

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

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
Majestic C Team, LLC) Docket No. CWA-07-2016-0026
)
)
Respondent) AMENDED 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 Water, Wetlands and Pesticides Division of EPA, Region 7.

2. The Respondent in this case is Majestic C Team, LLC (“Respondent”).

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 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, 33 U.S.C. § 1362(7), defines “navigable waters,” in part, as the “waters of the United States,” which are defined at 40 C.F.R. § 232.2, and which include tributaries to waters of the United States.

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), 122.26(c) requires 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 Nebraska Department of Environmental Quality (“NDEQ”) is the state agency with the authority to administer the federal NPDES program in Nebraska pursuant to Section 402 of the CWA. EPA maintains concurrent enforcement authority with authorized states for violations of the CWA.

11. On August 20, 2014, NDEQ issued Respondent a General Permit for construction storm water discharges (“General Permit”), NER114623. The General Permit governs stormwater discharges associated with industrial activity, including clearing, grading and excavation. The principal requirement of the General Permit is for the owner to develop and implement a Stormwater Pollution Prevention Plan (“SWPPP”).

FACTUAL BACKGROUND

12. Respondent is a “person,” as defined by Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

13. At all times relevant to this action, Respondent was the owner and operator of a residential construction site (“Site”), comprised of approximately 75 acres, and located at the intersection of 168th Street and State Street in Omaha, Nebraska. At the time of the EPA inspection, described below, Respondent had cleared and graded approximately 18 acres of Phase 1 of the construction project.

14. The Site has “stormwater discharges associated with industrial activity” as defined by 40 C.F.R. § 122.26(b)(14), is a “point source” as defined by Section 502(14) of the CWA, 33 U.S.C. § 1362(14), and discharges into an unnamed tributary to Big Papillion Creek, both “waters of the United States,” as defined by 40 C.F.R. § 232.2.

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

16. Respondent’s 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.

17. NDEQ issued NPDES Permit No. NER114623 to Respondent on August 20, 2014. This NPDES general permit governs Respondent’s stormwater discharges that are associated with industrial activity at the Site.

18. On November 16-20, 2015, EPA personnel, under the authority of Section 308(a) of the CWA, 33 U.S.C. § 1318(a), inspected the Site to determine Respondent’s compliance with its NPDES permit and the CWA. During the inspection, EPA issued Respondent a Notice of Potential Violation citing, *inter alia*, Respondent’s failure to properly maintain best management practices, failure to establish effective ground cover to stabilize the Site and Respondent’s contribution to an excursion above water quality standards.

19. On February 23, 2016, EPA issued Respondent a Findings of Violation and Order for Compliance, which included a 30 day opportunity for Respondent to confer with EPA concerning the terms of, and basis for, the Order. The parties conferred on March 8, 2016 and the results of that conference are included in this Amended Findings of Violation and Order for Compliance.

FINDINGS OF VIOLATION

Count 1

Failure to Properly Operate and Maintain Best Management Practices

20. Part III, Section E.1 of Respondent’s NPDES permit states that all erosion and sediment control measures and other protective measures identified in the SWPPP must be maintained in effective operating condition. Further, Respondent is required to perform maintenance on any BMPs that are not operating effectively within seven days of identifying such ineffective BMPs. Part III, Section L.4 of Respondent’s NPDES permit requires Respondent to initiate stabilization measures where construction activities have temporarily or permanently ceased, but in no case more than 14 days after the construction activity has ceased.

21. During the EPA inspection referenced above, the inspector observed that: (1) silt fences were both undercut and over-topped; (2) sediment basins were full beyond recommended design capacity and in need of repair; (3) stormwater inlet protection devices had been removed at the site;; (4) the washout of concrete chutes was not properly contained, and; (5) sparse vegetative ground cover estimated to be less than 25 percent of the Site's non-impervious surface, resulting in significant erosion near Site streets and significant amounts of soil in Site streets. A review of Respondent's Site inspection records indicate Respondent's awareness that silt fences were in need of maintenance between June and October 2015. Further, Respondent's written response to the NOPV issued during EPA's inspection indicates Respondent's awareness that the Site was not properly stabilized since at least September 2015.

22. Respondent's alleged failure to properly operate and maintain BMPs at the Site 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 Ensure that Discharges do not Contribute to an Excursion of Water Quality Standards

23. Part IV, Section C.1 of Respondent's NPDES permit requires that Respondent install, implement and maintain BMPs that are as stringent as necessary to ensure that discharges do not cause or contribute to an excursion above any applicable water quality standard. Nebraska water quality standards require that surface waters be free of "objectionable films, colors, turbidity, or deposits" (Neb. Rev. Stat. Title 117, Chapter 4, § 005).

24. During the EPA inspection referenced above, the inspector observed discharges of storm water from the Site into the unnamed tributary to Big Papillion Creek, resulting in observed increases of turbidity in the receiving stream, and which demonstrates a violation of state water quality standards.

25. Respondent's 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).

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), Respondent is hereby ORDERED as follows:

26. Within sixty (60) 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 its NPDES permit.

27. Within ninety (90) days of the effective date of this Order, Respondent shall provide EPA and NDEQ a written description of the actions it has taken to correct the deficiencies and eliminate and prevent recurrence of the violations cited above.

28. Respondent shall submit to EPA site inspection reports as required by its NPDES permit on a monthly basis until written termination of the Order, as described in Paragraph 37. After a period of one year, Respondent may request termination of this requirement.

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

bruno.jodi@epa.gov
Jodi Bruno, or her successor
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 NDEQ pursuant to this Order shall be submitted by mail to:

Steve Goans, Section Chief
Nebraska Department of Environmental Quality
1200 N St, The Atrium, Suite 400
P.O. Box 98922
Lincoln, Nebraska 68509-8922.

GENERAL PROVISIONS

Effect of Compliance with the terms of this Order

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

30. 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.

Access and Requests for Information

31. Nothing in this Order shall limit EPA's right to obtain access to, and/or to inspect property operated by Respondent 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

32. 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.

Parties Bound

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

Failure to Comply

34. Failure to comply with the terms of this Order may result in your liability for significant statutory civil penalties for each violation under Section 309(d) of the Act, 33 U.S.C. § 1319(d), as modified by 40 C.F.R. Part 19. Upon suit by EPA, the United States District Court for the District of Nebraska may impose such penalties if, after notice and opportunity for a hearing, the court determines that you have violated the Act as described above and failed to comply with the terms of this Order. In determining the amount of any penalty the court will consider the seriousness of your violations, your economic benefit resulting from the violations, any history you may have of such violations, any good faith efforts you have made to comply with legal requirements, the economic impact a penalty may have upon you, and such other matters as justice may require. The district court has the authority to impose separate civil penalties for any violations of the Act and for any violations of this Order.

Judicial Review

35. Respondent has 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

36. The terms of this Order shall be effective and enforceable upon receipt by Respondent.

Termination


37. This Order shall remain in effect until a written notice of termination is issued by an authorized representative of EPA. Such notice shall not be given until all of the requirements of this Order have been met.

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



KAREN A. FLOURNOY
Director
Water, Wetlands and Pesticides Division

5-11-16
DATE


CHRIS MUEHLBERGER
Assistant Regional Counsel
Office of Regional Counsel

5.11.16
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:

Majestic C Team, LLC
Koley Jessen P.C., L.L.O., Registered Agent
Suite 800
1125 South 103rd Street
Omaha, Nebraska 68124.

Steve Goans, Section Chief
Nebraska Department of Environmental Quality
1200 N St, The Atrium, Suite 400
P.O. Box 98922
Lincoln, Nebraska 68509-8922.

5.12.16
Date

