

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)	
)	Docket No. CWA-07-2010-0132
The City of Dubuque, Iowa)	
)	FINDINGS OF VIOLATION AND
Respondent)	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 Dubuque, Iowa (“Respondent” or “the City”), a municipality chartered under the laws of the State of Iowa. Respondent is the owner and/or operator of the Municipal Separate Storm Sewer System (“MS4”), located within the corporate boundary of the City of Dubuque, Dubuque 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 (“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): (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 CFR 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:

- 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.

10. 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).

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 the State 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 Dubuque, 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 Permit for discharges from Dubuque’s small municipal separate storm sewer system under the NPDES, Permit No. IA0078671. This Final Permit was issued on November 30, 2004, and expired on November 29, 2009. On November 30, 2009,

IDNR issued a new permit for discharges from Dubuque's MS4 under the same permit number, which will expire on November 29, 2014.

Findings of Violation

21. The facts stated in Paragraphs 12 through 20 above are herein incorporated.

Illicit Discharge Detection and Elimination Violations

22. Part III.6 of the City's permit requires that the City's "[Annual] report shall include the following: A summary describing the number and nature of inspections, enforcement actions, illicit discharges discovered, ordinances adopted, public education programs conducted, components of the MS4 cleaned, stream restoration activities, meetings held and any other actions taken by the permittee required by this permit during the reporting period."

23. The EPA inspection found that the City's 2008 annual report noted the existence of the pet waste ordinance but did not provide a summary of enforcement actions taken as part of the pet waste control program. The underlying reason for this deficiency was cited as the lack of communication between the City's Health Department, which enforces the pet waste ordinance, and the City's MS4 staff.

24. The City's failure to complete an annual report that included a summary of enforcement actions is a violation of the City's 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).

Construction Site Stormwater Runoff Control Violations

25. Part II.D.1 of the MS4 permit states that "An ordinance shall be developed or amended as needed and enforced on all sites for which NPDES permits are required that requires proper soil erosion and sediment control...The ordinance shall require site plan and pollution prevention plan review and approval by the permittee prior to issuance of any permits for the site by the permittee."

26. The EPA inspection found that the City did not evaluate the adequacy of erosion and sediment controls during the plan review process, specifically, that the City failed to determine if the Best Management Practices (BMPs) were adequate for the particular application under consideration. The City must enforce more than just whether BMPs are included in the plan, but also whether they are proper (e.g. adequate).

27. The City's failure to evaluate and enforce the adequacy of BMPs is a violation of the City's 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).

Pollution Prevention and Good Housekeeping Violations

28. Part II.F.1 of the City's permit states that "A program for inspecting, maintaining and cleaning all components of the MS4 including street sweeping shall be implemented. All components of the MS4 shall be inspected at least once every five years and maintenance performed as appropriate."

29. The EPA inspection found that the City inspects some MS4 components on an as-needed or infrequent basis, but that the City is not implementing a program to ensure that all components of the MS4 are inspected within a five-year period.

30. Part II.F.2 of the City's permit states that "A pesticide and fertilizer management program shall be developed, implemented and enforced which shall reduce pollutant discharge associated with storage, application and disposal of pesticides and fertilizers for municipal operations. The program shall...require training on management techniques addressing storage, application and disposal."

31. The EPA inspection found that the City did not have a specific protocol or plan for mixing pesticides outside on facility grounds. This represents the failure to develop and implement a pesticide and fertilizer management program.

32. With respect to the pesticide and fertilizer management program, Part II.F.2 of the permit also states that "Data regarding the application rates of pesticides and fertilizers shall be gathered and evaluated to determine if lower rates would be equally effective."

33. The EPA inspection found that the City has not conducted a review of application rates of pesticides or fertilizers to evaluate if the amounts applied by the City could be reduced.

34. Part II.F.4 of the City's permit requires that "A program shall be developed and implemented to assess BMPs at city facilities to be implemented that reduce pollutants in stormwater from these facilities. These measures shall then be implemented whenever practical. The program shall be implemented by the permittee beginning no later than September 1, 2006 and for the remainder of the duration of the permit."

35. The EPA inspection found that the City failed to develop, implement, and assess BMPs for handling materials exposed to stormwater at City facilities. Evidence of this violation was EPA's observation of several drums and containers located in close proximity to storm drains, some of which contained unlabeled and/or unknown substances.

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

Reporting Requirement Violations

37. Part III of the City's permit requires Respondent to "prepare an annual report to be submitted to the Department no later than September 30 of each calendar year with the first report due in calendar year 2005."

38. The EPA inspection found that the City failed to submit annual reports for calendar years 2005 and 2007.

39. The City's failure to submit annual reports is a violation of the City's 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

40. 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.

41. 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 applicable requirements of its MS4 permit.

42. Within sixty (60) days of the effective date of this Order, the City shall provide 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.

Submissions

43. All documents required to be submitted to EPA pursuant to Paragraph 42 of this Order shall be submitted by mail to:

Mr. Michael Boeglin
Water, Wetlands and Pesticides Division
U.S. Environmental Protection Agency – Region 7
901 North Fifth Street
Kansas City, Kansas 66101.

44. All documents required to be submitted to IDNR pursuant to Paragraph 42 of this Order shall be submitted by mail to:

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

General Provisions

Effect of Compliance with the Terms of this Order for Compliance

45. 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.

46. 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

47. 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

48. 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.

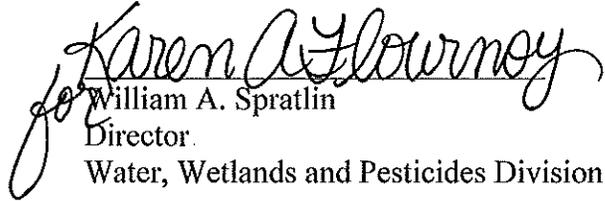
Effective Date

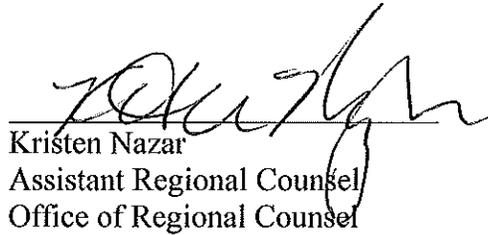
49. The terms of this Order shall be effective and enforceable against Respondent on the Effective Date, which is the date this Order is signed by EPA.

Termination

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

Issued this 5th day of August, 2010.


William A. Spratlin
Director
Water, Wetlands and Pesticides Division


Kristen Nazar
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:

Donald J. Vogt, Public Works Director
110 Manor Drive
50 West 13th Street
Dubuque, Iowa 52001;

and via first class mail to:

Mr. Joe Sanfilippo
Field Office #1
Iowa Department of Natural Resources
909 West Main Street, Suite 4
Manchester, Iowa 52057

Mr. Ed Tormey
Bureau Chief, Legal Services
Iowa Department of Natural Resources
502 East 9th Street
Des Moines, Iowa 50319

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

8/10/10

Date


Signature