regional Counsel
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Angela Acord
EPA Region 7 Enforcement and Compliance Assurance Division
acord.angela@epa.gov

For Nebraska Department of Environment and Energy:

Kara Valentine
kara.valentine@nebraska.gov

Date