

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

Received by
 EPA Region 7
 Hearing Clerk

IN THE MATTER OF:)	
)	Docket No. CWA-07-2022-0042
Evergreen Development, Inc.)	
)	FINDINGS OF VIOLATION AND
and)	ORDER FOR COMPLIANCE
)	
Mark Schmidt,)	
)	
Respondents)	
)	
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 Enforcement and Compliance Assurance Division of EPA Region 7.

2. The Respondents in this case are Evergreen Development, Inc., a corporation incorporated under the laws of the state of Nebraska, and Mark Schmidt, the operator of the Site.

Statutory and Regulatory Framework

3. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants except in compliance with, *inter alia*, Sections 402 and 404 of the CWA, 33 U.S.C. §§ 1342, 1344.

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 404 of the CWA, 33 U.S.C. § 1344, specifically requires a person to obtain a permit from the Secretary of the Army acting through the Chief of Engineers, commonly referred to as the U.S. Army Corps of Engineers (hereinafter “Corps”), for any discharge of “dredged or fill material” into the “navigable waters” of the United States.

6. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines “navigable waters,” in part, as the “waters of the United States.”

7. 40 C.F.R. § 232.2 defines “discharge of fill material” as “the addition of fill material into waters of the United States.”

8. 40 C.F.R. § 232.2 defines “fill material” as any material that has the effect of “replacing any portion of a water of the United States with dry land or changing the bottom elevation of any portion of a water of the United States.”

9. Section 402 of the CWA provides that pollutants may be discharged in accordance with the terms of a National Pollutant Discharge Elimination System (“NPDES”) permit issued pursuant to that Section.

10. 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.

11. 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.

12. 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. Construction activity also includes the disturbances of less than five acres of total land area that is part of a larger common plan of development or sale if the common plan will ultimately disturb five acres or more.

13. 40 C.F.R. §§ 122.26(a) 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.

14. The Nebraska Department of Environment and Energy (“NDEE”) 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.

15. Section 309(a) of the CWA, 33 U.S.C. § 1319(a), authorizes the issuance of an order against any person who violates Section 301 of the CWA, 33 U.S.C. § 1311, requiring such person to comply.

FACTUAL BACKGROUND

16. Respondents are each a “person” within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).
17. At all times relevant to this action, Respondents owned, operated, or otherwise controlled property and a residential construction site located in the Northwest Quarter of Section 11, Township 8 South, Range 8 East, in Lancaster County, Nebraska (hereinafter “the Site”).
18. The Site is a 16.5 acre residential development in the Village of Bennet, Nebraska.
19. A tributary to the Little Nemaha River enters the Site from the north through a large box culvert underneath Bennet Road, flows through the Site, and exits the Site on the eastern boundary underneath Hackberry Street.
20. Upon exiting the Site at Hackberry Street as described above, the tributary flows approximately 0.27 miles into the Little Nemaha River.
21. Starting on or about April 2019, Respondents conducted clearing and grading activities in the Site.
22. Since on or about April 2019, and continuing to the present, Respondents have disturbed approximately 12.1 acres within the Site.
23. Stormwater, snow melt, surface drainage, and runoff water leaves Respondents’ Site and discharge into the tributary to the Little Nemaha River.
24. The Site has “stormwater discharges associated with industrial activity” as defined by 40 C.F.R. § 122.26(b)(14) and is a “point source” as defined by Section 502(14) of the CWA, 33 U.S.C. § 1362(14).
25. Stormwater from the Site contains “pollutants” as defined by Section 502(6) of the CWA, 33 U.S.C. § 1362(6).
26. The tributary has perennial flow and a hydrological connection to the Little Nemaha River. The tributary and abutting wetlands are “navigable waters” within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7).
27. Stormwater runoff from Respondents’ industrial activity at the 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).
28. Respondents’ 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.

29. NDEE issued authorization to Respondents on March 22, 2019, for construction stormwater discharges under NPDES general permit NER160000, with permit tracking number CSW-201903475 (“Respondent’s NPDES Permit”). The construction stormwater general permit was signed by the Nebraska Department of Environmental Quality on September 30, 2016, and was effective between November 1, 2016, and October 31, 2021. It was administratively extended until, among other things, permittees submit a new Notice of Intent for coverage under NPDES general permit NER210000, with effective dates of December 1, 2021, through November 20, 2026. On June 14, 2022, NDEE administratively terminated Respondents’ NPDES coverage for failure to submit a Notice of Intent application for coverage under the new general permit, NER210000.

30. The principal requirement of Respondents’ NPDES Permit is for the permittee to develop and implement a Stormwater Pollution Prevention Plan (“SWPPP”). The SWPPP must identify potential sources of pollution which may reasonably be expected to affect the quality of the stormwater discharge from the construction activities, describe and ensure the implementation of best management practices (“BMPs”) that will be used to reduce the pollutants in stormwater discharge associated with industrial activity for construction activities at the construction site, and to assure compliance with the terms and conditions of the Permit.

31. NDEE conducted stormwater inspections on September 8, 2020, November 5, 2020, and April 20, 2021, and documented violations of Respondents’ NPDES Permit, including lack of BMPs, failure to maintain BMPs, and failure to conduct and document adequate inspections.

32. NDEE sent Respondents a Notice of Noncompliance on September 18, 2020, requesting Respondents take corrective action to address the violations identified by the NDEE inspections.

33. After receiving no response to the Notice of Noncompliance, NDEE filed a Compliance Order on June 30, 2021, requiring Respondents to take specific actions to address the violations. The Compliance Order was personally served on Respondents by the Lancaster County Sheriff’s Office on July 6, 2021.

34. To date, Respondents have failed to respond to or comply with NDEE’s Compliance Order. NDEE has requested that the EPA pursue the NPDES permit violations pursuant to the EPA’s concurrent enforcement authority.

35. In or around September through October 2020, Respondents directed, caused, or conducted earthmoving work using a trackhoe, backhoe, bulldozer, and/or other heavy equipment that widened and deepened the channel and placed fill material in the tributary to the Little Nemaha River and abutting wetlands.

36. On September 20, 2020, and November 5, 2020, Corps personnel conducted road-side investigations and observed fill material in the tributary to the Little Nemaha River within the Site and determined a violation of the CWA had occurred.

37. The Corps attempted to contact Respondent Mr. Schmidt by phone and sent Respondents letters containing notice of violation on October 2, 2020 and January 21, 2021.

38. On February 18, 2021, after receiving no response from Respondents to its attempts to contact or correspondence regarding the violations, the Corps Omaha District referred the results of the investigation to EPA Region 7 for potential enforcement.

39. On May 17, 2021, in the presence of Respondent Mr. Schmidt as the representative for Evergreen Development, Inc., EPA and Corps representatives conducted a site inspection and documented fill material in the unnamed tributary to the Little Nemaha River immediately downstream of the box culver under Bennet Road and continuing along approximately 230 linear feet and to approximately 0.13 acres of abutting wetlands.

40. The fill material discharged by Respondents into the unnamed tributary to the Little Nemaha River is a “pollutant” within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

41. The heavy equipment used to place the fill material into the unnamed tributary to the Little Nemaha River constitutes a “point source” within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

42. The discharge of the fill material into the unnamed tributary to the Little Nemaha River constitutes the “discharge of a pollutant” within the meaning of Section 502(12) of the CWA, 33 U.S.C. § 1362(12).

43. On May 17, 2022, a representative of EPA conducted a road-side investigation and observed that the fill material remains in the tributary and observed rough grading, earth-moving equipment, and ongoing construction activities at the Site.

FINDINGS OF VIOLATION

Count 1

Failure to Maintain NPDES Permit Authorization and Unauthorized Discharges

44. The facts stated above are herein incorporated by reference.

45. Respondents’ construction activity at the Site results in discharges of stormwater associated with industrial activity that must comply with the requirements of an NPDES Permit pursuant to 402(p) of the CWA, 33 U.S.C. § 1342(p).

46. Part II.C.2 of NER210000 requires that to continue to be permitted to discharge, Respondents must complete and submit to NDEE a Notice of Intent to apply for coverage within 180 days of the issuance date of the new general permit and continue to comply with NER160000 in the meantime; or, if final stabilization pursuant to Part I.C.5.d has been achieved within those 180 days and Respondents meet the termination of coverage requirements of Part VI.a, then Respondents must submit a Notice of Termination to NDEE.

47. Respondents' NPDES Permit authorization under NER160000 expired on June 1, 2022, Respondents failed to submit a Notice of Intent to apply for coverage under NER210000, and NDEE administratively terminated Respondents' NPDES Permit on June 14, 2022.

48. Respondents continue to conduct soil disturbing construction activities without NPDES permit authorization for pollutant discharges and final stabilization has not been achieved at the Site.

49. Respondents' failure to obtain NPDES Permit authorization for stormwater discharges associated with industrial activity, continued construction activity and failure to achieve final stabilization, and construction-related pollutant discharges without NPDES authorization are violations of Sections 301(a) and 402(p) of the CWA, 33 U.S.C. §§ 1311(a) and 1342(p).

Count 2 Unauthorized Discharge of Fill Material

50. The facts stated above are herein incorporated by reference.

51. Respondents did not obtain a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, prior to the performance of the fill placement described herein, nor did Respondents perform the work described herein under any prior permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, and the unauthorized fill material remains in place.

52. Respondents' discharge of pollutants from a point source into waters of the United States occurred without a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, and, therefore, these discharges violated and continue to violate Section 301 of the CWA, 33 U.S.C. § 1311.

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), Respondents are hereby ORDERED as follows:

CWA Sections 301 and 402 Compliance

53. Respondents shall cease the discharge of all pollutants from the Site or reinstate NPDES permit coverage by submitting to NDEE a Notice of Intent for coverage under general permit NER210000 or an application for an individual NPDES Permit and comply with all requirements of the NPDES permit or immediately cease construction activities and complete final stabilization of the Site.

CWA Section 404 Compliance

54. Respondents shall comply with CWA Section 404 by ceasing the placement of fill material into the unnamed tributary to the Little Nemaha River and taking steps to ensure that

they do not place fill material into the unnamed tributary to the Little Nemaha River in the future.

55. Retention of Qualified Consultant. Respondents shall retain a qualified consultant to perform a study of the Site and submit to EPA a Work Plan to be approved by EPA as follows:

- a. Within thirty (30) days of the Effective Date of this Order, Respondents shall provide to EPA in writing the name, address, phone number, and electronic mail address and qualifications of a consultant.
- b. EPA will approve/disapprove of Respondents' consultant based upon the person's qualifications and ability to effectively perform this role. The qualifications of the person(s) undertaking the work for Respondents shall be subject to EPA's review, for verification that such person(s) meet minimum technical background and experience requirements of the EPA. All persons under the direction and supervision of Respondents' consultant must possess all necessary professional licenses required by law.

56. Work Plan. Within thirty (30) days of the EPA's approval of the qualified consultant, Respondents shall submit a Work Plan to the EPA for review and approval that shall describe Respondents' proposed plan to achieve restoration of the Site or mitigation to address the impacts from the unauthorized fill material. The Work Plan shall include:

- a. If the Site will be restored, a proposed plan to conduct restoration work including: information concerning the methods and equipment proposed to accomplish the work; where any removed fill material will be placed; visual representations of proposed alterations to the stream and banks; erosion control measures; and information about any planned vegetation that will be planted including species information, size, spacing, and quantities; or
- b. If mitigation will be pursued, a proposed plan to mitigate the impacts, including proposed purchase of credits from an approved mitigation bank servicing the area as the preferred mitigation alternative; and
- c. A schedule, including milestones, to achieve restoration no later than twelve (12) months after the approval of the Work Plan and in accordance with the specifications set forth in the Work Plan. If purchase of mitigation credits is approved, then they must be purchased within sixty (60) days of approval and proof of the purchase must be submitted to EPA within fifteen (15) days of purchase.

57. Review and Approval. The EPA will review and approve the Work Plan as follows:

- a. If EPA approves the Work Plan, it shall be implemented according to the schedule for implementation in the approved work plan.

- b. Respondents shall identify and apply for all local, state, and federal permits required to implement the Work Plan within fifteen (15) days of the EPA's approval of the Work Plan.
 - c. If the EPA does not approve the Work Plan, Respondents shall address the comments and resubmit the work plan for review within thirty (30) days of receipt of the EPA's disapproval.
 - d. Upon resubmission, the EPA, in its sole discretion, may either approve the Work Plan, or if the EPA determines that the Work Plan does not adequately address the comments provided by the EPA, the EPA may modify the work plan and will provide Respondents with a copy of the work plan as modified. Respondents shall implement the modified Work Plan according to the schedule contained therein.
58. Once approved or modified by the EPA, the Work Plan identified above shall be incorporated by reference and fully enforceable under the terms of this Order.

59. Completion Report. Within thirty (30) days of completion of the work identified in the Work Plan, Respondents shall submit a completion report, which shall include photographic evidence, copies of relevant documents, and a signed statement indicating that the work is complete.

60. Annual Monitoring Reports. Respondents shall submit annual monitoring reports to the EPA, beginning on the date of the first anniversary of the completion of the Work Plan, for a period of five years. These reports shall include photos of the site, a narrative description of the status of the site, and any corrective actions, if any, that will be taken to correct the deficiencies to maintain proper stream functions. Annual monitoring reports must be submitted by December 1st of each year.

61. The submission of documents by Respondents, as identified above, shall include the following written statement, followed by signature of duly authorized representatives of Respondents:

I certify under penalty of law that the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

62. All documents to be submitted to the EPA under this Order shall be submitted by electronic mail to:

Dr. Delia Garcia, PhD, or her delegate
garcia.delia@epa.gov
Enforcement and Compliance Assurance Division
U.S. Environmental Protection Agency Region 7

63. All documents required to be submitted to NDEE pursuant to this Order shall be submitted by electronic mail to:

Mr. Reuel Andersen, Unit Chief
reuel.anderson@nebraska.gov
NPDES Permits and Compliance Unit
Water Quality Division
Nebraska Department of Environment and Energy

GENERAL PROVISIONS

Opportunity to Confer

64. Respondents have the opportunity to confer with and/or submit information to EPA concerning the validity of this Order, including the basis for the Order, the terms of the Order, and the applicability of this Order to the Respondents. Within ten days of receipt of this Order, Respondents may request a conference regarding the Order or to submit information to EPA. If Respondents request a conference or wish to submit information, the conference or submission of information shall take place within 20 days of receipt of this Order. EPA shall deem a failure to request a conference or to submit information as a waiver of the opportunity to confer.

65. Requests for a conference shall be made in writing to the EPA contact identified in Paragraph 62.

Effect of Compliance with the Terms of This Order

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

67. 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.

Amendments

68. EPA may subsequently amend this Order in accordance with the authority of the CWA. For example, EPA may amend this Order to address any non-compliance with the CWA, including, but not limited to, any non-compliance with the requirements of Sections 301, 402 or 404 of the CWA. In the event of any such subsequent amendment to this Order, all requirements for performance of this Order not affected by the amendment shall remain as specified by this original Order.

Access and Requests for Information

69. Nothing in this Order shall limit EPA's right to obtain access to, and/or to inspect property operated by Respondents and/or to request additional information from Respondents, pursuant to the authority of Section 308 of the CWA, 33 U.S.C. § 1318 and/or any other authority.

Severability

70. If any provision or authority of this Order, or the application of this Order to Respondents is held by federal judicial authority to be invalid, the application to Respondents of the remainder of this Order shall remain in full force and effect and shall not be affected by such a holding.

Parties Bound

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

Confidential Business Information

72. Pursuant to 40 C.F.R. §§ 2.201-2.311, Respondents may assert a business confidentiality claim covering any portion of the submitted information which is entitled to confidential treatment and which is not effluent data. For any such claim, describe the basis for the claim under the applicable regulation. Any material for which business confidentiality is claimed should be placed in a separate envelope labeled, "Confidential Business Information." Failure to assert a claim in the manner described in 40 C.F.R. § 2.203(b) allows EPA to release the submitted information to the public without further notice. EPA may disclose information subject to the business confidentiality claim only to the extent set forth in the above-cited regulations. Special rules governing information obtained under the CWA appear in 40 C.F.R. § 2.302.

Failure to Comply

73. Notice is hereby given that violation of, or failure to comply with, any of the provisions of the foregoing Order may subject Respondents to (1) civil penalties of up to \$54,833 per day for each violation, pursuant to Section 309(d) of the CWA, 33 U.S.C. § 1319(d); or (2) civil action in federal court for injunctive relief, pursuant to Section 309(b) of the CWA, 33 U.S.C. § 1319(b).

Judicial Review

74. Respondents have the right to seek federal judicial review of the Order pursuant to Chapter 7 of the Administrative Procedure Act, 5 U.S.C. §§ 701-706, upon the Effective Date of this Order. Section 706, which is set forth at <http://uscode.house.gov/download/pls/05C7.txt>,

provides the grounds for such review.

Effective Date

75. The terms of this Order shall be effective and enforceable against Respondents thirty (30) days after receipt of an executed copy of the Order. Any amendments shall become effective and enforceable on the date that the amendment is signed by EPA. Unless otherwise stated, all time periods stated herein shall be calculated in calendar days from the effective date.

Termination

76. This Order shall remain in effect until a written notice of termination is issued by an authorized representative of EPA.

For the Complainant, U.S. Environmental Protection Agency Region 7:

DAVID COZAD
Director
Enforcement and Compliance Assurance Division

SHANE MCCOIN
Assistant Regional Counsel
Office of Regional Counsel

CERTIFICATE OF SERVICE

I certify that on the date noted below I delivered this Findings of Violation and Order for Compliance to the Regional Hearing Clerk, U.S. Environmental Protection Agency, by electronic mail to R7_Hearing_Clerk_Filings@epa.gov

And by electronic mail to:

For Complainant, U.S. Environmental Protection Agency Region 7

garcia.delia@epa.gov
Delia Garcia, PhD, Enforcement and Compliance Assurance Division

mccoin.shane@epa.gov
Shane McCoin, Office of Regional Counsel

For Nebraska Department of Environment and Energy

reuel.anderson@nebraska.gov
Reuel Andersen Unit Chief, NPDES Permits and Compliance Unit

I have requested that a representative of the Lancaster County Sheriff's Office provide, by personal service, a copy of the signed Findings of Violation and Order for Compliance to:

Mark Schmidt
Respondent and Registered Agent
Evergreen Development, Inc.
8500 Lincoln Street
Lincoln, Nebraska 68526

Signature