

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

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
Pyramid Contractors, Inc.) Docket No. CWA-07-2019-0188
AND)
The City of Lenexa, Kansas)
)
)
Respondents) FINDINGS OF VIOLATION
) AND ORDER FOR COMPLIANCE
)
Proceedings under Section 309(a)(3) of the)
Clean Water Act, 33 U.S.C. § 1319(a)(3))
_____)

PRELIMINARY STATEMENT

1. The following Findings of Violation are made and Order for Compliance (“Order”) is issued pursuant to the authority of Section 309(a)(3) of the Clean Water Act (“CWA”), 33 U.S.C. § 1319(a)(3). The authority to take action under Section 309(a)(3) of the CWA, 33 U.S.C. § 1319(a)(3), is vested in the Administrator of the U.S. Environmental Protection Agency (“EPA”). The Administrator has delegated this authority to the Regional Administrator, EPA, Region 7, who in turn has delegated it to the Director of the Enforcement and Compliance Assurance Division of EPA, Region 7.

2. The Respondents in this case are Pyramid Contractors, Inc. and the city of Lenexa, Kansas (“Respondents”).

STATUTORY AND REGULATORY FRAMEWORK

3. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants, unless such discharge is in compliance with, *inter alia*, Section 402 of the CWA, 33 U.S.C. § 1342, which provides that pollutants may be discharged only in accordance with the terms of a National Pollutant Discharge Elimination System (“NPDES”) permit.

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 502(7) of the CWA defines “navigable waters,” as the “waters of the United States, including territorial seas.” 33 U.S.C. § 1362(7). In turn, “waters of the United States” has been defined to include, *inter alia*, all waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce; and tributaries to such waters. 40 C.F.R. § 122.2 (1993).

6. 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 comply with the requirements of an NPDES permit issued pursuant to Sections 301 and 402 of the CWA.

7. Pursuant to Section 402(p) of the CWA, 33 U.S.C. § 1342(p), EPA promulgated regulations at 40 C.F.R. § 122.26 that set forth the NPDES permit requirements for stormwater discharges.

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 acres of total land area which are part of a larger common plan of development or sale.

9. 40 C.F.R. §§ 122.26(a)(1)(ii) and 122.26(c) require dischargers of stormwater associated with industrial activity to apply for an individual permit or to seek coverage under a promulgated stormwater general permit.

10. 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.

FACTUAL BACKGROUND

11. Each 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 city of Lenexa was an owner or operator of a residential construction site (“Site”), comprised of approximately 75 acres, and which is an extension of Ridgeview Road north approximately one mile from Highway K-10 to Prairie Star Parkway in Lenexa, Kansas.

13. At all times relevant to this action, Respondent Pyramid Contractors, Inc. was an owner or operator of the Site.
14. At the time of the EPA inspection, described below, Respondents, and/or persons acting on their behalf, had cleared and graded a significant portion of the construction project at the Site.
15. Stormwater, snow melt, surface drainage, and runoff water leave Respondents' Site and discharge through various drainage pathways to an unnamed tributary to Mill Creek and Mill Creek.
16. Stormwater from the Site contains "pollutants" as defined by Section 502(6) of the CWA, 33 U.S.C. § 1362(6).
17. The Site has "stormwater discharges associated with industrial activity" as defined by 40 C.F.R. § 122.26(b)(14), and is a "point source" as defined by Section 502(14) of the CWA, 33 U.S.C. § 1362(14).
18. Mill Creek and its tributary identified in Paragraph 16 above are "navigable waters" as defined by Section 502(7) of the CWA, 33 U.S.C. § 1362(7).
19. Stormwater runoff from Respondents' industrial activity at the 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).
20. Respondents' discharge of pollutants associated with an industrial activity, as defined by 40 C.F.R. § 122.26(b)(14), requires a permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.
21. KDHE NPDES General Permit No. KSR100000 ("Permit") dated July 14, 2017 was effective August 1, 2017; the Permit will expire on July 31, 2022. This Permit governs Respondents' stormwater discharges that are associated with industrial activity at the Site.
22. The principal requirement of the General Permit is for the owner or operator to develop and implement a Stormwater Pollution Prevention Plan ("SWPPP"). The SWPPP must identify potential sources of pollution which may reasonably be expected to affect the quality of the storm water discharge from the construction activities, describe and ensure the implementation of best management practices ("BMPs") that will be used to reduce the pollutants in storm water discharge associated with industrial activity for construction activities at the construction site and to assure compliance with the terms and conditions of the permit.
23. On February 1, 2018, Respondent Pyramid Contractors, Inc. submitted a Notice of Intent ("NOI") with KDHE, seeking coverage under the Permit, and on March 5, 2018, KDHE authorized the coverage under permit number KSR113472.

24. On March 27, 29, and April 2, 2019, EPA performed a Construction Stormwater Compliance Evaluation Inspection (“Inspection”) of the Site under the authority of Section 308(a) of the CWA, 33 U.S.C. § 1318(a), to evaluate Respondents’ compliance with the Permit and the CWA.

25. During the Inspection, the EPA inspector reviewed and obtained copies of documents related to the Permit, including without limitation, the Site’s SWPPP dated January 2018 and Site inspection and self-monitoring records. The EPA inspector also toured and photographed the Site.

26. During the inspection, the inspector observed and documented significant amounts of sediment in the unnamed tributary to Mill Creek and Mill Creek that could be traced back to the site.

27. At the conclusion of the Inspection, the EPA inspector issued a Notice of Potential Violation (“NOPV”) citing, *inter alia*, failure to properly install and maintain appropriate BMPs, failure to employ good housekeeping practices, failure to amend the SWPPP, failure to conduct and record adequate site inspections, and contribution to excursions above water quality standards. On April 12, 2019, Respondent Pyramid Contractors, Inc. provided a written response to the NOPV.

FINDINGS OF VIOLATION

Count 1

Failure to Ensure that Discharges do not Contribute to an Excursion of Kansas Surface Water Quality Standards

28. Paragraphs 1 through 27 are re-alleged and incorporated herein by reference.

29. Part 3, Paragraph 4 of the Permit, What This Permit or the Rainfall Erosivity Waiver Does Not Cover, states that the Permit does not authorize construction activities that result in the discharge of stormwater runoff which violates the Kansas Surface Water Quality Standards.

30. During the Inspection referenced above, the EPA inspector observed discharges of stormwater from the Site into the unnamed tributary to Mill Creek, resulting in observed increases of turbidity in both the unnamed tributary and Mill Creek, and which demonstrates a violation of Kansas Surface Water Quality Standards.

31. Respondents’ alleged failure to ensure that discharges from the Site do not contribute to an excursion of water quality standards is a violation of the NPDES Permit, and as such, is a violation of Sections 301(a) and 402(p) of the CWA, 33 U.S.C. §§ 1311(a), 1342(p).

Count 2

**Failure to Properly Install, Operate, and/or Maintain Best Management Practices
(alternatively, Failure to Fully Implement the Provisions of the SWPPP)**

32. Paragraphs 1 through 31 are re-alleged and incorporated herein by reference.
33. Part 7 of the Permit, SWPPP Requirements and Guidelines, states the permittee shall fully implement the provisions of the SWPPP as a condition of the Permit throughout the term of the construction project.
34. Part 7 of the Permit further states that the permittee shall select, install, utilize, operate and maintain effective BMPs.
35. Part 7.1 of the Permit, General SWPPP Requirements, states the permittee shall ensure the BMPs and/or pollution controls are properly installed and maintained at the locations and relative timeframes specified in the SWPPP.
36. Part 7.2.9. of the Permit, Additional Site Management BMPs, describes additional BMP requirements to minimize contamination of stormwater from building materials, the storage of chemicals, concrete washout, trash, etc. and can collectively be described as good housekeeping measures.
37. Part 7.3.2(11) of the NPDES permit, Detailed SWPPP Plan Requirements, states that the permittee shall minimize the generation of dust through the application of water or other dust suppression techniques.
38. Part 7.3.2(12) of the NPDES permit, Detailed SWPPP Plan Requirements, requires the permittee to minimize off-site tracking of soils by utilizing wheel washing facilities or an appropriately designed construction entrance and exit.
39. During the EPA Inspection referenced above, the inspector observed:
- a. The rock ditch checks (“RDCs”) observed during the Inspection were not constructed in accordance with the design described in the SWPPP, none of the RDCs met design specifications and many were either so poorly constructed and/or maintained that the inspector could not discern their original construction height, shape or composition, and the RDCs were largely ineffective at controlling either stormwater velocity or the discharge of sediment from the Site;
 - b. Many RDCs described in the SWPPP were not installed at the Site;
 - c. Significant rill erosion along the east side of Ridgeview Road near the bridge abutment and at the south bridge abutment and a general lack of controls in this area;

- d. None of the three construction entrances met the design specifications as very little rock was visible and soil was tracked out onto public roadways/parking areas;
- e. The failure by the permittee to employ good housekeeping practices required by the Permit as evidenced by the presence of a pile of used tires on the north side of 99th Street;
- f. All of the concrete washout pits were full and in need of maintenance and one had overflowed; and
- g. Significant dust being generated on the Site.

40. Respondents' alleged failure to properly install, operate, and/or maintain BMPs at the Site or, in the alternative, failure to fully implement the SWPPP is a violation of the NPDES Permit, and as such, is a violation of Sections 301(a) and 402(p) of the CWA, 33 U.S.C. §§ 1311(a), 1342(p). The failures to comply with the terms and conditions of the permit resulted in observed impacts to Mill Creek and its tributary.

Count 3

Failure to Update and Amend the SWPPP

41. Paragraphs 1 through 40 are re-alleged and incorporated herein by reference.

42. Part 7.3.2 of the Permit requires that the permittee shall modify or amend the SWPPP, at a minimum, whenever there is a change in design, operation, or maintenance of BMPs, pollution controls, or pollution prevention measures, and whenever the SWPPP is determined to be ineffective in significantly minimizing or controlling erosion and sedimentation, such as excessive site erosion, excessive sediment leaving the site, or excessive sediment deposits in drainage channels, streams, or lakes.

43. During the EPA inspection referenced above, in addition to the deficiencies listed in Paragraph 39, the inspector also observed:

- h. Three RDCs that were not in the SWPPP;
- i. Mulch berms used as a perimeter control throughout the Site instead of the silt fence as a perimeter control called for in the SWPPP; and
- j. Sediment traps onsite that were not constructed in accordance with specifications detailed in the SWPPP and were not effective.

44. The significance of the rill erosion, sediment migration, and impacts on the receiving streams observed during the inspection required amendment of the SWPPP and the installation of more robust BMPs to meet the requirements of the Permit.

45. Respondents' alleged failure to update and amend the SWPPP is a violation of the NPDES Permit, and as such, is a violation of Sections 301(a) and 402(p) of the CWA, 33 U.S.C.

§§ 1311(a), 1342(p). The failures to comply with the terms and conditions of the permit resulted in observed impacts to Mill Creek and its tributary.

Count 4

Failure to Document Adequate Inspections and Take Appropriate Corrective Action

46. The facts stated in Paragraphs 1 through 45 are re-alleged and incorporated herein by reference.

47. Part 7.2.10 of the Permit requires that the permittee shall ensure the entire Site is inspected on a regular schedule (not to exceed every 14 days), and by the end of the next day following a rain event which results in a rainfall total of 0.5 inches or greater. The Permit further requires that a report of each regularly scheduled inspection and required rain event inspection shall be documented and any deficiencies in the operation and maintenance, effectiveness, adequacy or coverage extent of all installed BMPs shall be noted in the inspection report and corrected within seven days unless infeasible.

48. The EPA inspector reviewed several months of inspection reports generated by Respondent Pyramid Contractors, Inc. and noted that none of the BMP or other site deficiencies identified during the EPA Inspection, including RDC construction and effectiveness, rill erosion, full concrete washouts, etc. were included in Respondent Pyramid Contractors, Inc.'s recent inspection reports.

49. Respondents' alleged failure to document adequate inspections and take appropriate corrective action is a violation of the terms and conditions of the NPDES Permit, and as such, is a violation of Section 402(p) of the CWA, 33 U.S.C. §1342(p).

ORDER FOR COMPLIANCE

Based on the findings set forth above, and pursuant to Section 309(a)(3) of the CWA, 33 U.S.C. § 1319(a)(3), Respondents are hereby ORDERED as follows:

50. Respondents shall comply with the SWPPP, the terms and conditions of the NPDES permit, and the CWA.

51. Within seven (7) days of the effective date of this Order, Respondents 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 the applicable requirements of the NPDES Permit.

52. Within fourteen (14) days of the effective date of this Order, Respondents shall provide EPA and KDHE a written description of the actions they have taken to correct the deficiencies and eliminate and prevent recurrence of the violations cited above.

53. Respondents shall submit to EPA site inspection reports as required by their NPDES Permit monthly until written termination of this Order, as described in Paragraph 66.

All required documents, including certifications, shall be submitted by electronic mail to:

sans.cynthia@epa.gov
Cynthia Sans
U.S. Environmental Protection Agency – Region 7
Water, Wetlands and Pesticides Division
11201 Renner Boulevard
Lenexa, Kansas 66219.

Electronic submissions will be deemed submitted on the date they are transmitted electronically. Any report, notification, certification, or other communication that cannot be submitted electronically shall be submitted in hard-copy as provided in this Paragraph.

All documents required to be submitted to KDHE pursuant to this Order shall be submitted by mail to:

Tom Stiles, Acting Director
Kansas Department of Health and Environment
Bureau of Water
1000 SW Jackson Street, Suite 420
Topeka, Kansas 66612-1367.

GENERAL PROVISIONS

Opportunity to Confer

54. Within five days of receipt of this Order, Respondents may request a conference regarding the Order or to submit information to EPA. If Respondents request a conference or wish to submit information, the conference or submission of information shall take place within 10 days of receipt of this Order. EPA shall deem a failure to request a conference or to submit information as a waiver of the opportunity to confer.

55. Requests for a conference shall be made in writing to the EPA contact identified in Paragraph 53.

Effect of Compliance with the Terms of This Order

56. This Order shall not constitute a permit under the CWA. Compliance with the terms of this Order shall not relieve Respondents of their responsibility to obtain any required local, state, and/or federal permits.

57. 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 Section 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.

Amendments

58. EPA may subsequently amend this Order in accordance with the authority of the CWA. For example, EPA may amend this Order to address any non-compliance with the CWA, including, but not limited to, any non-compliance with the requirements of Section 402 of the CWA. In the event of any such subsequent amendment to this Order, all requirements for performance of this Order not affected by the amendment shall remain as specified by this original Order.

Access and Requests for Information

59. Nothing in this Order shall limit EPA's right to obtain access to, and/or to inspect property operated by Respondents and/or to request additional information from Respondents, pursuant to the authority of Section 308 of the CWA, 33 U.S.C. § 1318 and/or any other authority.

Severability

60. If any provision or authority of this Order, or the application of this Order to Respondents, is held by federal judicial authority to be invalid, the application to Respondents of the remainder of this Order shall remain in full force and effect and shall not be affected by such a holding.

Parties Bound

61. This Order shall apply to and be binding upon Respondents, their agents, successors and assigns. Respondents shall ensure that any directors, officers, employees, contractors, consultants, firms or other persons or entities acting under or for them with respect to matters included herein comply with the terms of this Order.

Confidential Business Information

62. Pursuant to 40 C.F.R. §§ 2.201-2.311, Respondents may assert a business confidentiality claim covering any portion of the submitted information which is entitled to confidential treatment and which is not effluent data. For any such claim, describe the basis for the claim under the applicable regulation. Any material for which business confidentiality is claimed should be placed in a separate envelope labeled, "Confidential Business Information." Failure to assert a claim in the manner described in 40 C.F.R. § 2.203(b) allows EPA to release

the submitted information to the public without further notice. EPA may disclose information subject to the business confidentiality claim only to the extent set forth in the above-cited regulations. Special rules governing information obtained under the CWA appear in 40 C.F.R. § 2.302.

Failure to Comply

63. Notice is hereby given that violation of, or failure to comply with, any of the provisions of the foregoing Order may subject Respondents to (1) civil penalties of up to \$54,833 per day for each violation, pursuant to Section 309(d) of the CWA, 33 U.S.C. § 1319(d); or (2) civil action in federal court for injunctive relief, pursuant to Section 309(b) of the CWA, 33 U.S.C. § 1319(b).

Judicial Review

64. Respondents have the right to seek immediate federal judicial review of the Order pursuant to Chapter 7 of the Administrative Procedure Act, 5 U.S.C. §§ 701-706. Section 706, which is set forth at <http://uscode.house.gov/download/pls/05C7.txt>, provides the grounds for such review.

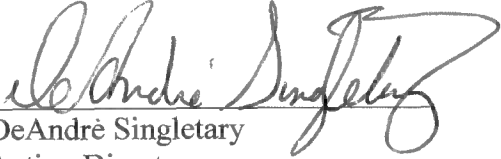
Effective Date

65. The terms of this Order shall be effective and enforceable against Respondents upon their receipt. All time periods herein shall be calculated therefrom unless otherwise provided in this Order.

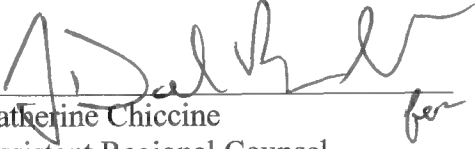
Termination

66. This Order shall remain in effect until a written notice of termination is issued by an authorized representative of EPA.

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


DeAndrè Singletary
Acting Director
Enforcement and Compliance Assurance Division

5/7/19
DATE


Catherine Chiccine
Assistant Regional Counsel
Office of Regional Counsel

5/8/19
DATE

CERTIFICATE OF SERVICE

I certify that on the date noted below I hand delivered the original and one true copy of this Administrative Order for Compliance on Consent to the Regional Docket Clerk, U.S. Environmental Protection Agency, 11201 Renner Boulevard, Lenexa, Kansas 66219.

I further certify that on the date noted below I mailed the foregoing Findings of Violation and Order for Compliance by certified mail, return receipt requested, to:

Pyramid Contractors, Inc.
Registered Agent: Connie Lewis
795 W. Ironwood Drive
Olathe, KS 66061;

City of Lenexa
c/o Mayor Michael Boehm
17101 W. 87th St. Pkwy.
Lenexa, KS 66219; and

Tom Stiles, Acting Director
Kansas Department of Health and Environment
Bureau of Water
1000 SW Jackson Street, Suite 420
Topeka, KS66612-1367.

Date

5/8/19

