

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-07-2010-0137
)
Garney Construction, Inc., and)
Garney Companies, Inc.)
1333 N.W. Vivion Road)
Kansas City, Missouri 64118)
)
) CONSENT AGREEMENT/
) FINAL ORDER
)
)
Respondents)
)
)
Proceedings under Section 309(g) of the)
Clean Water Act, 33 U.S.C. § 1319(g))
)
_____)

The United States Environmental Protection Agency (EPA), Region 7 (Complainant) and the two Respondents, Garney Construction, Inc. and Garney Companies, Inc., (Respondents) have agreed to a settlement of this action before the filing of a complaint, and thus this action is simultaneously commenced and concluded pursuant to Rules 22.13(b) and 22.18(b)(2) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits (Consolidated Rules), 40 C.F.R. §§ 22.13(b) and 22.18(b)(2).

ALLEGATIONS

Jurisdiction

1. This is an administrative action for the assessment of civil penalties instituted pursuant to Section 309(g) of the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act (CWA), 33 U.S.C. § 1319(g), and in accordance with the Consolidated Rules, 40 C.F.R. Part 22.

2. This Consent Agreement and Final Order (CA/FO) serves as notice that EPA has reason to believe that Respondent has violated Sections 301 and 402 of the CWA, 33 U.S.C. § 1311 and § 1342, and regulations promulgated thereunder.

Parties

3. The authority to take action under Section 309(g) of the CWA, 33 U.S.C. § 1319(g), is vested in the Administrator of 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 Water, Wetlands and Pesticides Division of EPA, Region 7 (Complainant).

4. The Respondents are Garney Construction, Inc., and Garney Companies, Inc. Both companies are registered under the laws of Kansas and are authorized to conduct business in the State of Kansas.

Statutory and Regulatory Framework

5. 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.

6. 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.

7. 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, 33 U.S.C. § 1342(p), 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.

8. 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.

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. 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.

11. 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 authorized states for violations of the CWA.

12. The KDHE issued a General Permit for the discharge of stormwater under the NPDES, Permit No. KSR100000. This General Permit became effective on January 2, 2007, and expires on December 31, 2011. This General Permit governs construction or land disturbance activity (e.g., clearing, grubbing, excavating, grading, and other activity that results in the destruction of the root zone and/or land disturbance activity that is reasonably certain to cause pollution to waters of the state). This General Permit also applies to land disturbance activities near valuable resource waters.

Factual Background

13. Respondents are each a "person" as defined by Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

14. At all times relevant to this action, Respondents were the operators at a construction site known as Johnson County Water One Projects MP-05322 and MP-05323 ("Site") which extended along K-7 in Johnson County, Kansas and paralleled 118th Street and 115th Street in Wyandotte County, 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.

15. Respondents applied for and were issued NPDES permit coverage under the General Permit described in paragraph 12, above, for the entire site. KDHE assigned Respondents permit number KSR104682, which was issued on October 15, 2007, authorizing Respondent to operate under the General Permit.

16. Stormwater, snow melt, surface drainage, and runoff water from Respondents' facility goes into East Mission Creek; the Kansas River; Clear Creek, which is a tributary of Mill Creek and the Kansas River; an unnamed tributary to the Kansas River; Conner Creek, a tributary to the Missouri River; Honey Creek, a tributary to the Missouri River; and Island

Creek, a tributary to the Kansas River . The runoff and drainage from Respondents' facility is "stormwater" as defined by 40 C.F.R. § 122.26(b)(13).

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

18. 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).

19. Respondents discharged pollutants into "navigable waters" as defined by CWA Section 502, 33 U.S.C § 1362.

20. Stormwater runoff from Respondents' 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).

21. Respondents' 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.

22. On January 14, 20, 22 and February 10, 2009, 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 Install Best Management Practices (BMPs)

23. Paragraphs 1 through 22 above are herein incorporated.

24. Part 7 of Respondents' General Permit states that "the permittee shall select, install, utilize and maintain the 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)."

25. At the time of the EPA inspections referenced in paragraph 22 above, Respondents had not installed all necessary BMPs on the Site, as required by the General Permit. Specifically: Respondents failed to install or complete the installation of silt fences on the slope at the Southwest corner of 118th and Riverview Road, and on the shoulder of Westbound Interstate 70 north of 118th Street, in Wyandotte County; Respondents failed stabilize the slope in the area along the first mile north of K-32 in Wyandotte County for a significant period of time during the construction activity; and Respondents failed to install required BMPs or complete required stabilization in an area west of K-7, approximately 400 feet north of Johnson Drive, in Johnson County for a significant period of time during the construction activity.

26. Respondents' failure to install and maintain adequate BMPs is a violation of Respondent's Permit, and as such, is a violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a), and a permit issued pursuant to Section 402(p) of the CWA, 33 U.S.C. § 1342(p).

Count 2

Failure to Design, Implement or Maintain Best Management Practices (BMPS)

27. Paragraphs 1 through 26 above are herein incorporated.

28. Part 7 of Respondents' General Permit states that "the permittee shall select, install, utilize and maintain the 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)."

29. At the time of the EPA inspections referenced in paragraph 22 above, Respondents had not maintained necessary BMPs on the Site, as required by the General Permit. Specifically: Respondents failed to maintain silt fencing throughout the entire site for a significant period of time during the construction activity; Respondents failed to adequately maintain inlet protection for the storm drains on the east side of 121st street in Wyandotte County for a significant time period during the construction activity; Respondents failed to adequately stabilize the slope that is west of K-7 and 1,500 feet south of 47th Street for a significant period of time during the construction activity; and Respondents failed to properly trench ditch checks for the area west of K-7 between Johnson Drive and Shawnee Mission Parkway for a significant time during the construction activity.

30. Respondents' failure to design, implement or maintain adequate BMPs is a violation of Respondents' Permit, and as such, is a violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a), and a permit issued pursuant to Section 402(p) of the CWA, 33 U.S.C. § 1342(p).

Count 3

Failure to Amend the Stormwater Pollution Prevention Plan (SWP2)

31. Paragraphs 1 through 30 above are herein incorporated.

32. Part 7 of Respondents' General Permit requires that Respondents "develop a Stormwater Pollution Prevention Plan (SWP2) which is specific to the construction activities which are to be employed at the site authorized by the general permit to discharge stormwater runoff." Part 7.1 of Respondents' General Permit required the Respondents to "amend the SWP2 plan, at a minimum whenever: there is a change in design, operation or maintenance of BMPs . . ."

33. During the EPA inspection referenced in paragraph 22 above, the EPA inspector discovered that the 348 ditch checks depicted in Respondents' E&SC Plan, which is part of the the SWP2, were generally not implemented. Respondents later explained to EPA that these measures were not implemented because they were judged to be impractical due to the quantity of traffic along the corridor during the period of active construction.

34. Respondents' decision not to implement the ditch checks constituted a change in the "design, operation or maintenance of BMPs", however, Respondents' failed to amend its SWP2, as required by the General Permit.

35. Respondents' failure to amend the SWP2 by describing the decision not to implement the ditch checks is a violation of Respondents' Permit, and as such, is a violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a), and a permit issued pursuant to Section 402(p) of the CWA, 33 U.S.C. § 1342(p).

36. Based on the foregoing Findings of Violation, and pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), EPA, Region 7 hereby proposes to issue a Final Order assessing an administrative penalty jointly against the Respondents for the violations cited in Counts 1 through 3 above, in the amount of \$45,000.

CONSENT AGREEMENT

37. Respondents and EPA agree to the terms of this CA/FO and Respondents agree to comply with the terms of the Final Order portion of this CA/FO.

38. Respondents admit the jurisdictional allegations of this CA/FO and agree not to contest EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of the Final Order portion of this CA/FO.

39. Respondents neither admit nor deny the factual allegations set forth above.

40. Respondents waive their right to a judicial or administrative hearing on any issue of fact or law set forth above, and their right to appeal the Final Order portion of this CA/FO.

41. Respondents and Complainant agree to conciliate the matters set forth in this CA/FO without the necessity of a formal hearing and agree to bear their own costs and attorney's fees incurred as a result of this action.

42. The undersigned representative of Respondents certify that he or she is fully authorized to enter the terms and conditions of this CA/FO and to execute and legally bind Respondents to it.

43. Nothing contained in the Final Order portion of this CA/FO shall alter or otherwise affect Respondents' obligation to comply with all applicable federal, state and local environmental statutes and regulations and applicable permits.

44. This CA/FO addresses all civil and administrative claims for the CWA violations identified above. Complainant reserves the right to take any enforcement action with respect to any other violations of the CWA or any other applicable law.

45. Each Respondent certifies by the signing of this CA/FO that to the best of its knowledge, its facility is in compliance with all requirements of Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342.

46. The effect of settlement described above is conditional upon the accuracy of the Respondents' representations to EPA, as memorialized in paragraph 45 above, of this CA/FO.

47. Respondents agree that, in settlement of the claims alleged in this CA/FO, they shall pay a joint penalty of \$45,000 as set forth in paragraph 1 of the Final Order.

48. Respondents understand that failure to pay any portion of the civil penalty on the date the same is due may result in the commencement of a civil action in Federal District Court to collect said penalty, along with interest thereon at the applicable statutory rate.

FINAL ORDER

Payment Procedures

Pursuant to the authority of Section 309(g) of the CWA, 33 U.S.C. § 1319(g), and according to terms of this CA/FO, IT IS HEREBY ORDERED THAT:

1. Respondents shall pay a mitigated civil penalty of Forty-five Thousand Dollars (\$45,000) within thirty (30) days of the effective date of this Final Order.
2. Payment of the penalty shall be by cashier or certified check made payable to the "United States Treasury" and remitted to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, Missouri 63197-9000.

This payment shall reference docket number CWA-07-2010-0137.

Copies of the check shall be mailed to:

Raymond C. Bosch
Assistant Regional Counsel
U.S. Environmental Protection Agency - Region 7
901 North 5th Street
Kansas City, Kansas 66101

and to

Kathy Robinson
Regional Hearing Clerk
U.S. Environmental Protection Agency - Region 7
901 North 5th Street
Kansas City, Kansas 66101.

3. No portion of the civil penalty or interest paid by Respondents pursuant to the requirements of this CA/FO shall be claimed by Respondents as a deduction for federal, state, or local income tax purposes.

Parties Bound

4. This Final Order portion of this CA/FO shall apply to and be binding upon Respondents and Respondents' agents, successors and/or assigns. Respondents shall ensure that all contractors, employees, consultants, firms or other persons or entities acting for Respondents with respect to matters included herein comply with the terms of this CA/FO.

General Provisions

5. Notwithstanding any other provision of this CA/FO, EPA reserves the right to enforce the terms of the Final Order portion of this CA/FO by initiating a judicial or administrative action pursuant to Section 309 of the CWA, 33 U.S.C. § 1319, and to seek penalties against Respondents or to seek any other remedy allowed by law.

6. Complainant reserves the right to take enforcement action against Respondents for any future violations of the CWA and its implementing regulations and to enforce the terms and conditions of this CA/FO.

7. This Order shall be entered and become effective only after the conclusion of the period of public notice and comment required pursuant to Section 309(g)(4) of the CWA, 33 U.S.C. § 1319(g)(4), and 40 C.F.R. § 22.45. Unless otherwise stated, all time periods stated herein shall be calculated in calendar days from such date.

8. Respondents and Complainant shall bear their respective costs and attorney's fees.

9. The headings in this CA/FO are for convenience of reference only and shall not affect interpretation of this CA/FO.

COMPLAINANT:
U.S. ENVIRONMENTAL PROTECTION AGENCY

9/29/10

Date

William A. Spratlin

William A. Spratlin

Director

Water, Wetlands and Pesticides Division

9-29-2010

Date

Raymond C. Bosch

Raymond C. Bosch

Assistant Regional Counsel

Office of Regional Counsel

RESPONDENT:
GARNEY CONSTRUCTION, INC.

8-16-10
Date

Stephen M. McCandless

Name (Print) STEPHEN M. MCCANDLESS

Title SR. VICE PRESIDENT

RESPONDENT:
GARNEY COMPANIES, INC.


8-16-10
Date

Stephen M. McCandless

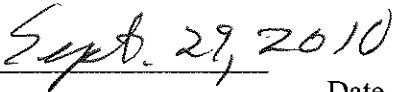
Name (Print) STEPHEN M. MCCANDLESS

Title SR. VICE PRESIDENT

IT IS SO ORDERED. This Final Order shall become effective immediately.



Robert Patrick
Regional Judicial Officer



Date

I certify that a true and correct copy of the foregoing CA/FO was sent this day in the following manner to:

Copy hand delivered to
Attorney for Complainant:

Raymond C. Bosch
Assistant Regional Counsel
United States Environmental Protection Agency
901 North 5th Street
Kansas City, Kansas 66101

Copy by Certified Mail Return Receipt to:

Jessica Merrigan
Attorney at Law
Lathrop and Gage, LLC
2345 Grand Blvd
Suite 2800
Kansas City, MO 64108

Sent via first class mail to:

Karl Mueldener
Kansas Department of Health and Environment
1000 SW Jackson - Suite 560
Topeka, Kansas 66612-1368

9/30/10
Date

Kathy Robinson