

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VII
901 NORTH FIFTH STREET
KANSAS CITY, KANSAS 66101

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ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)	
)	Docket No. CWA-07-2006-0241
Scherer Construction, Inc.)	
1706 N 150 th Street)	CONSENT AGREEMENT
Basehor, KS 66007)	FINAL ORDER
)	
Respondent)	
)	
Proceedings under Section 309(g) of the)	
Clean Water Act, 33 U.S.C. § 1319(g))	
)	

The United States Environmental Protection Agency (EPA), Region VII (Complainant) and Scherer Construction, Inc. (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) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits (Consolidated Rules), 40 C.F.R. §§ 22.13(b) and 22.18(b)(2).

ALLEGATIONS

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, 40 C.F.R. Part 22.

2. This Consent Agreement and Final Order serves as notice that the United States Environmental Protection Agency (EPA) has reason to believe that Respondent has violated Sections 301 and 402 of the CWA, 33 U.S.C. § 1311 and § 1342, and regulations promulgated thereunder.

*In the Matter of Scherer Construction, Inc.
Consent Agreement Final Order*

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 VII, who in turn has delegated it to the Director of the Water, Wetlands and Pesticides Division of EPA, Region VII (Complainant).

4. Respondent is Scherer Construction, Inc., a company incorporated 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 storm water. Section 402(p) of the CWA, 33 U.S.C. § 1342(p), requires, in part, that a discharge of storm water 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 storm water 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 storm water associated with industrial activity to apply for an individual permit or to seek coverage under a promulgated storm water general permit.

10. 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 (5) acres of total land area which are not part of a larger common plan of development or sale.

*In the Matter of Scherer Construction, Inc.
Consent Agreement Final Order*

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 delegated states for violations of the CWA.

12. KDHE issued a general permit for the discharge of storm water under the NPDES, Permit No. S-MCST-0110-1. The general permit governs storm water discharges associated with construction or land disturbance activity. The general permit became effective on March 1, 2003 and expires on December 31, 2006.

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 owner and/or operator of a construction site known as the Creek Ridge Development located near the southwest corner of 155th Street and Parallel Road, Basehor, Kansas ("Site"). 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. Storm water, snow melt, surface drainage and runoff water leaves Respondent's facility and goes into a tributary of Hog Creek, which is a tributary of Stranger Creek and the Kansas River. The runoff and drainage from Respondent's facility is "storm water" as defined by 40 C.F.R. § 122.26(b)(13).

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

17. The site has "storm water 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).

18. Respondent discharged pollutants into "navigable waters" as defined by CWA Section 502(7), 33 U.S.C. § 1362(7).

19. Storm water 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).

*In the Matter of Scherer Construction, Inc
Consent Agreement Final Order*

20. 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.

21. Respondent applied for and was issued NPDES permit coverage under the general permit described in paragraph 12 above. KDHE assigned Respondent Permit No. KS-R100993, which was issued on June 23, 2003.

22. On May 11, 2005, 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 treatment and disposal of storm water at the site in accordance with the CWA.

Findings of Violation

Count 1

Failure to Maintain Pollution Control Measures

23. The facts stated in paragraphs 13 through 22 above are herein incorporated.

24. Part X of the Respondent's permit requires Respondent to maintain, repair, and/or replace all pollution control measures in need of maintenance in a timely manner to avoid discharging sediment-laden storm water runoff.

25. The inspection referenced in paragraph 22 above, revealed that Respondent's pollution control measures, including the sediment trap and silt fences, were not properly maintained. Specifically, the rock in the sediment trap was shifted to the banks of the channel and was clogged with accumulated sediment. Additionally, numerous silt fences were undermined, overrun, or filled with sediment.

26. Respondent's failure to properly maintain its pollution control measures is a violation of Respondent's permit, and as such, is a violation of Sections 301(a) and 402(p) of the CWA, 33 U.S.C. § 1311(a) and § 1342(p).

Count 2

Failure to Install Appropriate Best Management Practices

27. The facts stated in paragraphs 13 through 22 above are herein incorporated.

28. Part VII of the Respondent's permit states that storm water runoff from disturbed areas which leave the site boundary shall pass through an appropriate impediment to sediment

*In the Matter of Scherer Construction, Inc.
Consent Agreement Final Order*

movement, such as a sedimentation basin, sediment trap, silt fence, etc., prior to leaving the construction site.

29. At the time of the inspection referenced in paragraph 22 above, Respondent had not installed storm water impediment mechanisms to protect storm drain inlets.

30. Respondent's failure to install appropriate impediments to sediment movement is a violation of Respondent's permit, and as such, is a violation of Sections 301(a) and 402(p) of the CWA, 33 U.S.C. § 1311(a) and § 1342(p).

Count 3

Failure to Perform and Document Site Inspections

31. The facts stated in paragraphs 13 through 22 above are herein incorporated.

32. Part VII of the Respondent's permit requires that regular inspections be performed at a minimum of once per month and within twenty-four (24) hours of the end of a rain event which results in precipitation of 0.5 inches or greater. In addition, the permit requires that reports of each inspection are to be made and any deficiencies revealed by the inspection are to be noted and corrected within seven (7) calendar days of the inspection.

33. The inspection referenced in paragraph 22 above, revealed that Respondent did not perform documented monthly site inspections during construction on the Site, nor did the Respondent perform documented inspections within seven (7) days of significant rain events.

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

Count 4

Failure to Develop an Adequate Stormwater Pollution Prevention Plan

35. The facts stated in paragraphs 13 through 22 above are herein incorporated.

36. Part VII of the Respondent's permit requires that the Stormwater Pollution Prevention Plan ("SWPPP") include, *inter alia*, the following items:

Description of Best Management Practices -- The SWPPP plan shall provide a physical description, installation and construction procedures, and operation and maintenance procedures for each BMP which will be used at the site. The SWPPP plan shall provide information detailing where the BMP is to be located,

*In the Matter of Scherer Construction, Inc.
Consent Agreement Final Order*

when the BMP will be installed, and what conditions must be met before its removal.

Permanent Stormwater Management – The SWPPP plan shall include a description of the measures that will be installed during construction to control pollutants in stormwater runoff that will occur after construction activity has been completed.

Additional Site Management BMPs – The SWPPP plan shall address other BMPs, as required by site activities, to prevent contamination of stormwater runoff.

37. The inspection referenced in paragraph 22 above, revealed that Respondent's SWPPP failed to include a sufficient description of best management practices, a permanent stormwater management plan, and a description of additional site management BMPs.

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

Count 5

Unauthorized Discharge of Pollutants

39. The facts stated in paragraphs 13 through 22 above are herein incorporated.

40. Part III of the Respondent's permit states that the discharge of wash and/or rinse waters from concrete mixing equipment to waters of the state is not authorized by the Kansas general permit.

41. The inspection referenced in paragraph 22 above, revealed that concrete washout had been discharged on the banks of, and directly into, the tributary of Hog Creek.

42. Respondent's unauthorized discharge of concrete wash water to waters of the state is a violation of Respondent's permit, and as such, is a violation of Sections 301(a) and 402(p) of the CWA, 33 U.S.C. § 1311(a) and § 1342(p).

Count 6

Discharge Without a Permit

43. The facts stated in paragraphs 13 through 22 above are herein incorporated.

*In the Matter of Scherer Construction, Inc.
Consent Agreement Final Order*

44. Part I of the Respondent's permit requires the owner or operator of any project which may discharge stormwater runoff from construction activities to obtain authorization under the Kansas general NPDES permit prior to commencing construction at the project site.

45. The inspection referenced in paragraph 22 above, revealed that Respondent commenced construction and land disturbance activities prior to obtaining authorization on a parcel of land beyond the coverage of the Respondent's permit.

46. Respondent's failure to obtain a permit before commencing land disturbing activities is a violation of Sections 301(a) and 402(p) of the CWA, 33 U.S.C. § 1311(a) and § 1342(p).

47. Based on the foregoing Findings of Violation, and pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), EPA, Region VII hereby proposes to issue a Final Order assessing an administrative penalty against the Respondent for the violations cited above, in the amount of \$27,949.68

CONSENT AGREEMENT

1. Respondent and EPA agree to the terms of this Consent Agreement and Final Order and Respondent agrees to comply with the terms of the Final Order portion of this Consent Agreement and Final Order.

2. Respondent admits the jurisdictional allegations of this Consent Agreement and Final Order 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 Consent Agreement and Final Order.

3. Respondent neither admits nor denies the factual allegations and legal conclusions set forth in this Consent Agreement and Final Order.

4. 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 Consent Agreement and Final Order.

5. Respondent and Complainant agree to conciliate the matters set forth in this Consent Agreement and 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.

6. This Consent Agreement and Final Order 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.

*In the Matter of Scherer Construction, Inc.
Consent Agreement Final Order*

7. Nothing contained in the Final Order portion of this Consent Agreement and 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.

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

9. Respondent certifies by the signing of this Consent Agreement and Final Order that it is in compliance with the requirements of Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342.

10. The effect of settlement described in paragraph 6 above is conditional upon the accuracy of the Respondent's representations to EPA, as memorialized in paragraph 9 above, of this Consent Agreement and Final Order.

11. Respondent agrees that, in settlement of the claims alleged in this Consent Agreement and Final Order, Respondent shall pay a penalty of \$27,949.68 as set forth in paragraph 1 of the Final Order.

12. 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 Consent Agreement and Final Order, IT IS HEREBY ORDERED THAT:

1. Respondent shall pay a civil penalty of Twenty-seven Thousand Three Hundred Seventy-five dollars (\$27,375) plus interest of Five Hundred Seventy-four dollars and Sixty-eight cents (\$574.68) over a period of two (2) years for a total payment of Twenty-seven Thousand Nine Hundred Forty-nine dollars and Sixty-eight cents (\$27,949.68). The total civil penalty of \$27,949.68 shall be paid in twenty-four (24) monthly payments of One Thousand One Hundred Sixty-four dollars and Fifty-seven cents (\$1,164.57). The first payment of \$1,164.57 is due within thirty (30) days of the effective date of this Consent Agreement and Final Order. Respondent shall make monthly payments of \$1,164.57 due every thirty (30) days thereafter, with the total payment of \$27,949.68 to be paid in full no later than 720 days after the effective date of this Consent Agreement and Final Order.

*In the Matter of Scherer Construction, Inc
Consent Agreement Final Order*

2. Pursuant to 40 C.F.R. § 13.18, failure to make any payment according to the above schedule will automatically accelerate the debt which will become due and owing in full, immediately. Interest on any late payment will be assessed at the annual 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 and interest:

3. 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 Region VII
P.O. Box 371099M
Pittsburgh, Pennsylvania 15251.

The payment shall reference docket number CWA-07-2006-0241.

Copies of the checks shall be mailed to:

Sarah Thibos
Assistant Regional Counsel
U.S. Environmental Protection Agency - Region VII
901 North 5th Street
Kansas City, Kansas 66101

and

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

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

Parties Bound

5. This Final Order portion of this Consent Agreement and 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

*In the Matter of Scherer Construction, Inc.
Consent Agreement Final Order*

for Respondent with respect to matters included herein comply with the terms of this Consent Agreement and Final Order.

General Provisions

6. Notwithstanding any other provision of this Consent Agreement and Final Order, EPA reserves the right to enforce the terms of the Final Order portion of this Consent Agreement and 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.

7. 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 Consent Agreement and Final Order.

8. 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.

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

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

For the Respondent:

Jeff Scherer

Printed Name:

Aug 28 2006

Date

Title: Pres



*In the Matter of Scherer Construction, Inc.
Consent Agreement Final Order*

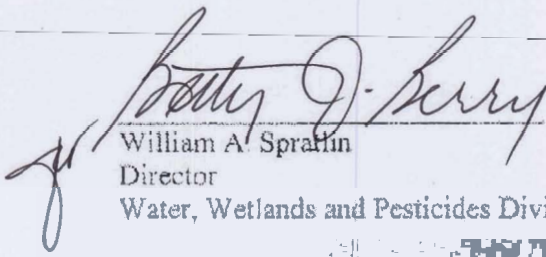


For the Complainant:
The United States Environmental Protection Agency



Sarah Thibos
Assistant Regional Counsel

10/16/06
Date



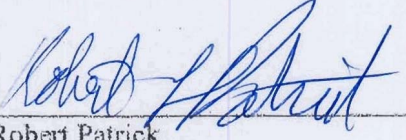
William A. Sprafin
Director
Water, Wetlands and Pesticides Division

10/16/06
Date

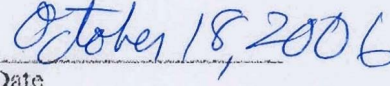


*In the Matter of Scherer Construction, Inc.
Consent Agreement Final Order*

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



Robert Patrick
Regional Judicial Officer



Date

IN THE MATTER OF Scherer Construction, Inc., Respondent
Docket No. Cwa-07-2006-0241

CERTIFICATE OF SERVICE

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

Copy hand delivered to:

Sarah Thibos LaBoda
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region 7
901 N. 5th Street
Kansas City, Kansas 66101


Copy by Certified Mail Return Receipt to:

Mr. G. Edgar James
Shughart Thomson & Kilroy
Twelve Wyandotte Plaza
120 West 12th Street
Kansas City, Missouri 64105

and to:

Mr. Karl Mueldener
Kansas Department of Health and Environment
Bureau of Water
1000 SW Jackson Street, Suite 420
Topeka, Kansas 66612-1367

10/19/06
Dated


Kathy Robinson
Kathy Robinson
Hearing Clerk, Region 7