



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
FOUR PENN CENTER – 100 JOHN F. KENNEDY BLVD.
PHILADELPHIA, PENNSYLVANIA 19103

VIA UNITED PARCEL SERVICE
SIGNATURE REQUIRED

Robert Horsey
Top Drawer, LLC
28107 Beaver Dam Branch Road
Laurel, DE 19956
bobbydgh@aol.com

**Re: Administrative Order for Compliance
National Pollutant Discharge Elimination System (“NPDES”) Program
Cypress Pointe, Laurel, Delaware - Docket No. CWA-03-2022-0059DN**

Dear Mr. Horsey:

On May 26, 2021, the U.S. Environmental Protection Agency, Region III (“EPA”) conducted a storm water compliance inspection of Cypress Pointe A site at Ship Builders Drive & Woodland Ferry Road, Laurel, DE 19956. The purpose of the inspection was to evaluate the Permittee’s compliance with applicable storm water requirements, including the conditions of the General Permit No. DE0051268 (Site Specific Permit No. DEC006311), issued pursuant to section 402 of the Clean Water Act (“CWA”), 33 U.S.C. § 1342. An inspection report was generated after the inspection and was finalized and sent to you on July 21, 2021.

The inspection revealed instances in which the Permittee appeared not to have complied with the Permit’s requirements. EPA has authority under section 309 of the Act, 33 U.S.C. § 1319, to take enforcement actions, including seeking civil penalties, when violations of the Permit are identified. In response to violations identified, EPA is issuing the enclosed Administrative Order for Compliance (“Order”). If the Permittee intends to comply with this Order, it must, within **fourteen (14) days** of receipt of this letter and Order, correct all deficiencies listed in Paragraph 16 of the Order, and provide proof of documentation of corrections. If the Permittee would like to discuss the terms of the Order, please respond within five (5) days to request a virtual conference.

If you do not comply with this Order, EPA may pursue a formal enforcement action for penalties.

EPA encourages prompt compliance and is committed to settling this matter fairly and expeditiously. If you have any questions or comments, such as how to document corrective actions, please contact Mike Greenwald at greenwald.michael@epa.gov. If the Respondent is represented by an attorney in this matter who has questions, please ask the attorney to contact Natalie Katz at katz.natalie@epa.gov.

Sincerely,

Karen Melvin, Director
Enforcement and Compliance Assurance Division

*Re: Administrative Order for Compliance
National Pollutant Discharge Elimination System (“NPDES”) Program
Cypress Pointe, Laurel, Delaware - Docket No. CWA-03-2022-0059DN*

Enclosures:
Administrative Order for Compliance

CC:
Scott Penner, David G Horsey and Sons, scottdgh@yahoo.com
Kelly Horsey, David G Horsey and Sons, horsey9420@gmail.com
Mike Greenwald, EPA, greenwald.michael@epa.gov
Natalie Katz, EPA, katz.natalie@epa.gov
Bonnie Arvay, DNREC, bonnie.arvay@delaware.gov
Jessica Watson, Sussex Conservation District, jessica.watson@sussexconservation.org

6. The term “industrial activity” includes, among others, “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 a part of a larger common plan of development or sale if the larger common plan will ultimately disturb five acres or more. . . .” 40 C.F.R. § 122.26(b)(14)(x).
7. “Storm water” is defined as “storm water runoff, snow melt runoff and surface runoff and drainage.” 40 C.F.R. § 122.26(b)(13).
8. Owners and/or operators who discharge stormwater associated with construction activities to waters of the United States must comply with an NPDES permit.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

9. At all times relevant to the allegations described in this Order, Top Drawer, LLC (“Respondent”) was a corporation and as such was a “person” as defined in Section 502(5) of the CWA, 33 U.S.C. § 1362(5), and 40 C.F.R. § 122.2.
10. At all times relevant to this Order, upon information and belief, Respondent was the “owner” and/or “operator” of a site known as Cypress Pointe A, located at Ship Builders Drive & Woodland Ferry Road, Laurel, DE 19956 (“Site”), as those terms are described in federal regulations at 40 C.F.R. §§ 122.2.
11. At all times relevant to this Order, Respondent has been engaged in “construction activity” at the Site that “discharges” “stormwater” from a “point source” to Broad Creek, as those terms are described in federal regulations at 40 C.F.R. §§ 122.2 and 122.26. The construction activity at the Site has disturbed or will disturb approximately 56.60 acres of land.
12. Storm water from the Site discharges into Broad Creek, which is a perennial stream.
13. The Site’s approved Sediment and Stormwater Management Plan describes the Site as being located in the Tussocky/Broad Creek Watershed. Tussocky Creek is a tributary and flows into Broad Creek, which flows to the Nanticoke River. These water bodies are “waters of the United States” as that term is defined in Section 502(7) of the CWA, 33 U.S.C. § 1362(7).
14. EPA has authorized the Delaware Department of Natural Resources and Environmental Control (“DNREC”) to administer the NPDES program in the state of Delaware. DNREC has EPA authorization to issue NPDES stormwater permits under Section 402(b) of the CWA, 33 U.S.C. § 1342(b).
15. Pursuant to Section 402 of the CWA, 33 U.S.C. § 1342, DNREC issued general NPDES permit DE0051268, effective March 11, 2021, for stormwater discharges associated with construction activities. On October 21, 2020, DNREC received the Respondent’s Notice of Intent for coverage of the stormwater discharges associated with Respondent’s construction activities at the Site under this permit, identified by No. DEC006311 (“Permit”). This Permit allows Respondent to discharge stormwater associated with construction activities from the Site, in compliance with the specified conditions and limitations in the Permit. Coverage became effective on March 11, 2021 and will expire on March 10, 2026. On October 3, 2019, the Site’s Sediment and

Stormwater Management Plan was approved by DNREC.

16. On May 26, 2021, a representative of EPA conducted an inspection of the Site, where Respondent was conducting construction activities. The EPA Inspection Report and associated attachments were finalized on July 21, 2021. The EPA representative observed the following conditions, which were subsequently identified as violations:

- a. Observation #1 of the Inspection Report:** At the time of the inspection, no Notice of Permit Coverage was posted.

The Permit requires the permittee to meet the requirements of Permit Part 1.C.10 (Requirement to Post a Notice of Permit Coverage). This Permit requirement states that a sign or other notice of permit coverage be posted at a safe, publicly accessible location. Thus, on May 26, 2021, Respondent's failure to post a Notice of Permit Coverage violated the requirements of Part 1.C.10 of the Permit.

- b. Observation #2 of the Inspection Report:** The EPA Inspection Team observed areas where silt fencing along Broad Creek Circle and active lots there was ripped, down, removed from stakes, and/or required cleanout as noted in the Photograph Log of the Inspection Report (see photographs DSCN0438, DSCN0453, DSCN0454, DSCN0455, DSCN0461, DSCN0463, DSCN0464, DSCN0472, DSCN0474, DSCN0475, DSCN0482, DSCN0487, DSCN0488, and DSCN0489).

The Permit requires the permittee to meet the requirements of Permit Part 1.D.1. and 1.D.1.3 (Erosion and Sediment Control Requirements). These Permit requirement states that the permittee must design, install, and maintain effective erosion controls and sediment controls. Thus, on May 26, 2021, Respondent's failure to maintain and repair silt fencing in numerous locations throughout the Site violated the requirements of Part 1.D.1. and 1.D.1.3 of the Permit.

- c. Observation #3 of the Inspection Report:** The EPA Inspection Team observed storm drain inlets along Broad Creek Circle with Inlet Protection Type 2, geotextile inlet inserts, in place with accumulated sediment in the bags, clogged bags containing sediment and water, as well as sediment accumulation adjacent to the inlet as noted in the Photograph Log of the Inspection Report (see photographs DSCN0442, DSCN0444, DSCN0466, DSCN0468, and DSCN0469). There was evidence of sediment accumulation along the active roadway of Broad Creek Circle leading to the inlets from the site's disturbed areas (see photographs DSCN0447, DSCN0449, and DSCN0464).

The Permit requires the permittee to meet the requirements of Permit Part 1.D.1.8 (Erosion and Sediment Control Requirements - Protect Storm Drain Inlets). This Permit requirement states that the permittee must install inlet protection measures, and that they must clean, or remove and replace the protection measures as sediment accumulates. Thus, on May 26, 2021, Respondent's failure to clean out and maintain sediment protection measures violated the requirements to comply with Part 1.D.1.8 of the Permit.

- d. Observation #4 of the Inspection Report:** The EPA Inspection Team observed sediment trackout from disturbed area to an active roadway Board Creek Circle as noted in the Photograph Log of the Inspection Report (see photographs DSCN0448 and DSCN0450). Inlet protection was present showing accumulated sediment outside and

inside the bags (see Observation #3). Site representatives stated that they conduct street sweeping twice a week.

The Permit requires the permittee to meet the requirements of Permit Part 1.D.4.4 (Pollution Prevent Measures – For equipment maintenance). This Permit requirement states that the permittee must minimize sediment trackout and lists requirements for corrective actions. Thus, on May 26, 2021, Respondent’s failure to minimize sediment trackout violated the requirements of Part 1.D.4.4 of the Permit.

- e. **Observation #5 of the Inspection Report:** One of the single residence lot construction entrances along Board Creek Circle had the incorrect stone size and the construction entrance was not the full width at ingress and egress as noted in the Photograph Log of the Inspection Report (see photograph DSCN0471). One of the single residence lot construction entrances along Board Creek Circle showed evidence of missing aggregate and sediment in the active roadway (see photograph DSCN0448).

The Permit requires the permittee to meet the requirements of Permit Part 1.D.4 (Pollution Prevent Measures – For equipment maintenance). This Permit requirement states that the permittee must minimize sediment trackout. The approved Sediment and Stormwater Management plans for the site state “All Erosion and Sediment Control practices shall comply with the Delaware Erosion and Sediment Control Handbook, Latest Edition.”. Section 3.4.7-1 of Delaware’s Erosion and Sediment Control Handbook specifies requirements for stabilized construction entrances including stone size and required widths. Thus, on May 26, 2021, Respondent’s failure to have required stone size and full width at ingress and egress violated the requirements of Delaware’s Erosion and Sediment Control Handbook and Part 1.D.4 of the Permit.

- f. **Observation #6 of the Inspection Report:** The EPA Inspection Team observed a weathered pile of construction debris, including hay bales as noted in the Photograph Log of the Inspection Report (see photograph DSCN0495). This was along where Broad Creek Circle had not been constructed to-date, close to where the east entrance to Timber Circle will be constructed.

The Permit requires the permittee to meet the requirements of Permit Part 1.D.4.b and 1.D.4.3 (Pollution Prevention Measure). This Permit requires the permittee to minimize the exposure of building materials and contain waste materials in lidded dumpsters in a location that does not drain to a waterbody. Thus, on May 26, 2021, Respondent’s failed to properly contain waste at the Site and violated the requirements of Parts 1.D.4.b and 1.D.4.3 of the Permit.

- g. **Observation #7 of the Inspection Report:** The EPA Inspection Team observed uncovered/unlidded dumpsters on site containing waste materials along Board Creek Circle as noted in the Photograph Log of the Inspection Report (see photographs DSCN0446, DSCN0477, and DSCN0483).

The Permit requires the permittee to meet the requirements of Permit Part 1.D.4.b (Minimize the exposure of building materials) and 1.D.4.3 (For Waste Management...). This Permit requirement states that waste materials should be collected and stored in lidded dumpsters in a location that does not drain to a waterbody. Thus, on May 26, 2021,

Respondent's failure to provide covers or lids on dumpsters storing waste at the Site violated the requirements of Part 1.D.4.b and 1.D.4.3 of the Permit.

- h. Observation #8 of the Inspection Report:** During the inspection, the EPA Inspection Team observed staff conducting washout of a concrete truck on an active roadway section of Broad Creek Circle in an area that drains to storm water inlets on site with no impervious berm present as noted in the Photograph Log of the Inspection Report (see photograph DSCN0437).

The Permit requires the permittee to meet the requirements of Permit Part 1.D.4.4.e (Pollution Prevention - Equipment Maintenance). The Permit requirement states that washout from concrete trucks shall be disposed of in a designated concrete washout area. Thus, on May 26, 2021, Respondent's washout of a concrete truck in an area that drains to stormwater inlets violated the requirements of Part 1.D.4.4.e of the Permit.

- i. Observation #9 of the Inspection Report:** There was a designated concrete washout area with signage as noted in the Photograph Log of the Inspection Report (see photographs DSCN0490 and DSCN0491). At the time of the inspection, there was evidence of a concrete washout spill next to the concrete washout area (see photograph DSCN0493). This was near the end of where the east side of where Broad Creek Circle had been constructed to-date.

The Permit requires the permittee to meet the requirements of Permit Part 1.D.4.4 (Equipment Maintenance) and 1.D.4.5.j (Clean up spills...). The Permit requirement states that washout from concrete trucks shall be disposed of in a designated concrete washout area, and that spills should be immediately contained, cleaned up and properly disposed. Thus, on May 26, 2021, Respondent's failure to immediately clean up a concrete wash spill violated the requirements of Part 1.D.4.4 and 1.D.4.5.j of the Permit.

- j. Observation #10 of the Inspection Report:** The pond identified as Pond 3 was partially excavated and unstabilized, as noted in the Photograph Log of the Inspection Report (see Photograph DSCN0497). Facility representatives stated that this excavation was "start and stop" over an extended period of time. The Sussex Conservation District noted in its October 5, 2020 inspection report that topsoil was being stripped and grading was ongoing for the pond and in their November 11, 2020 that excavation was ongoing. The Permit requires the permittee to meet the requirements of Permit Part 1.D.1 (Erosion and Sediment Control Requirements). The Permit requirement states that the permittee must stabilize exposed portions of the site. Thus, on May 26, 2021, Respondent's failure to stabilize the area around Pond 3 violated the requirements of Part 1.D.1 of the Permit.

- k. Observation #11 of the Inspection Report:** The EPA Inspection Team requested Self Inspection Reports from February 1, 2021 to the date of the inspection. Inspection Reports provided were dated for each week between the "Week of 3/1/21" through the "Week of 5/17/21." No self-inspection reports were provided for the month of February 2021 or the week of the EPA inspection. The inspection reports provided did not include the specific date, time of the inspection, the names of the individuals who performed the inspection, or the phase of construction (Attachment E). Site representatives stated that currently the self-inspections are not being conducted by a Certified Construction

Reviewer (“CCR”) due to the size of the current active area.

The Permit requires the permittee to meet the requirements of Permit Part 1.E.2 (Monitoring) and E.3 (Record Keeping). The Permit requirement states that the permittee must conduct inspections of erosion and sediment controls, and shall retain records for a minimum of three years. Thus, during February 2021, and the week of May 26, 2021, Respondent failure to conduct inspections of erosion and sediment controls, and failure to maintain inspection records violated the requirements of Parts 1.E.2 and E.3 of the Permit.

17. By violating the conditions of the Permit, Respondent is in violation of Section 402 of the CWA.

III. ORDER FOR COMPLIANCE

AND NOW, pursuant to Section 309(a) of the CWA, 33 U.S.C. § 1319(a), EPA hereby ORDERS Respondent to do the following:

18. Within **five (5) days** upon receipt of this Order, Respondent shall respond to EPA by taking one of the following actions:
- a. If Respondent agrees to follow the requirements listed below in Paragraph 19, please notify EPA by email that the Respondent will comply with the terms of the Order.
 - b. If Respondent requests to discuss the Order with EPA, Respondent may request a conference (or “Opportunity to Confer”). At the conference, the Respondent may present evidence bearing on the finding of violation, on the nature of the violation, on conclusions reflected in this Order, and on any efforts it may have taken or it proposes to take to achieve compliance. Any such conference can be by telephone or by other electronic means. The conference will be expected to occur within **ten (10) days** upon receipt of this Order. If such a conference is desired, Respondent should contact Michael Greenwald at (215) 814-2398. If represented by counsel, Respondent’s attorney may contact Natalie Katz, Senior Assistant Regional Counsel, at (215) 814-2615.
19. Within **fourteen (14) days** upon receipt of this Order, Respondent shall comply with all the terms and conditions of the Permit, including ensuring all site BMPs are properly maintained, and inspections are being conducted as required. To verify work has been completed, Respondent shall submit to EPA documentation of all activities it completed to comply with the Permit and correct items listed in Paragraph 16 within this fourteen day deadline. Documentation can include citing information provided to EPA previously in response to the inspection report, an inspection (conducted by an official party such as the county or state) documenting that the site is in compliance, or a description & photographs of activities conducted to achieve compliance. Along with this documentation, Respondent shall submit the following certification, which shall be signed by a responsible corporate officer, as defined in 40 C.F.R. § 122.22:

“I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, 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.”

20. Respondent shall take all actions necessary to correct the violations identified in this Order within the time period specified. However, if conditions are present that hinder Respondent’s efforts to timely address all the violations, Respondent may request an extension from EPA. The Respondent shall address all violations that do not require an extension within the time period specified. A request for an extension must be submitted to EPA as soon as the Respondent anticipates that a delay is likely, but no later than the deadline identified in this Order. The request shall have an explanation of why you believe an extension is necessary and a proposed new deadline for correcting the remaining violations.
21. Respondent shall send all submissions to EPA, by electronic mail, to the following individual:

Michael Greenwald
U.S. EPA, Region III, 3ED32
(215) 814-2398
greenwald.michael@epa.gov

IV. GENERAL PROVISIONS

22. EPA reserves the right to commence action against any person, including Respondent, in response to any condition which EPA determines may present an imminent and substantial endangerment to the public health, public welfare, or the environment. Further, EPA reserves any rights and remedies available to it under the CWA, the CWA regulations promulgated, and any other federal laws or regulations for which EPA has jurisdiction, to enforce the provisions of this Order. Issuance of this Order shall not be deemed an election by EPA to forego any administrative, civil, or criminal action to seek penalties, fines, or any other appropriate relief under the CWA for the violations cited herein. EPA reserves the right to seek any remedy available under the law that it deems appropriate for the violations cited above. If EPA initiates such an action, Respondent will be subject to civil penalties of up to \$25,000 per day of violation, adjusted upward for inflation, pursuant to 33 U.S.C. § 1319 and the most recent Adjustment of Civil Monetary Penalties for Inflation, set forth at 40 C.F.R. Part 19.
23. Violation of the terms and conditions of this Order constitutes an additional violation of the CWA, and may result in a civil action for injunctive relief and/or a penalty not to exceed \$25,000 per day of violation, adjusted upward for inflation, pursuant to 33 U.S.C. § 1319(b) and (d), and the most recent Adjustment of Civil Monetary Penalties for Inflation, set forth at 40 C.F.R. Part 19. In addition, Section 309 provides criminal sanctions for knowing or negligent violations of the CWA including imprisonment and fines of up to \$50,000 per day of violation.
24. EPA reserves all existing inspection authority otherwise available to EPA pursuant to Section 308 of the CWA, 33 U.S.C. § 1318, or pursuant to any other statute or law.
25. This Order does not constitute a waiver or modification of the terms or conditions of any NPDES permit. Compliance with the terms and conditions of this Order does not relieve the Respondent of its obligations to comply with any applicable Federal, state, or local law or regulation or any NPDES permit.

26. For purposes of the identification requirement in Section 162(f)(2)(A)(ii) of the Internal Revenue Code, 26 U.S.C. § 162(f)(2)(A)(ii), and 26 C.F.R. § 162-21(b)(2), performance of the activities in Section III (Order for Compliance), Paragraphs 11 - 21 is restitution, remediation, or required to come into compliance with the law.

V. JUDICIAL REVIEW

27. Respondent may seek federal judicial review of this Compliance Order, issued under Section 309 of the CWA, 33 U.S.C. § 1319, pursuant to the Administrative Procedure Act, 5 U.S.C. § 702.

VI. EFFECTIVE DATE

28. This ORDER is effective five days after receipt of the Order, or, if the Opportunity to Confer occurs as identified in Paragraph 18 above, upon five days of the date of the Opportunity to Confer.

VII. TERMINATION

29. Once Respondent has complied with the requirements of this Order and has documented such compliance as required by Paragraph 19, EPA shall provide Respondent with written notification of termination of this Order. EPA reserves the right to unilaterally terminate this Order in its unreviewable discretion.

[Digital Signature and Date]

Karen Melvin, Director
Enforcement and Compliance Assurance Division
EPA, Region III

**BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
Philadelphia, Pennsylvania 19103**

IN THE MATTER OF:)	DOCKET NO.: CWA-03-2022-0059DN
)	
Top Drawer, LLC)	NPDES CGP Permit No. DE0051268
28107 Beaver Dam Branch Road, Laurel, DE)	NPDES Site Specific Permit No.
19956)	DEC006311
)	
Respondent)	ADMINISTRATIVE ORDER FOR
)	COMPLIANCE PURSUANT TO 33
Cypress Pointe A)	U.S.C. § 1319(a)
Ship Builders Drive & Woodland Ferry Road,)	
Laurel, DE 19956)	
)	
Site Name and Address)	
)	

CERTIFICATE OF SERVICE

I certify that the foregoing Order for Compliance was filed with the EPA Region III Regional Hearing Clerk on the date that has been electronically stamped on the Order for Compliance. I further certify that on the date set forth below, I caused to be served a true and correct copy of the foregoing Order for Compliance to each of the following persons, in the manner specified below, at the following addresses:

Copies served via overnight mail and email to:

Robert Horsey
David G. Horsey & Sons, Inc.
28107 Beaver Dam Branch Road, Laurel, DE 19956
bobbydgh@aol.com

Copies served via email to:

Natalie Katz
Senior Assistant Regional Counsel
U.S. EPA, Region III
katz.natalie@epa.gov

Michael Greenwald
Enforcement Officer
U.S. EPA, Region III
greenwald.michael@epa.gov

[Digital Signature and Date]
U.S. Environmental Protection Agency
Region III