

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 storm water. Section 402(p) of the CWA requires, in part, that a discharge of storm water 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 storm water 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 storm water associated with industrial activity to apply for an individual permit or to seek coverage under a promulgated storm water general permit.

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 (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, 33 U.S.C. § 1342. EPA maintains concurrent enforcement authority with delegated states for violations of the CWA.

10. KDHE has issued a general permit for the discharge of storm water under the NPDES, Permit No. S-MCST-0110-1. The general permit governs storm water discharges associated with construction or land disturbance activity and provides coverage to a person when KDHE authorizes a Notice of Intent (NOI) for land disturbance activities. The general permit became effective on March 1, 2003 and expires on December 31, 2006.

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 the Jackson Heights Development located on Highway 5 (Tonganoxie Road), Tonganoxie Kansas (“Site”). Beginning in approximately April 2004, through at least May 10, 2005, construction activities occurred at the Site that included clearing, grading, and excavation which disturbed five (5) or more acres of total land area and/or which disturbed less than five (5) acres of total land area but that was part of a larger common plan of development or sale. Specifically, the Site consists of an estimated sixty-five (65) acres, with plans for 191 residential lots. To date, Respondent’s development of the Site has proceeded in two phases, a 7.69 acre phase (Jackson Heights I) and 6.02 acre phase (Jackson Heights II).

13. Storm water, snow melt, surface drainage and runoff water leaves Respondent's facility and goes into an unnamed tributary which transects the Site and flows into Tonganoxie Creek. The runoff and drainage from Respondent's facility is "storm water" as defined by 40 C.F.R. § 122.26(b)(13).

14. Storm water contains "pollutants" as defined by Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

15. The Site has "storm water 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. Respondent discharged pollutants into the unnamed tributary of Tonganoxie Creek. The unnamed tributary and Tonganoxie Creek are each "navigable waters," as defined by CWA Section 502(7), 33 U.S.C. § 1362(7).

17. Storm water 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).

18. 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.

19. On May 10, 2005, representatives of EPA 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 Respondent's compliance with Sections 301 and 402 of the CWA. Following EPA's inspection, EPA contacted KDHE and found that Respondent had never applied for, nor obtained, the storm water general permit required for its land disturbance activities. Additionally, during EPA's inspection, EPA observed that Respondent had failed to comply with the substantive requirements for control of storm water runoff

20. Following EPA's inspection, on May 17, 2005, Respondent applied for the required NPDES permit coverage under the general permit described in paragraph 10 above. Respondent's NOI states that the disturbance of Jackson Heights I portion of the Site was scheduled to be completed by December 25, 2005. On May 23, 2005, KDHE authorized Respondent's NOI for the Jackson Heights I portion of the Site, and the terms of KDHE's general storm water permit (Kansas Permit No. KS71-0011, EPA Permit No. R-102513) became effective and enforceable for all future land disturbance activities at the Site. Additionally, a general storm water permit was authorized for the Jackson Heights II portion of the Site (Kansas Permit No. KS71-0012, EPA Permit No. R-102514) authorizing land disturbance activities described as scheduled to begin on May 25, 2005 and end on December 25, 2005.

B. Findings of Violation

Failure to Obtain a Permit

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

22. Between April 2004 and May 23, 2005, Respondent failed to obtain authorization pursuant to a Kansas general storm water NPDES permit for the construction and land disturbance activities occurring on the Site, as required by 40 C.F.R. § 122.26(b)(14)(x), and Section 402 of the CWA, 33 U.S.C. § 1342.

23. Respondent's failure to obtain a permit before commencing land disturbing activities was a violation of Sections 301(a) and 402(p) of the CWA, 33 U.S.C. § 1311(a) and § 1342(p).

C. Order For Compliance

24. 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 25 through 27.

25. Within thirty (30) days of the effective date of this Order, Respondent 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 the permits issued to Respondent (Kansas Permit No. KS71-0011, EPA Permit No. R-102513 and Kansas Permit No. KS71-0012, EPA Permit No. R-102514). Such actions shall include, but shall not be limited to, a description of the corrective actions necessary to address the following deficiencies observed during EPA's May 10, 2005, inspection of the Site (Jackson Heights I and II):

- a. Respondent's failure to develop a Stormwater Pollution Prevention Plan (SWPPP);
- b. Respondent's failure to properly install Best Management Practices (BMP) by construction of a sedimentation basin properly sized for the size of the Site; and
- c. Respondent's failure to properly maintain required BMPs (i.e., by allowing numerous silt fences to be undermined, overrun, or filled with sediment).

26. 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 and schedule (Plan) for the elimination of the cited violations to EPA for review and approval. EPA may approve the Plan, disapprove the Plan and request revisions and resubmittal of the Plan, or modify the Plan and approve the Plan as modified. The Plan shall describe in detail the specific corrective actions to be taken and why such actions are sufficient to correct the violations. The proposed schedule for the elimination of the violations shall require compliance within the shortest possible time, as well as specify whatever measures are necessary to prevent these or similar violations from recurring.

27. Within thirty (30) days of the effective date of this Order, the Respondent shall submit a written report to EPA that details the specific actions taken to correct the deficiencies cited in paragraph 26, above, and explaining why such actions are anticipated to be sufficient to prevent recurrence of these or similar violations. Thereafter, no later than the 15th day of each month for a period of twelve (12) months, Respondent shall submit to EPA a copy of the written inspection reports for the preceding month, as required by Part IV of the general storm water permit described in Paragraph 10, above.

Submissions

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

Larry Long
Water, Wetlands, and Pesticides Division
U.S. Environmental Protection Agency - Region VII
901 North Fifth Street
Kansas City, Kansas 66101.

29. A copy of documents required to be submitted to KDHE by this Order, shall be submitted by mail to:

Mr. Don Carlson
Kansas Department of Health and Environment
Bureau of Water
1000 SW Jackson Street, Suite 420
Topeka, Kansas 66612-1367.

General Provisions

Effect of Compliance with the Terms of this Order for Compliance

30. 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, for violations of the CWA.

31. This Order does not constitute a waiver or a modification of any requirements of the Clean Water Act, 33 U.S.C. § 1251 et seq., all of which remain in full force and effect. The EPA retains the right to seek any and all remedies available under Sections 309 of the Act, 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 Act for any violation whatsoever.

Access and Requests for Information

32. 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

33. 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

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

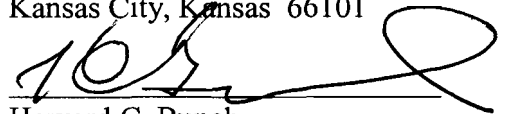
Termination

35. This Order shall remain in effect until a written notice of termination is issued by an authorized representative of the U.S. Environmental Protection Agency. Such notice shall not be given until all of the requirements of this Order have been met.

Issued this 1st day of November, 2005.


Leo J. Alderman

Director
Water, Wetlands and Pesticides Division
U.S. Environmental Protection Agency
Region VII
901 North Fifth Street
Kansas City, Kansas 66101



Howard C. Bunch
Sr. Assistant Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency
Region VII
901 North Fifth Street
Kansas City, Kansas 66101

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:

Jack Willis, Registered Agent
South Park Development Company. L.L.C.
410 Smiley
P.O. Box 147
Tonganoxie, KS 66086

and

Mr. Don Carlson
Kansas Department of Health and Environment
Bureau of Water
1000 SW Jackson Street, Suite 420
Topeka, Kansas 66612-1367.

11/2/05
Date

Ethel C. Watchett