

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)
)
L.K. Properties II, L.L.L.P.)
P.O. Box 340)
St. Peters, MO 63376)
)
Respondent)
)
Proceedings under Section 309(g) of the)
Clean Water Act, 33 U.S.C. § 1319(g))
_____)

Docket No. CWA-07-2006-0258

**CONSENT AGREEMENT AND
FINAL ORDER**

CONSENT AGREEMENT AND FINAL ORDER

The United States Environmental Protection Agency (EPA), Region 7 (Complainant) and L.K. Properties II, L.L.L.P., (L.K. Properties or Respondent) 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 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 Consent Agreement and Final Order 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. Respondent is L.K. Properties II, L.L.L.P., a Missouri Limited Liability Limited Partnership authorized to conduct business in the State of Missouri.

4. The authority to take action under Section 309(g) of the CWA, 33 U.S.C. § 1319(g), is vested in the Administrator of the 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).

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 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, 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.

8. Pursuant to Section 402(p) of the CWA, the 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,” 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 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. The EPA maintains concurrent enforcement authority with delegated states for

violations of the CWA.

12. The MDNR implemented a General Permit for the discharge of storm water under the NPDES, Permit Series No. MOR101-R108 (the General Permit). The General 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).

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 Northport Commerce Center, a residential and commercial development site located at I-270 and Missouri Highway 367 in Bellefontaine Neighbors, Missouri (the 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 goes into tributaries to Maline Creek, which flows into the Mississippi River. 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(14), 33 U.S.C. § 1362(14).

19. Respondent discharged pollutants into a “navigable water” as defined by CWA Section 502(7), 33 U.S.C § 1362(7).

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.

21. On March 1, 2004, Respondent submitted an application for coverage under the MDNR General Permit.

22. On May 13, 2004, Missouri issued permit MO-R106370 (the Permit) to Respondent (identified therein, apparently erroneously, as "L.K. Properties II L.L.C."), which document will expire on February 7, 2007.

23. On February 17-18, 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 the requirements of the Permit and with the terms of the Site's Storm Water Pollution Prevention Plan (SWPPP), in accordance with the CWA.

Findings of Violation

Count I

Failure to Develop and Implement an Adequate Storm Water Pollution Prevention Plan (SWPPP)

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

25. Section 8 of Respondent's Permit establishes requirements regarding the contents of the Site's SWPPP. Respondent's Permit requires the SWPPP to include, among other things, detailed information regarding the Site description, erosion and sediment controls, storm water management controls, waste disposal controls (including vehicle tracking of sediment), maintenance, inspections, and requirements regarding contractors and subcontractors.

26. Respondent's SWPPP failed to adequately address the requirements established by Section 8 of the "Requirements and Guidelines" section of the Permit (SWPPP Requirements) as follows:

- a. The SWPPP failed to clearly describe the sequence of major activities and the appropriate control measures and the timing during the construction process that the measures would be implemented, sufficient that the permittee may ensure that the BMPs are properly installed at the locations and relative times necessary to protect the Site from sediment discharge.
- b. The discussion of stabilization practices failed to include site specific scheduling of the implementation of the practices.
- c. The SWPPP does not include a description of all BMPs that will be implemented to control pollutants in storm water discharges.
- d. The SWPPP states that "details of the control devices are depicted on the rough grading plan." However, the SWPPP does not show significant details

of the control devices such as material specifications, spacing of posts, or trenching of silt fences or hay bales.

27. Respondent's failure to develop and implement an adequate SWPPP is a violation of Paragraph 8 of the Requirements and Guidelines section of the 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 Implement Best Management Practices (BMPs)

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

29. Section 8d of the Requirements and Guidelines section of the Permit requires that stabilization measures to control erosion and sediment shall be initiated on all disturbed areas within fourteen (14) days of cessation of soil disturbing activities.

- a. At the time of the February 17-18, 2005 inspection, none of the slopes around the perimeter of the site had been stabilized.
- b. At the time of the February 17-18, 2005 inspection, approximately fourteen (14) weeks had elapsed since the cessation of grading of the disturbed area.

30. Section 8h of the Requirements and Guidelines section of the Permit requires both temporary and permanent sedimentation basins to have a stabilized spillway.

- a. At the time of the February 17-18, 2005 inspection, Temporary Sedimentation Basins 1, 2, and 3 each lacked any stabilization device at the discharge end of the pipe.
- b. At the time of the February 17-18, 2005 inspection, Basin 3 also lacked an outfall/discharge structure.

31. Paragraph 7 of the Requirements and Guidelines section of the Permit requires as a condition of the permit that Respondent develop and fully implement a SWPPP throughout the term of the land disturbance project.

- a. At the time of the February 17-18, 2005 inspection, approximately 70 feet of the perimeter silt fence near the northeast corner of the Site required by the SWPPP was missing.

32. Respondent's multiple failures to implement BMPs as detailed in paragraphs 29-31

above are violations of Paragraphs 7 and 8 of the Requirements and Guidelines section of the Permit, and as such, are violations of Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342.

Count 3
Failure to Maintain Pollution Control Measures

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

34. Paragraph 11 of the Requirements and Guidelines section of Respondent's General Permit states in part that Respondent shall at all times maintain all pollution control measures and systems in good order to achieve compliance with the terms of the General Permit.

35. At the time of the February 17-18, 2005 inspection, Respondent had failed to maintain Sedimentation Basin 3 in good repair.

36. At the time of the February 17-18, 2005 inspection, the EPA inspector documented twenty-seven (27) areas where the silt fences were either overtopped, filled up with silt, downed, undermined or inadequately anchored. Approximately 431 feet of silt fence was in need of repair or replacement and an additional 252 feet of silt fence, situated primarily along the south boundary of the Site and east of Basin #3 was inadequately trenched in.

37. Respondent's failure to properly maintain its pollution control measures is a violation of Paragraph 11 of the Requirements and Guidelines Section of Respondent's General Permit, and as such, are violations of Sections 301(a) and 402(p) of the CWA, 33 U.S.C. §§ 1311(a) and 1342(p).

Proposed Penalty

38. 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 against the Respondent for the violations cited above, in the amount of \$46,000.00.

CONSENT AGREEMENT

1. Respondent and EPA agree to the terms of this Consent Agreement and Final Order and Respondent agrees to comply with the terms of the Final Order portion of this Consent Agreement and Final Order.

2. Respondent admits the jurisdictional allegations of this Consent Agreement and Final

Order and agrees not to contest the EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of the Final Order portion of this Consent Agreement and Final Order set forth below.

3. Respondent neither admits nor denies the factual allegations and legal conclusions set forth in this Consent Agreement and Final Order.

4. Respondent waives its right to a judicial or administrative hearing on any issue of fact or law set forth above, and its right to appeal the proposed Final Order portion of the Consent Agreement and Final Order.

5. Respondent and Complainant agree to conciliate the matters set forth in this Consent Agreement and Final Order without the necessity of a formal hearing and to bear their respective costs and attorney's fees.

6. This Consent Agreement and Final Order addresses all civil 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.

7. Nothing contained in the Final Order portion of this Consent Agreement and Final Order shall alter or otherwise affect Respondent's obligation to comply with all applicable federal, state and local environmental statutes and regulations and applicable permits.

8. Respondent certifies by the signing of this Consent Agreement and Final Order that, to the best of its knowledge and after thorough investigation, it has corrected all violations of Sections 301(a) and 402(p) of the CWA, 33 U.S.C. §§ 1311(a) and 1342(p) identified in this document and in the EPA inspector's report documenting the February 17-18, 2005 inspection, and that it is otherwise in compliance with all requirements of Sections 301(a) and 402(p) of the CWA, 33 U.S.C. §§ 1311(a) and 1342(p).

9. The effect of settlement described in Paragraph 6 above is conditional upon the accuracy of the Respondent's representations to EPA as memorialized in Paragraph 8 above of this Consent Agreement and Final Order.

10. The undersigned representative of Respondent certifies that he or she is fully authorized to enter the terms and conditions of this Complaint and Consent Agreement and Final Order and to execute and legally bind Respondent to it.

11. Respondent agrees that, in settlement of the claims alleged in this Consent Agreement and Final Order, Respondent shall pay a penalty of \$46,000.00 as set forth in Paragraph 1 of the Final Order.

12. Respondent understands 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

A. Payment Procedures

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

1. Respondent shall pay a civil penalty of Forty-Six Thousand Dollars (\$46,000) 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 "Treasurer of the United States" and remitted to:

U.S. EPA Region 7
P.O. Box 371099M
Pittsburgh, Pennsylvania 15251

The Respondent shall reference the Docket Number on the check. A copy of the check shall also be mailed to:

Chris R. Dudding
CNSL
U.S. EPA Region 7
901 North 5th Street
Kansas City, Kansas 66101

3. No portion of the civil penalty or interest paid by Respondent pursuant to the requirements of this Consent Agreement and Final Order shall be claimed by Respondent as a deduction for federal, state, or local income tax purposes.

B. Parties Bound

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

C. General Provisions

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

6. Complainant reserves the right to take enforcement action against Respondent for any future violations of the CWA and its implementing regulations and to enforce the terms and conditions of this Consent Agreement and Final Order.

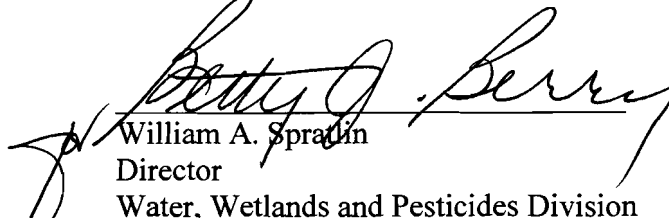
7. This Order shall be entered and become effective only after the conclusion of the period of public notice and comment required pursuant to Section 309(g)(4) of the CWA, 33 U.S.C. § 1319(g)(4), and 40 C.F.R. § 22.45. Unless otherwise stated, all time periods stated herein shall be calculated in calendar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

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

9. The headings in this Consent Agreement and Final Order are for convenience of reference only and shall not affect interpretation of this Consent Agreement and Final Order.

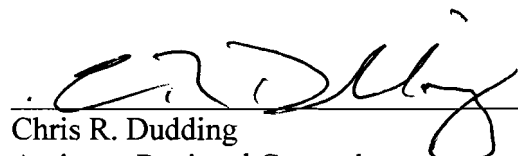
COMPLAINANT:
U.S. ENVIRONMENTAL PROTECTION AGENCY

11/28/06
Date



William A. Spratin
Director
Water, Wetlands and Pesticides Division
U.S. Environmental Protection Agency
Region 7

Date



Chris R. Dudding
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region 7

RESPONDENT:
L.K. Properties II, L.L.L.P.

9/19/06
Date

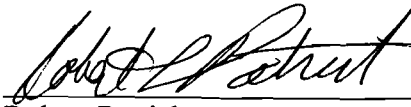
By LK Management Inc., General Partner

Name Leonard Kaplan

Title President

Address PO Box 340 St Petersburg MO 63376

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



Robert Patrick
Regional Judicial Officer

Date December 6, 2006

IN THE MATTER OF L.K. Properties II, L.L.L.P., Respondent
Docket No. CWA-07-2006-0258

CERTIFICATE OF SERVICE

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


Copy hand delivered to
Attorney for Complainant:

Chris R. Dudding
Assistant Regional Counsel
Region VII
United States Environmental Protection Agency
901 N. 5th Street
Kansas City, Kansas 66101

Copy by Certified Mail Return Receipt to:

Tom Glosier
Kaplan Development and Investment Co.
P.O. Box 340
St. Peters, Missouri 63376

Dated: 12/16/06


Kathy Robinson
Hearing Clerk, Region 7