

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VII
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)
)
)
Washam Development, LLC)
d/b/a Washam Construction, Inc.)
2058 NW South Outer Road)
Blue Springs, Missouri 64015)
)
Respondent)
)
Proceedings under Section 309(g) of the)
Clean Water Act, 33 U.S.C. § 1319(g))
)
_____)

Docket No. CWA-07-2006-0155

COMPLAINT AND
CONSENT AGREEMENT/
FINAL ORDER

COMPLAINT

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 of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. Part 22.

2. This Complaint serves as notice that the United States Environmental Protection Agency ("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. Respondent is Washam Development, LLC, d/b/a Washam Construction, Inc., a company incorporated under the laws of Missouri and authorized to conduct business in the State of Missouri.

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 storm water. Section 402(p) of the CWA, 33 U.S.C. § 1342(p), 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.

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 storm water discharges at 40 C.F.R. § 122.26.

9. 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.

10. 40 C.F.R. § 122.26(b)(14)(x) defines “storm water discharge associated with industrial activity,” as “construction activity including clearing, grading, and excavation, except operations that result in the disturbance of less than five acres of total land area. Construction activity also includes the disturbance of less than five acres of total land area that is part of a larger common plan of development or sale if the larger common plan will ultimately disturb five acres or more.

11. The Missouri Department of Natural Resources (“MDNR”) is the state agency with the authority to administer the federal NPDES program in Missouri pursuant to Section 402 of the CWA, 33 U.S.C. § 1342. The EPA maintains concurrent enforcement authority with delegated states for violations of the CWA.

12. The MDNR issued a General Permit to Washam Construction, Inc. for the discharge of storm water under the NPDES, Permit No. MO-R109D40 (“Permit”). The Permit became effective on March 8, 2002, and expires on March 7, 2007. The Permit governs storm water discharges associated with construction or land disturbance activity (e.g., clearing, grubbing,

excavating, grading, and other activity that results in the destruction of the root zone). The Permit also applies to land disturbance activities near valuable resource waters.

Factual Background

13. Respondent is 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, Respondent was the owner and/or operator of a construction site known as Whispering Park 1st Plat located at the NW corner of Duncan Road and Dillingham Road, Grain Valley, Missouri (“Site”). 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. Storm water, snow melt, surface drainage and runoff water leaves Respondent’s facility and flows south into Swiney Branch. From the southeast corner of the site, Swiney Branch flows approximately 2.2 miles south east into Sni-A-Bar Creek. The runoff and drainage from Respondent’s facility is “storm water” as defined by 40 C.F.R. § 122.26(b)(13).

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

17. Respondent’s storm water runoff is the “discharge of a pollutant” as defined by CWA Section 502(12), 33 U.S.C. § 1362(12).

18. The Site was a “point source” which caused the “discharge of pollutants” as defined by CWA Section 502, 33 U.S.C. § 1362.

19. Respondent discharged pollutants into Swiney Branch, a tributary of Sni-A-Bar Creek. Swiney Branch and Sni-A-Bar Creek are “navigable waters” as defined by CWA Section 502, 33 U.S.C § 1362.

20. 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.

21. Respondent applied for and was issued NPDES permit coverage under the General Permit described in paragraph 12 above. MDNR assigned Respondent Permit No. MO-R109D40, which was issued on June 25, 2004.

22. On March 21 and 22, 2005, 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.

Findings of Violation

Count 1

Failure to Maintain Pollution Control Measures

23. The facts stated in paragraphs 13 through 22 above are herein incorporated.

24. Part 7 of the Requirements and Guidelines section of Respondent's Permit requires Respondent to maintain all pollution control measures and systems in good order to achieve compliance with the terms of the General Permit.

25. The inspection referenced in paragraph 22 above revealed that Respondent's pollution control measures, including silt fences, were not properly maintained. Specifically, several silt fences near the drain inlets and outlets that lead to Swiney Branch between Lots 40 and 41 and Lots 4 and 5 were down and full of sediment.

26. Respondent's failure to properly maintain its pollution control measures is a violation of Respondent's General 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 Appropriate Best Management Practices

27. The facts stated in paragraphs 13 through 22 above are herein incorporated.

28. Part 8.e. of the Requirements and Guidelines section of Respondent's Permit states that storm water runoff from disturbed areas which leave the site boundary shall pass through an appropriate impediment to sediment movement, such as a sedimentation basin, sediment trap, silt fence, etc., prior to leaving the construction site.

29. The inspection referenced in paragraph 22 above revealed that Respondent did not install appropriate impediments to sediment movement for storm water to pass through prior to leaving the construction site in the following areas.

- a. Part 8.d. of the Requirements and Guidelines section of Respondent's Permit states that where soil disturbing activities cease in an area for more than 14

days, the disturbed areas shall be protected from erosion by stabilizing the area with mulch or other similarly effective control Best Management Practices (“BMPs”). At the time of inspection, soil disturbing activities had ceased on the Site for a minimum of 81 days, and Respondent failed to stabilize the Site with mulch or other similarly effective erosion control BMPs, resulting in erosion and sediment runoff.

- b. Respondent’s Stormwater Pollution Prevention Plan (“SWPPP”) includes placement of a temporary sediment basin upstream of the drain inlet between Lots #40 and #41. At the time of inspection, the temporary sediment basin was not in place, resulting in erosion and sediment runoff.
- c. Part 7 of the Requirements and Guidelines section of Respondent’s Permit states that BMPs must be selected, installed, used, operated, and maintained in accordance with, inter alia, MDNR’s “Protecting Water Quality: A field guide to erosion, sediment, and storm water best management practices for development sites in Missouri.” The guide specifies that a rock outlet should be used where concentrated storm water outlet velocity creates potential for downstream erosion. At the time of inspection, the concentrated storm water outlet between lots 4 and 5 was unprotected and discharged directly down the soil bank of Swiney Branch.
- d. Respondent’s SWPPP includes placement of straw bales perpendicular to the swale area. At the time of inspection, no straw bales were in place, resulting in erosion and sediment runoff.

30. Respondent’s failure to install appropriate impediments to sediment movement is a violation of Respondent’s General 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 Perform and Document Site Inspections

- 31. The facts stated in paragraphs 13 through 22 above are herein incorporated.
- 32. Part 10 of the Requirements and Guidelines section of Respondent’s Permit requires that regular inspections be performed at a minimum of once per week on disturbed areas which have not been finally stabilized. In addition, it requires that any deficiencies be noted in a report and corrected within seven (7) calendar days of the inspection. The report is to be kept at a site which is readily available from the permitted site until final stabilization is achieved.

33. The inspection referenced in paragraph 22 above revealed that Respondent did not adequately perform site inspections at a minimum of once per week, note any deficiencies in a report, correct the deficiencies within seven (7) calendar days of the inspection, or keep the report at a site which is readily available from the permitted site. Specifically, the inspection revealed that Respondent failed to perform and document inspections after December 2004. In addition, Respondent's inspection reports from June to December 2004, failed to document the actions taken or necessary to correct the pollution control deficiencies. The reports also failed to identify areas where land disturbance operations had permanently or temporarily ceased.

34. Respondent's failure to perform and document site inspections is a violation of Respondent's General 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).

CONSENT AGREEMENT

35. Respondent admits the jurisdictional allegations of this Complaint and Consent Agreement/Final Order and agrees not to contest EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of the Consent Agreement/Final Order.

36. Respondent neither admits nor denies the factual allegations or Findings of Violations contained in this Complaint and Consent Agreement/Final Order.

37. Respondent explicitly waives its right to a hearing on any issue of fact or law set forth in the Complaint.

38. Respondent waives any right to contest the allegations in the above Complaint and its right to appeal the proposed Final Order accompanying this Complaint and Consent Agreement.

39. Respondent and Complainant shall pay their own costs and attorneys' fees incurred as a result of this action.

40. This Complaint and Consent Agreement/Final Order shall not relieve Respondent of its obligation to comply with all applicable provisions of federal, state or local law, nor shall it be construed to be a ruling on, or determination of, any issue related to any federal, state or local permit.

41. Solely for the purpose of settling this matter and thereby avoiding the expense and uncertainties involved in a formal adjudication, Respondent consents to the issuance of the Final Order hereinafter recited and consents to the payment of the civil penalty as set forth in the Final Order.

42. Respondent agrees to pay a mitigated civil penalty of Forty Thousand Dollars (\$40,000) within thirty (30) days of the effective date of the Complaint and Consent Agreement/Final Order (the date by which payment must be received shall hereafter be referred to as the "due date"). The effective date of the Final Order is the date on which it is signed by the Regional Judicial Officer, following Respondent's signature and the conclusion of the public comment period required under Section 309(g)(4)(A) of the CWA.

43. Payment of this civil penalty shall resolve all civil and administrative claims of the United States alleged in the above Complaint.

44. The penalty payment made by Respondent pursuant to this Complaint and Consent Agreement/Final Order is payment of a civil penalty and shall not be deductible for purposes of federal taxes.

45. Each signatory to this Agreement certifies that he or she is fully authorized to enter into the terms and conditions of this Complaint and Consent Agreement/Final Order.

46. Respondent certifies by the signing of this Complaint and Consent Agreement/Final Order that it is in compliance at the Whispering Park 1st Plat site with the requirements of Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342.

47. The effect of settlement described in paragraph 43 above is conditional upon the accuracy of the Respondent's representations to EPA, as memorialized in paragraph 46 above of this Complaint and Consent Agreement/Final Order.

FINAL ORDER

Pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), and based upon information contained in this Consent Agreement, IT IS HEREBY ORDERED THAT:

1. Respondent shall pay a civil penalty of Forty Thousand Dollars (\$40,000). The payment shall identify the Respondent by name and docket number and shall be by certified or cashiers check made payable to "United States Treasury," and remitted to:

Mellon Bank
US EPA Region 7
PO Box 371099M
Pittsburgh, PA 15251

Copies of the check shall be mailed to:

Jonathan W. Meyer
Assistant Regional Counsel
U.S. Environmental Protection Agency
901 North 5th Street
Kansas City, Kansas 66101

and

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

2. Should the civil penalty not be paid as provided above, interest will be assessed at the annual rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717. The interest will be assessed on the overdue amount from the due date through the date of payment. Failure to pay the civil penalty when due may result in the commencement of a civil action in Federal District Court to collect said penalty, together with costs and interest. A late payment handling charge of Fifteen Dollars (\$15) will be imposed for payments received thirty (30) days after any date of payments, and an additional Fifteen Dollars (\$15) will be charged for each subsequent thirty (30) day period.

3. The EPA reserves the right to enforce the terms of this Consent Agreement/Final Order by initiating a judicial or administrative action pursuant to Section 309 of the CWA, 33 U.S.C. § 1319.

4. With respect to matters not addressed in this Complaint and Consent Agreement/Final Order, EPA reserves the right to take any enforcement action pursuant to the CWA, or any other available legal authority, including without limitation, the right to seek injunctive relief, monetary penalties and for punitive damages.

5. Compliance with the terms of this Consent Agreement/Final Order shall resolve the civil and administrative claims of the United States alleged in the above Complaint in this matter. This Final Order shall terminate after satisfaction by Respondent of the requirements of this Final Order.

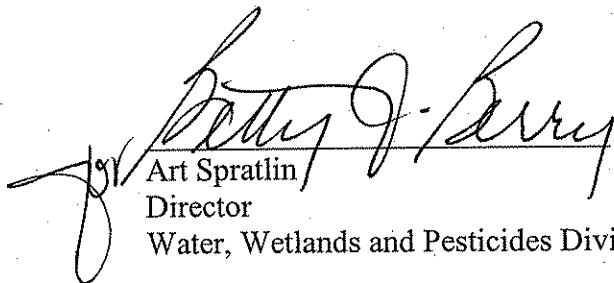
6. This Final Order shall be effective upon receipt by Respondent of a fully executed copy hereof. All time periods herein shall be calculated therefrom unless otherwise provided in this Final Order.

7. This executed Complaint and Consent Agreement/Final Order shall be filed with the Regional Hearing Clerk, U.S. Environmental Protection Agency, 901 North 5th Street, Kansas City, Kansas 66101.

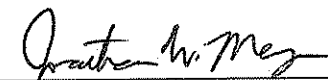
COMPLAINANT:

U.S. ENVIRONMENTAL PROTECTION AGENCY

08/16/06
Date


Art Spratlin
Director
Water, Wetlands and Pesticides Division

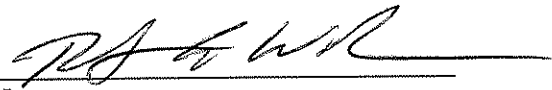
8/15/06
Date


Jonathan W. Meyer
Assistant Regional Counsel

RESPONDENT:

Washam Development, LLC
d/b/a Washam Construction, Inc.

4-19-06
Date


Name:
Title: Pres. - lead

IT IS SO ORDERED.

August 17, 2006
Date

Robert L. Patrick
Robert L. Patrick
Regional Judicial Officer

IN THE MATTER OF Washam Development, LLC d/b/a Washam Construction, Inc.,
Respondent
Docket No. CWA-07-2006-155

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Complaint and Consent Agreement/
Final Order was sent this day in the following manner to the addressees:

Copy hand delivered to:

Jonathan W. Meyer
Assistant Regional Counsel
901 N. 5th Street
Kansas City, Kansas 66101

Copy by Certified Mail Return Receipt to:

Robert A. Washam Construction, Inc.
Registered Agent: Robert A. Washam
2058 NW South Outer Road
Blue Springs, MO 64015

Please Copy the Attorney also:

Jessica E. Merrigan, Esq.
Lathrop & Gage
2345 Grand Blvd.
Suite 2800
Kansas City, MO 64108

8/17/06
Dated



Hearing Clerk, Region 7