

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

UNITED STATES
ENVIRONMENTAL PROTECTION
AGENCY-REGION 7
2020 FEB 20 AM 9:05

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
 Fremont at 84, LLC) Docket No. CWA-07-2020-0007
)
 Respondent) COMPLAINT AND
) CONSENT AGREEMENT/
) FINAL ORDER
 Proceedings under Section 309(g) of the)
 Clean Water Act, 33 U.S.C. § 1319(g))
 _____)

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 (“Consolidated Rules”), 40 C.F.R. Part 22.

2. Complainant, the U.S. Environmental Protection Agency Region 7 (“EPA”) and Respondent, Fremont at 84, LLC (“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) and (3) of the Consolidated Rules, 40 C.F.R. §§ 22.13(b) and 22.18(b)(2) and (3).

3. This Complaint and Consent Agreement/Final Order serves as notice that the EPA has reason to believe that the Respondent has violated Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311, 1342, and regulations promulgated thereunder.

Parties

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 the authority under Section 309(g) to the Director of the Enforcement and Compliance Assurance Division of EPA Region 7 (collectively referred to as the “Complainant”).

5. Respondent is and was at all relevant times a limited liability company under the laws of the state of Nebraska.

Statutory and Regulatory Framework

6. 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 in accordance with the terms of a National Pollutant Discharge Elimination System (“NPDES”) permit issued pursuant to that Section.

7. 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.

8. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines “navigable waters” as the “waters of the United States,” which in turn has been defined to include, *inter alia*, all waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, and tributaries to such waters. 40 C.F.R. § 122.2.

9. 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.

10. Pursuant to Section 402(p) of the CWA, the EPA promulgated regulations setting forth the NPDES permit requirements for stormwater discharges at 40 C.F.R. § 122.26.

11. 40 C.F.R. §§ 122.26(a)(1)(ii) 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.

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 which are part of a larger common plan of development or sale.”

13. 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.

EPA’s General Allegations

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

15. At all times relevant to this action, Respondent was the owner and/or operator of a residential construction site known as The Villas on Fremont, comprised of approximately 22.78 acres, and located at the intersection of 84th Street and Fremont Street in Lincoln, Nebraska (“Site”).

16. At the time of the EPA inspection, described below, Respondent had cleared and graded most of the 22.78 acres that form the construction project, and was conducting construction activities on a phase of the project consisting of approximately 7 acres.

17. Stormwater, snow melt, surface drainage, and runoff water leave Respondent’s Site and discharge into Stevens Creek and/or into a drainageway to the north of the Site boundary, which is also referred to as the open channel municipal separate storm sewer system (“MS4”), that drains to the east and into Stevens Creek.

18. 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).

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

20. Stevens Creek is a perennial stream and a tributary to Salt Creek, which is a tributary to the Platte River, which is a tributary to the Missouri River, a traditionally navigable water. Stevens Creek is a “water of the United States.”

21. Stormwater runoff from Respondent’s 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).

22. 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.

23. NDEE issued authorization to Respondent on November 8, 2016, for construction stormwater discharges under NPDES general permit NER160000, with permit tracking number CSW-201600792 (“Respondent’s NPDES Permit”). The construction stormwater general permit was signed by the Nebraska Department of Environmental Quality on September 30, 2016, and is effective between November 1, 2016 and October 31, 2021. This NPDES general permit governs Respondent’s stormwater discharges that are associated with industrial activity at the Site, including clearing, grading and excavation.

24. The principal requirement of Respondent’s NPDES Permit is for the owner 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 construction activities at the construction Site, and to assure compliance with the terms and conditions of the Permit.

25. On July 16, 2019, 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 (the “EPA Inspection”). During the EPA Inspection, the inspector reviewed and obtained copies of documents related to the Permit, including without limitation, the Site’s SWPPP and self-inspection reports, toured the Site, and photographed various stormwater-related areas.

26. During the EPA Inspection, the inspector observed and documented significant sediment accumulation offsite in the drainageway/open channel MS4, from the Site’s northeast outfall continuing up to Stevens Creek. The failure to select, install, and maintain BMPs and to take corrective actions when deficiencies were noted during self-inspections contributed to the sediment observed offsite and in the MS4.

27. At the conclusion of the EPA Inspection, the inspector issued Respondent a Notice of Potential Violation (“NOPV”) citing, *inter alia*, Respondent’s failure to maintain controls to minimize offsite sediment deposition to the MS4.

28. On or about July 23, 2019, Respondent emailed a response to the NOPV to the inspector, including photographs showing that some, but not all, BMP deficiencies were addressed by Respondent following the EPA Inspection.

29. On September 16, 2019, EPA issued Findings of Violation and Order for Compliance to correct all deficiencies and maintain compliance with Respondent’s SWPPP and NPDES Permit.

EPA’s Allegations

Count 1

Failure to Minimize Pollutants in Stormwater, Promptly Remove Offsite Sediment Deposition, and Review Adequacy of Controls

30. The paragraphs above are re-alleged and incorporated herein by reference.

31. Part III.E.2 of Respondent’s NPDES Permit requires that the facility minimize pollutants, including sediment, in stormwater discharges from the site. Part III.F.7 of Respondent’s NPDES permit states: “When sediment escapes the construction site boundaries, the offsite accumulations must be removed promptly to minimize the disturbance. In addition, the erosion controls for that portion of the project must be reviewed for adequacy of design and/or implementation to prevent reoccurrence with updates or modifications to the SWPPP as appropriate.”

32. During the EPA Inspection, the inspector observed and documented significant sediment deposition in the drainageway/open channel MS4 beyond the Site's north boundary and draining east to Stevens Creek. The accumulated sediment extended in the conveyance for approximately 34 stream yards between the Site's north outfall and the Site's northeast outfall, and for approximately 387 stream yards downstream of the Site's northeast outfall leading up to its discharge point into Stevens Creek. The sediment accumulation in these areas demonstrate that stormwater runoff from the Site had the ability to carry pollutants from the Site into Stevens Creek.

33. Respondent's alleged failure to minimize pollutants in stormwater, promptly remove offsite sediment accumulations and review adequacy of erosion controls for that portion of the project is a violation of the NPDES permit that resulted in the discharge of pollutants to navigable waters, and as such, is a violation of Sections 301(a) and/or 402(p) of the CWA, 33 U.S.C. §§ 1311(a), 1342(p).

Count 2

Failure to Properly Select, Install and/or Maintain BMPs and Failure to Fully Implement the Provisions of the SWPPP

34. The paragraphs above are re-alleged and incorporated herein by reference.

35. Part III of Respondent's NPDES Permit requires that a SWPPP be prepared and describes the required contents for the SWPPP which must, *inter alia*, describe structural and non-structural controls to be used on site in order to minimize erosion and reduce pollutants in storm water. Part III.A.4 of Respondent's NPDES Permit requires that "the Permittee must implement the SWPPP and modifications to the SWPPP from commencement of construction activity until final stabilization is complete."

36. Part III.C.2 of Respondent's NPDES Permit requires that the SWPPP describe "all temporary construction stormwater management practices that retain/detain flows or otherwise limit runoff and the discharge of pollutants from exposed areas of the construction site." Part III.F.8 of Respondent's NPDES permit requires that all temporary control measures be "properly selected, installed, and maintained."

37. During the EPA Inspection, the inspector observed and documented several areas of the Site that required different or additional BMPs and several BMPs described in the SWPPP that were not in place on the Site, including:

- a. Two areas on the west side of the active construction area, along the Site's north and south perimeters were lacking a combined total of 237 feet of fabric silt fence;
- b. Ten fabric fence "J" hooks identified in the SWPPP plans to be incorporated into the perimeter fence to reduce stormwater velocity were not in place;

- c. Approximately 339 feet on the Site's west side where City streets were in place was lacking back-of-curb protection or other controls; and
- d. Riprap protection identified in the SWPPP plans at the outfall along the Site's eastern boundary was not in place.

38. During the EPA Inspection, the inspector observed and documented several BMPs on the Site in need of maintenance, including:

- a. Approximately 335 linear feet of downed or damaged fabric silt fence along the Site's perimeter;
- b. Approximately 20 feet of fabric silt fence that was undercut along the Site's east perimeter;
- c. Three street inlet controls, including one on Fremont Street that had completely collapsed into the inlet structure, another inlet opposite it that was filling in with sediment, and an inlet control on the west side of the active construction area that was collapsing inward and was undercut;
- d. Three other inlets, which are future street inlets but were acting as area inlets, that had stormwater controls that were badly damaged or overwhelmed with sediment deposition;
- e. An area inlet with a broken inlet riser pipe and no other controls, allowing sediment and other pollutants in stormwater to escape offsite to the MS4; and
- f. Riprap protection at the outfall on the Site's northeast boundary that had washed out and was no longer functioning as intended, allowing sediment and other pollutants in stormwater to escape offsite, including the sediment deposition observed where the outfall flowed to the MS4 open channel.

39. Part III.C.5.d. of Respondent's NPDES permit requires that "[w]here sediment has been tracked-out from your site on to the surface of off-site streets, other paved areas, and sidewalks, the deposited sediment must be removed by the end of the same work day in which the track-out occurs or by the end of the next work day if track-out occurs on a non-work day."

40. During the EPA Inspection, the inspector observed and documented sediment deposition on City streets and a Site representative indicated that the Site does not always clean the streets every work day as required by the NPDES Permit.

41. Part III.C.4.a. of Respondent's NPDES permit requires that the SWPPP describe, and permittees implement, controls to prevent prohibited discharges from "wastewater from washout of concrete, unless managed by an appropriate control implemented according to industry standards." Furthermore, Part III.E.5.a. of Respondent's NPDES permit requires the "design, installation, implementation, and maintenance of effective pollution prevention measures (that) at a minimum minimize the discharge of pollutants from equipment and vehicle washing, wheel wash water, and other wash waters."

42. During the EPA Inspection, the inspector observed and documented that the Site's concrete washout or mason's area was lacking stormwater controls as described in the SWPPP to prevent migration of stormwater pollutants from the immediate area.

43. Part III.C.6. of Respondent's NPDES permit requires the SWPPP to describe "construction materials, products and waste materials expected to be stored at the construction site or supporting areas," including "controls and storage practices to minimize exposure of the materials to stormwater and storm water runoff."

44. During the EPA Inspection, the inspector observed and documented dumpsters in the active construction area; however, the inspector also observed and documented construction debris scattered throughout the Site and within the offsite open channel MS4 beyond to the Site's north boundary.

45. Respondent's alleged failure to properly select, install and/or maintain BMPs at the Site and failure to fully implement the provisions of the SWPPP is a violation of the conditions or limitations of the NPDES permit, and as such, is a violation of Section 402(p) of the CWA, 33 U.S.C. § 1342(p).

Count 3

Failure to Document Adequate Inspections and Take Appropriate Corrective Action

46. The paragraphs above are re-alleged and incorporated herein by reference.

47. Part III.J. of Respondent's NPDES Permit requires regular site inspections and provides the timeframes, conditions, areas to be inspected, and requirements for the contents of the inspection report, and the timeframe for maintaining inspection reports. Specifically, Part III.J.6 of Respondent's NPDES Permit provides that inspection reports must include weather information for the period since the last inspection, including approximate rainfall amount and whether any discharges occurred, locations of BMPs that need to be maintained, failed to operate as designed or proved inadequate, and where additional BMPs are needed, and corrective action that required changes to the SWPPP and dates the changes were inspected.

48. Part III.F.8.b of Respondent's NPDES Permit requires that as to temporary construction control BMPs, "[i]f periodic inspections or other information indicates a control has been installed incorrectly or if the control implemented as planned is ineffective, the operator must either correct the deficiencies of the existing control or modify that portion of the SWPPP plan and implement effective controls as soon as practicable." Further, Part III.F.8.c of Respondent's NPDES Permit requires that corrective action be completed within seven (7) days or before the next storm event, whichever is practicable.

49. Based on a review of the facility's self-inspection reports and observations made during the EPA Inspection, the inspection reports did not have the required content and when

deficiencies were noted in the reports, corrective actions were not taken in a timely manner, including:

- a. Many of the self-inspection reports do not include the required weather data for the day self-inspections were performed in addition to rainfall events that happened prior to each self-inspection;
- b. Self-inspection reports conducted on May 20, 2019, May 24, 2019, June 17, 2019, and July 16, 2019, identified BMPs in need of maintenance, including certain deficiencies that had been documented in previous inspection reports but remained unaddressed, and did not note that any corrective action was taken; and
- c. In many instances, no corrective action was taken for deficiencies noted in the self-inspection reports until after the EPA Inspection.

50. Respondent's alleged failure to document adequate inspections and take appropriate corrective action is a violation of the conditions or limitations of the NPDES permit, and as such, is a violation of Section 402(p) of the CWA, 33 U.S.C. § 1342(p).

Penalty

51. As alleged in the preceding Counts 1, 2 and 3, and pursuant to Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), as adjusted pursuant to 40 C.F.R. § 19.4, Respondent is liable for civil penalties of up to \$20,965 per day for each day during which the violation continues, up to a maximum of \$262,066.

CONSENT AGREEMENT

52. Respondent and the EPA agree to the terms of this Consent Agreement/Final Order.

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

54. Respondent neither admits nor denies the factual allegations and legal conclusions asserted by the EPA in this Complaint and Consent Agreement/Final Order.

55. Respondent waives its right to contest any issue of fact or law set forth above, and their right to appeal this Consent Agreement/Final Order.

56. Respondent and Complainant agree to conciliate the matters set forth in this Consent Agreement/Final Order without the necessity of a formal hearing and agree to bear their own costs and attorney's fees incurred as a result of this action.

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

58. Respondent understands and agrees that this Consent Agreement/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/Final Order.

59. Respondent certifies by the signing of this Consent Agreement/Final Order that Respondent's Site is in current compliance with NPDES general permit NER160000, with permit tracking number CSW-201600792, and Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342, and applicable regulations.

Penalty Payment

60. Respondent agrees that, in settlement of the claims alleged in this Consent Agreement/Final Order, Respondent shall pay a civil penalty of **Thirty Thousand Dollars (\$30,000)** pursuant to the authority of Section 309(g) of the CWA, 33 U.S.C. § 1319(g), to be paid in full no later than 30 days after the effective date of this Consent Agreement/Final Order as set forth below.

61. Respondent shall pay the penalty identified above by certified or cashier's check made payable to "Treasurer, United States of America," with a transmittal that identifies the case name, facility address, and docket number CWA-07-2020-0007 to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, Missouri 63197-9000

or by alternate payment method described at <http://www.epa.gov/financial/makepayment>.

62. Respondent shall simultaneously send copies of the transmittal letter and the check, as directed above, to the following:

Lisa Haugen
Regional Hearing Clerk
U.S. Environmental Protection Agency
11201 Renner Boulevard
Lenexa, Kansas 66219

and

Shane McCoin
Office of Regional Counsel
U.S. Environmental Protection Agency
11201 Renner Boulevard
Lenexa, Kansas 66219.

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

64. Interest on any late payment will be assessed at the annual interest rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717. The interest will be assessed on any 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 or interest.

Effect of Settlement and Reservation of Rights

65. Respondent's payment of the entire civil penalty pursuant to this Consent Agreement/Final Order resolves all civil and administrative claims pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), for alleged violations identified in this Complaint and Consent Agreement/Final Order. Complainant reserves the right to take any enforcement action with respect to any other violations of the CWA or any other applicable law.

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

67. Nothing contained in this Consent Agreement/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.

68. Notwithstanding any other provision of this Consent Agreement/Final Order, 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, and to seek penalties against Respondent or to seek any other remedy allowed by law.

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

General Provisions

70. The Parties acknowledge that this Consent Agreement/Final Order is subject to the 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.

71. Pursuant to 40 C.F.R. § 22.31(b), this Consent Agreement/Final Order shall be effective after signature by the authorized regional official and upon filing with the Regional Hearing Clerk, U.S. Environmental Protection Agency, 11201 Renner Boulevard, Lenexa, Kansas 66219. All time periods herein shall be calculated therefrom in calendar days unless otherwise provided in this Consent Agreement/Final Order.

72. The state of Nebraska has been provided an opportunity to consult with Complainant regarding this matter in accordance with the requirements of 40 C.F.R. § 22.38(b) and Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1).

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

74. Respondent and Complainant agree that this Consent Agreement/Final Order may be signed in part and counterpart.

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

2/18/20
Date

David Cozad
David Cozad
Director
Enforcement and Compliance Assurance Division

2/18/20
Date

Shane E. C. McCain
Shane E. C. McCain
Office of Regional Counsel

For the Respondent, Fremont at 84, LLC:



Signature

12.16.19

Date

Thomas Schleicher

Name

Manager

Title

FINAL ORDER

Pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), and 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, the foregoing Consent Agreement resolving this matter is hereby ratified and incorporated by reference into this Final Order.

The Respondent is ORDERED to comply with all of the terms of the Consent Agreement. In accordance with 40 C.F.R. § 22.31(b), the effective date of the foregoing Consent Agreement and this Final Order is the date on which this Final Order is filed with the Regional Hearing Clerk.

IT IS SO ORDERED.

Feb. 19, 2020
Date

Karina Borromeo
Karina Borromeo
Regional Judicial Officer

CERTIFICATE OF SERVICE

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

Copy by First Class Mail to Respondent:

Fremont at 84, LLC
c/o Registered Agent Randy Chevalier
7211 S. 27th Street
Lincoln, Nebraska 68512;

Copy emailed to Attorney for Complainant:

Shane McCoin
U.S. Environmental Protection Agency Region 7
mccoin.shane@epa.gov

Copy by First Class Mail to the Nebraska Department of Environment and Energy:

Mr. Reuel Andersen Unit Chief
NPDES Permits and Compliance Unit
Water Quality Division
Nebraska Department of Environment and Energy
1200 N Street, Suite 400
P. O. Box 98922
Lincoln, Nebraska 68509-8922.

February 19, 2020
Date

Edith Beekun
for Lisa Haugen
Regional Hearing Clerk
Region 7