



Parties

3. The authority to take action under Section 309(g) of the CWA, 33 U.S.C. § 1319(g), is vested in the Administrator of EPA. The Administrator has delegated this authority to the Regional Administrator, EPA, Region 7, who in turn has delegated it to the Director of the Water, Wetlands and Pesticides Division of EPA, Region 7 (Complainant).

4. Respondent is BRB Contractors, Inc., a company registered under the laws of Kansas and authorized to conduct business in the State of Kansas.

Statutory and Regulatory Framework

5. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants except in compliance with, inter alia, Section 402 of the CWA, 33 U.S.C. § 1342. Section 402 of the CWA, 33 U.S.C. § 1342, provides that pollutants may be discharged only in accordance with the terms of a National Pollutant Discharge Elimination System (NPDES) permit issued pursuant to that Section.

6. The CWA prohibits the discharge of “pollutants” from a “point source” into a “navigable water” of the United States, as these terms are defined by Section 502 of the CWA, 33 U.S.C. § 1362.

7. Section 402(p) of the CWA, 33 U.S.C. § 1342(p), sets forth requirements for the issuance of NPDES permits for the discharge of stormwater. Section 402(p) of the CWA, 33 U.S.C. § 1342(p), requires, in part, that a discharge of stormwater associated with an industrial activity must conform with the requirements of an NPDES permit issued pursuant to Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342.

8. Pursuant to Section 402(p) of the CWA, 33 U.S.C. § 1342(p), EPA promulgated regulations setting forth the NPDES permit requirements for stormwater discharges at 40 C.F.R. § 122.26.

9. 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.

10. 40 C.F.R. § 122.26(b)(14)(x) defines “stormwater discharge associated with industrial activity,” in part, as construction activity including clearing, grading, and excavation, except operations that result in the disturbance of less than five (5) acres of total land area which are not part of a larger common plan of development or sale.

11. The Kansas Department of Health and Environment (KDHE) is the state agency with the authority to administer the federal NPDES program in Kansas pursuant to Section 402 of the CWA, 33 U.S.C. § 1342. EPA maintains concurrent enforcement authority with authorized states for violations of the CWA.

12. The KDHE issued a General Permit for the discharge of stormwater under the NPDES, Permit No. KSR100000. This General Permit became effective on January 2, 2007, and expires on December 31, 2011. This General Permit governs construction or land disturbance activity (e.g., clearing, grubbing, excavating, grading, and other activity that results in the destruction of the root zone and/or land disturbance activity that is reasonably certain to cause pollution to waters of the state). This General Permit also applies to land disturbance activities near valuable resource waters.

#### Factual Background

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

14. At all times relevant to this action, Respondent was the operator at a construction site known as Johnson County Water One Project MP-05321 ("Site") which extended along 115<sup>th</sup> Street, from Parallel Parkway to Sam Clark Lane, in Wyandotte County, Kansas. Construction activities occurred at the Site including clearing, grading, and excavation which disturbed five (5) or more acres of total land area or which disturbed less than five (5) acres of total land area that was part of a larger common plan of development or sale.

15. Respondent applied for and was issued NPDES permit coverage under the General Permit described in paragraph 12, above, for the entire site. KDHE assigned Respondent permit number KSR104611, which was issued on September 25, 2007, authorizing Respondent to operate under the General Permit.

16. Stormwater, snow melt, surface drainage, and runoff water from Respondent's facility goes into Conner Creek, Honey Creek and other unnamed tributaries of the Kansas River. The runoff and drainage from Respondent's facility is "stormwater" as defined by 40 C.F.R. § 122.26(b)(13).

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

18. The Site has “stormwater discharge associated with industrial activity” as defined by 40 C.F.R. § 122.26(b)(14)(x), and is a “point source” as defined by Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

19. The Site has “stormwater discharges associated with industrial activity” as defined by 40 C.F.R. § 122.26(b)(14)(x), and is a “point source” as defined by Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

20. Respondent discharged pollutants into “navigable waters” as defined by CWA Section 502, 33 U.S.C § 1362.

21. Stormwater runoff from Respondent’s construction 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)(x), requires a permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

23. On January 14, 20, 22 and February 15, 2009, EPA inspectors performed an inspection of the Site under the authority of Section 308(a) of the CWA, 33 U.S.C. § 1318(a). The purpose of the inspection was to evaluate the management of stormwater at the site in accordance with the CWA.

### Findings of Violation

#### Count 1

#### **Failure to have an Adequate Stormwater Pollution Prevention Plan (SWPPP)**

24. Paragraphs 1 through 23 above are herein incorporated.

25. Part 7 of the Requirements and Guidelines section of the General Permit requires that the Respondent shall develop and prepare a Stormwater Pollution Prevention Plan (SWPPP) in order to be in compliance with the terms of the General Permit. The General Permit requires that the SWPPP shall be a “working document which contractors and site construction workers can use to guide the installation and maintenance of BMPs [Best Management Practices].”

26. Respondent’s SWPPP failed to identify the full area of the site, and did not list all of the impacted streams in the area, thus it was inadequate to guide the installation and

maintenance of BMPs at the site.

27. Part 7 of the Requirements and Guidelines section of the General Permit requires that the Respondent's SWPPP shall provide extensive information about BMPs at the site, including:

- whether the BMP is temporary or permanent;
- where, in relation to the other site features, the BMP is to be located;
- when, in relation to each phase of the construction, the BMP will be installed; and
- what site conditions must be met before removal of the BMP, if the BMP is not a permanent BMP.

28. Respondent's SWPPP contained drawings of BMPs, but the drawings were not accompanied by a narrative detailing how to properly install or maintain the BMPs. It, thus, did not meet the requirements of the General Permit regarding the description of the BMPs within the SWPPP.

29. Respondent's failure to develop an adequate SWPPP is a violation of Respondent's Permit, and as such, is a violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a), and a permit issued pursuant to Section 402(p) of the CWA, 33 U.S.C. § 1342(p).

### Count 2

#### **Failure to Install Appropriate Best Management Practices**

30. Paragraphs 1 through 29 above are herein incorporated.

31. Part 7 of the Requirements and Guidelines section of Respondent's permit states that "the permittee shall select, install, utilize and maintain the BMPs in accordance with the concepts and methods described in the Environmental Protection Agency (EPA) document number 832-R-92-005, entitled Stormwater Management for Construction Activities – Developing Pollution Prevention Plans and Best Management Practices (see endnote 5, page 13)."

32. At the time of the EPA inspection referenced in paragraph 23 above, Respondent had not installed all necessary BMPs on site. Specifically, Respondent had failed to install adequate silt fences, sediment control blankets or to properly seed and mulch disturbed areas, or use other equivalent BMPs, for much of the Site, as required by the General Permit.

33. Respondent's failure to install adequate BMPs is a violation of Respondent's Permit, and as such, is a violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a), and a permit issued pursuant to Section 402(p) of the CWA, 33 U.S.C. § 1342(p).

**Count 3**

**Failure to Perform and Document Site Inspections**

34. Paragraphs 1 through 33 above are herein incorporated.

35. Part 7 of the Requirements and Guidelines section of Respondent's permit requires that Respondent insure that the site shall be inspected within twenty-four hours of the end of a precipitation event which results in precipitation of 0.5 inches or greater.

36. The EPA inspection referenced in paragraph 23 above, revealed that Respondent did not perform documented inspections in response to at least 17 different heavy rain events between January 2, 2008 and January 19, 2009.

37. Respondent's failure to perform and document site inspections is a violation of Respondent's Permit, and as such, is a violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a), and a permit issued pursuant to Section 402(p) of the CWA, 33 U.S.C. § 1342(p).

38. Based on the foregoing Findings of Violation, and pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), EPA, Region 7 hereby proposes to issue a Final Order assessing an administrative penalty against the Respondent for the violations cited in Counts 1 through 3 above, in the amount of \$56,100.

**CONSENT AGREEMENT**

39. Respondent and EPA agree to the terms of this CA/FO and Respondent agrees to comply with the terms of the Final Order portion of this CA/FO.

40. Respondent admits the jurisdictional allegations of this CA/FO and agrees not to contest EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of the Final Order portion of this CA/FO.

41. Respondent neither admits nor denies the factual allegations set forth above.

42. Respondent waives its right to a judicial or administrative hearing on any issue of fact or law set forth above, and its right to appeal the Final Order portion of this CA/FO.

43. Respondent and Complainant agree to conciliate the matters set forth in this CA/FO 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.

44. The undersigned representative of Respondent certifies that he or she is fully authorized to enter the terms and conditions of this CA/FO and to execute and legally bind Respondent to it.

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

46. This CA/FO addresses all civil and administrative claims for the CWA violations identified above. Complainant reserves the right to take any enforcement action with respect to any other violations of the CWA or any other applicable law.

47. Respondent certifies by the signing of this CA/FO that to the best of its knowledge, Respondent's facility is in compliance with all requirements of Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342.

48. The effect of settlement described above is conditional upon the accuracy of the Respondent's representations to EPA, as memorialized in paragraph 47 above, of this CA/FO.

49. Respondent agrees that, in settlement of the claims alleged in this CA/FO, Respondent shall pay a penalty of \$56,100 as set forth in paragraph 1 of the Final Order.

50. Respondent understands that failure to pay any portion of the civil penalty on the date the same is due may result in the commencement of a civil action in Federal District Court to collect said penalty, along with interest thereon at the applicable statutory rate.

### FINAL ORDER

#### **Payment Procedures**

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

1. Respondent shall pay a mitigated civil penalty of Fifty-six Thousand One Hundred Dollars (\$56,100) within thirty (30) days of the effective date of this Final Order.
2. Payment of the penalty shall be by cashier or certified check made payable to the "United States Treasury" and remitted to:

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

This payment shall reference docket number CWA-07-2010-0078.

Copies of the check shall be mailed to:

Raymond C. Bosch  
Assistant Regional Counsel  
U.S. Environmental Protection Agency - Region 7  
901 North 5th Street  
Kansas City, Kansas 66101

and to

Kathy Robinson  
Regional Hearing Clerk  
U.S. Environmental Protection Agency - Region 7  
901 North 5th Street  
Kansas City, Kansas 66101.

3. No portion of the civil penalty or interest paid by Respondent pursuant to the requirements of this CA/FO shall be claimed by Respondent as a deduction for federal, state, or local income tax purposes.

#### **Parties Bound**

4. This Final Order portion of this CA/FO 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 CA/FO.

#### **General Provisions**

5. Notwithstanding any other provision of this CA/FO, EPA reserves the right to enforce

the terms of the Final Order portion of this CA/FO 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.

6. Complainant reserves the right to take enforcement action against Respondent for any future violations of the CWA and its implementing regulations and to enforce the terms and conditions of this CA/FO.

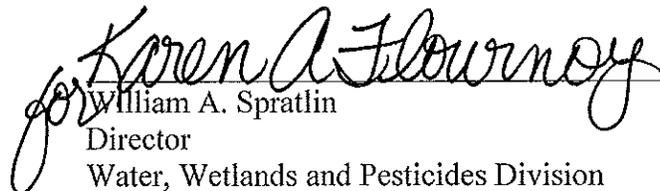
7. This Order shall be entered and become effective only after the conclusion of the period of public notice and comment required pursuant to Section 309(g)(4) of the CWA, 33 U.S.C. § 1319(g)(4), and 40 C.F.R. § 22.45. Unless otherwise stated, all time periods stated herein shall be calculated in calendar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

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

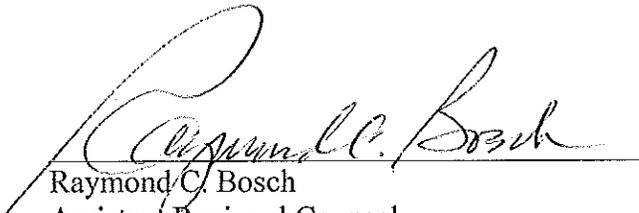
9. The headings in this CA/FO are for convenience of reference only and shall not affect interpretation of this CA/FO.

COMPLAINANT:  
U.S. ENVIRONMENTAL PROTECTION AGENCY

5-10-10  
Date

  
William A. Spratlin  
Director  
Water, Wetlands and Pesticides Division

4-29-2010  
Date

  
Raymond C. Bosch  
Assistant Regional Counsel  
Office of Regional Counsel

RESPONDENT:  
BRB CONTRACTORS, INC.

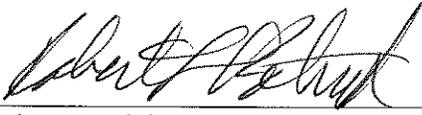
05/07/2010  
Date

Daniel M. Welch

Name (Print) DANIEL M WELCH

Title GENERAL COUNSEL

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

  
\_\_\_\_\_  
Robert Patrick  
Regional Judicial Officer

June 24, 2010  
Date

I certify that a true and correct copy of the foregoing CA/FO was sent this day in the following manner to:

Copy hand delivered to  
Attorney for Complainant:

Raymond C. Bosch  
Assistant Regional Counsel  
United States Environmental Protection Agency  
901 North 5<sup>th</sup> Street  
Kansas City, Kansas 66101

Copy by Certified Mail Return Receipt to:

Dan Welch  
Legal Counsel  
BRB Contractors, Inc.  
3805 NW 25th Street  
Topeka, Kansas 66618

Sent via first class mail to:

Karl Muedener  
Kansas Department of Health and Environment  
1000 SW Jackson - Suite 560  
Topeka, Kansas 66612-1368

6/24/10  
Date

Kathy Robinson