

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)
)
KANSAS DEPARTMENT OF)
TRANSPORTATION)
Respondent)
)
Proceedings under Section 309(a) of the)
Clean Water Act, 33 U.S.C. § 1319(a))
_____)

Docket No. CWA-07-2011-0005

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 7 and further delegated to the Director of Region 7’s Water, Wetlands and Pesticides Division.

2. Respondent is the Kansas Department of Transportation (“KDOT” or “Respondent”), a state agency in the State of Kansas (“Kansas”), authorized to conduct business in 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 stormwater. Section 402(p) of the CWA requires, in part, that a discharge of stormwater 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 stormwater 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 stormwater associated with industrial activity to apply for an individual permit or to seek coverage under a promulgated stormwater general permit.

8. 40 C.F.R. § 122.26(b)(14)(x) defines “stormwater 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. EPA maintains concurrent enforcement authority with authorized states for violations of the CWA.

10. KDHE issued a general permit for the discharge of stormwater under the NPDES, General Permit No. 2. The general permit governs stormwater discharges associated with construction or land disturbance activity. The general permit became effective March 1, 2003, and extends through December 31, 2006. This permit was reissued on January 1, 2007, and expires on December 31, 2011.

Factual Background

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

12. At all times relevant to this action, Respondent was the owner and/or operator of a construction site known as U.S. Highway 59 (“Site”) located approximately 1,800 feet south of the Franklin/Douglass County line and ending north of Road 1100, south of the City of Lawrence, Kansas. 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.

13. Stormwater, snow melt, surface drainage and runoff water leaves the Site and flows into the unnamed tributaries of West Fork Taury Creek and the Wakarusa River. The runoff and drainage from the Site is “stormwater” as defined by 40 C.F.R. § 122.26(b)(13).

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

15. The Site has “stormwater discharge 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).

16. Stormwater 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).

17. 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.

18. Respondent applied for and was issued NPDES permit coverage under the general permit described in paragraph 10 above. KDHE issued Respondent permit number KSR104357 on June 26, 2007.

19. Respondent’s permit coverage is for the U.S. Highway 59 Road Construction Project located approximately 1,800 feet south of the Franklin/Douglas County line and ending north of Road 1100, south of the City of Lawrence, Kansas. The total length of the road building project is approximately 10.4 miles and the total disturbed area is 472 acres.

20. On or about August 10-20, 2010, 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 management of stormwater at the site in accordance with the CWA.

Findings of Violation

Count 1

Failure to Properly Maintain Best Management Practices (BMPs)

21. The facts stated in paragraphs 11 through 20 above are herein incorporated.

22. Part 7 of Respondent’s permit states that “the permittee shall select, install, utilize, operate, and maintain BMPs in accordance with the concepts and methods described in the Environmental Protection Agency (EPA) document number 832-R-92-005, entitled Stormwater Management for Construction Activities – Developing Pollution Prevention Plans and Best Management Practices (see endnote 5, page 13).”

23. The EPA inspection referenced in paragraph 20 above revealed that Respondent had not adequately maintained rock check dams. Specifically, numerous rock check dams throughout the Site were found to be washed-out or covered in sediment.

24. Part 7.2.5 of Respondent's permit requires that sediment basins be designed and maintained to provide at least 3,600 cubic feet of storage per acre drained.

25. The EPA inspection referenced in paragraph 20 above revealed that Respondent had failed to remove accumulated sediment from sediment basins, in violation of the maintenance and size requirement of Part 7.2.5 of Respondent's permit.

26. Respondent's failure to properly maintain BMPs 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 Adequate BMPs

27. The facts stated in paragraphs 11 through 20 above are herein incorporated.

28. Part 7.2.3 of Respondent's permit requires that "where soil disturbing activities are scheduled to be stopped in an area, the disturbed area shall be protected from erosion by maintaining erosion control BMPs, or stabilizing the area with mulch or other similarly effective soil stabilizing BMPs."

29. The EPA inspection referenced in paragraph 20 above revealed that Respondent had not adequately stabilized areas where soil disturbing activity had ceased for more than 14 days. Specifically, numerous areas throughout the site lacked any type of temporary stabilization. Other areas were not adequately stabilized, some areas had less than 10% overall vegetative cover.

30. Part 7 of Respondent's permit states that "the permittee shall select, install, utilize, operate, and maintain BMPs in accordance with the concepts and methods described in EPA document number 832-R-92-005, entitled Stormwater Management for Construction Activities – Developing Pollution Prevention Plans and Best Management Practices (endnote 5, page 13 of Respondent's permit)."

31. The EPA inspection referenced in paragraph 20 above revealed numerous disturbed areas where sediment control was inadequate or lacking altogether, contrary to the sediment control concepts and methods described above. Specifically, numerous ditches and waterways

throughout the Site lacked silt fencing, berms, or an equivalent impediment to sediment movement.

32. The EPA inspection referenced in paragraph 20 above revealed numerous stormwater inlet pipes that lacked adequate protection. Specifically, significant sediment deposits were observed at the inlet of the stormwater pipe in the southwest corner of the intersection of Missouri and Woodson roads. Significant amounts of sediment deposition were observed at the inlet of the culvert near the intersection of Highway 59 and Highway 56.

33. Respondent's failure to properly install BMPs 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 Develop an Adequate Stormwater Pollution Prevention Plan (SWPPP)

34. The facts stated in paragraphs 11 through 20 above are herein incorporated.

35. Part 7 of the Respondent's permit requires that the Stormwater Pollution Prevention Plan ("SWPPP") include, *inter alia*, the following items: site description, signed KDHE Contractor Certification form, and written notification to all contractors including utility crews of the existence of the SWPPP.

36. The EPA inspection referenced in paragraph 20 above revealed that the SWPPP maintained by the contractor did not have all the necessary elements of a SWPPP. Specifically, the Respondent's SWPPP lacked the site description, evidence of the permittee having all contractors sign a KDHE Contractor Certification Form, and permittee notification of all contractors including utility crews of the SWPPP.

37. Respondent's failure to adequately develop a 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).

Count 4

Failure to Properly Implement SWPPP

38. The facts stated in paragraphs 11 through 20 above are herein incorporated.

39. Part 7 of Respondent's permit requires that the Respondent fully implement the provisions of the SWPPP throughout the term of the construction project.

40. The EPA inspection referenced in paragraph 20 above, revealed that Respondent failed to properly implement several elements of the SWPPP. Specifically, Respondent failed to properly implement SWPPP requirements for the installation of silt fences, rock check dams, and hay bales throughout the Site.

41. Respondent's failure to adequately implement a SWPPP at the construction Site 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 5

Failure to Update and Amend SWPPP

42. The facts stated in paragraphs 11 through 20 above are herein incorporated.

43. Part 7.1 of Respondent's permit requires that the permittee amend the SWPPP, at a minimum whenever there is a change in design, operation or maintenance of BMPs; there is a change in the design of the construction project which could significantly affect the quality of the stormwater runoff or the use of designated BMPs; the permittee's inspections indicate deficiencies in the SWPPP plan or any BMP.

44. The EPA inspection referenced in paragraph 20 above revealed that Respondent did not amend the SWPPP to reflect actual Site conditions and BMPs in place at the time of the inspection.

45. Respondent's failure to update and amend the SWPPP at the construction site 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 6

Failure to Adequately Document Site Inspections and Comply with Site Inspection Requirements

46. The facts stated in paragraphs 11 through 20 above are herein incorporated.

47. Part 7.2.8 of Respondent's permit requires that the permittee document each inspection and that the inspection report include the following minimum information: inspector's name, date of inspection, observations relative to the effectiveness of the BMPs, actions taken or necessary to correct deficiencies, listing of areas where construction operations have permanently or temporarily stopped, and observations of stormwater discharge locations

with respect to the effectiveness of the upgradient BMPs. The inspection report shall be signed by the person performing the inspection.

48. The EPA inspection referenced in paragraph 20 above revealed that Respondent's inspection reports were not thorough enough to identify specific site deficiencies, often were not dated, and often did not identify deficiencies or corrective actions taken.

49. Part 7.2.8 of Respondent's permit requires that the permittee correct any deficiencies within seven calendar days of the inspection.

50. The EPA inspection referenced in paragraph 20 above revealed that Respondent failed to correct deficiencies noted during Site inspections within seven calendar days.

51. 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).

Order For Compliance

52. 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 53 through 55.

53. Within thirty (30) days of the Effective Date, as defined in paragraph 64 herein, Respondent shall take all corrective action that is necessary to correct the deficiencies, eliminate and prevent recurrence of the violations cited in this Order and to come into compliance with all of the applicable requirements of Respondent's permit.

Submissions

54. 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.

55. 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.

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

Dr. Delia Garcia
Water, Wetlands and Pesticides Division
U.S. Environmental Protection Agency - Region 7
901 North Fifth Street
Kansas City, Kansas 66101.

Acceptance of Submissions and Incorporation into the Order for Compliance

57. Upon receipt, EPA will review all documents submitted by Respondent pursuant to paragraphs 54 or 55, and accept such submittals or require modification and resubmittal of a portion or all of the documents pursuant to paragraph 58, below. Upon acceptance, documents submitted under paragraphs 54 or 55 above, or resubmitted pursuant to paragraph 58, below, shall be deemed incorporated into and become enforceable under this Order, or at EPA's discretion, shall be incorporated into, and become enforceable under, a separate order issued under the authority of the CWA.

Modification and Resubmission of Documents

58. If required by EPA pursuant to paragraph 57 above, Respondent shall, within fifteen (15) days of receipt of any written comments from EPA regarding the documents submitted by Respondent pursuant to this Order, make modifications and changes to such documents as directed by EPA, and resubmit the documents to EPA. The parties may agree, in writing, to a longer period of time for resubmission of such documents.

Certification

59. All submissions made by Respondent to EPA pursuant to the requirements of this Order shall contain the following certification signed by an authorized official, as described at 40 CFR 122.22:

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 submissions of false information.

General Provisions

Effect of Compliance with the Terms of this Order for Compliance

60. 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.

61. 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 of the CWA, 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 CWA for any violation whatsoever.

Access and Requests for Information

62. 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

63. 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.

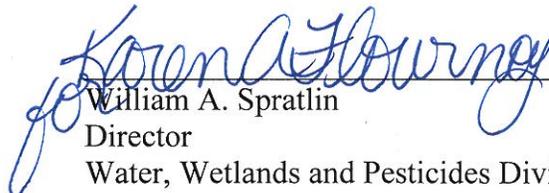
Effective Date

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

Termination

65. 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 29th day of November, 2010.



William A. Spratlin
Director
Water, Wetlands and Pesticides Division



Kristen Nazar
Attorney
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:

Ms. Deb Miller, Secretary of Transportation
Kansas Department of Transportation
Dwight D. Eisenhower State Office Building
700 SW Harrison Street
Topeka, Kansas 66603-3754

Ms. Vicky Johnson, Chief Counsel
Kansas Department of Transportation
Dwight D. Eisenhower State Office Building
700 SW Harrison Street
Topeka, Kansas 66603-3754

Sent 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

Dec 2, 2010
Date

Kimberly Keyser