

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VII

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901 NORTH FIFTH STREET
KANSAS CITY, KANSAS 66101
ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)	
)	Docket No. CWA-07-2005-0399
L.K. Properties II, LLC)	
P.O. Box 340)	
St. Peters, MO 63376)	FINDINGS OF VIOLATION,
)	ORDER FOR COMPLIANCE
Respondent)	
)	
Proceedings under Section 309(g) of the)	
Clean Water Act, 33 U.S.C. § 1319(g))	
_____)	

Preliminary Statement

1. The following Findings of Violation and Order for Compliance (“Order”) are made and issued pursuant to the authority of Section 309(a)(3) of the Clean Water Act (“CWA”), 33 U.S.C. § 1319(a)(3). This authority has been delegated by the Administrator of the United States Environmental Protection Agency (“EPA”) to the Regional Administrator, EPA Region VII and further delegated to the Director of Region VII’s Water, Wetlands and Pesticides Division.

2. Respondent is L.K. Properties II, LLC., a company incorporated under the laws of Missouri and authorized to conduct business in the State of Missouri.

Statutory and Regulatory Framework

3. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants except in compliance with, inter alia, 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.

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

5. Section 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.

6. 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.

7. 40 C.F.R. § 122.26(a)(1)(ii) and 122.26(c) requires 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.

8. 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.

9. The Missouri Department of Natural Resources (“MDNR”) is the state agency with the authority to administer the federal NPDES program in Missouri pursuant to Section 402 of the CWA, 33 U.S.C. § 1342. The EPA maintains concurrent enforcement authority with delegated states for violations of the CWA.

10. The MDNR issued a General Permit for the discharge of storm water under the NPDES, Permit No. MO-R106370 (“Permit”). The permit became effective on February 8, 2002, and expires on February 7, 2007. The permit governs storm water discharges associated with construction or land disturbance activity (e.g., clearing, grubbing, excavating, grading, and other activity that results in the destruction of the root zone).

Factual Background

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

12. At all times relevant to this action, Respondent was the owner and/or operator of a construction site known as Northport Commerce Center located south of Pershall Road, one half mile west of Highway 367 in Bellefontaine Neighbors, Missouri (“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.

13. Storm water, snow melt, surface drainage and runoff water leaves Respondent's facility and goes into tributaries of Maline Creek. The runoff and drainage from Respondent's facility is "storm water" as defined by 40 C.F.R. § 122.26(b)(13).

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

15. Respondent's storm water runoff is the "discharge of a pollutant" as defined by CWA Section 502(12), 33 U.S.C. § 1362(12).

16. The Site was a "point source" which caused the "discharge of pollutants" as defined by CWA Section 502, 33 U.S.C. § 1362.

17. Respondent discharged pollutants into tributaries to Maline Creek. Maline Creek is a "navigable water" as defined by CWA Section 502, 33 U.S.C. § 1362.

18. 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.

19. Respondent applied for and was issued NPDES permit coverage under the General Permit described in paragraph 10 above. MDNR assigned Respondent Permit No. MO-R106370, which was issued on May 13, 2004.

20. On February 17-18, 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 compliance with the requirements of the CWA.

Findings of Violation

Count 1

Failure to Maintain Pollution Control Measures

21. The facts stated in paragraphs 11 through 20 above are herein incorporated.

22. Part 11 of the Requirements and Guidelines section of Respondent's permit requires Respondent to maintain all pollution control measures and systems in good order to achieve compliance with the terms of the General Permit.

23. The inspection referenced in paragraph 20 above, revealed that Respondent's pollution control measures, including silt fences and sedimentation basin number 3, were not

properly maintained. Specifically, several perimeter silt fences were either overtopped, filled up with silt, downed, or not adequately anchored. Silt fences along the south boundary of the site and east of basin number 3 were not adequately trenched in. Sedimentation basin number 3 was not functional and in need of repair for six weeks prior to being repaired.

24. Respondent's failure to properly maintain its pollution control measures is a violation of Respondent's General 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 Institute Appropriate Best Management Practices

25. The facts stated in paragraphs 11 through 20 above are herein incorporated.

26. Part 8 of the Requirements and Guidelines section of Respondent's permit states that storm water runoff from disturbed areas which leave the site boundary shall pass through an appropriate impediment to sediment movement, such as a sedimentation basin, sediment trap, silt fence, etc., prior to leaving the construction site.

27. The inspection referenced in paragraph 20 above, revealed that Respondent failed to install appropriate impediments to sediment movement for storm water to pass through prior to leaving the construction site as follows:

- a. Part 8(d) of the Requirements and Guidelines section of Respondent's permit states that "[w]here soil disturbing activities cease in an area for more than 14 days, the disturbed areas shall be protected from erosion by stabilizing the area with mulch or other similarly effective control BMPs." At the time of inspection, soil disturbing activities had ceased on the Site in mid-November 2004, and Respondent failed to adequately stabilize the Site with mulch or other similarly effective erosion control Best Management Practices ("BMPs"), resulting in erosion and sediment runoff.
- b. Respondent installed a number of sedimentation basins on the Site. Part 8 (h) of the Requirements and Guidelines section of Respondent's permit requires that sediment basins be provided with a stabilized spillway to minimize potential for erosion of the spillway or basin embankment. At the time of inspection, no stabilization devices could be discerned at any of the three basins inspected.

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- c. Respondent's SWPPP calls for silt fence to be placed in the northeast corner of the site. At the time of inspection, no silt fence had been installed in this area.

28. Respondent's failure to install appropriate impediments to sediment movement as noted in paragraph 27 is a violation of Respondent's General 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 Develop an Adequate SWPPP

29. The facts stated in paragraphs 11 through 20 above are herein incorporated.

30. Part 8(a) of the Requirements and Guidelines section of Respondent's permit states the SWPPP shall contain sufficient information to be of practical use to contractors and site construction workers to guide the installation and maintenance of the BMPs.

31. The inspection referenced in paragraph 20 above revealed that Respondent's SWPPP failed to contain sufficient information to be of practical use to contractors and site construction workers. Specifically the SWPPP failed to include:

- a. The nature/sequence of construction activity.
- b. A description of all BMPs that will be implemented to control pollutants in storm water discharges.
- c. The sequence and timing by which structural controls will be implemented.
- d. All potential sources of pollution.
- e. Details of control devices on the rough grading plan.

32. Respondent's failure to develop an adequate SWPPP is a violation of Respondent's General 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).

Order For Compliance

33. Based on the Findings of Fact and Findings of Violation set forth above, and pursuant to the authority of Sections 308(a) and 309(a)(3) of the CWA, 33 U.S.C. §§ 1318(a) and 1319(a)(3), Respondent is hereby ORDERED to take the actions described in paragraphs 34 through 36.

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34. Within thirty (30) days of the effective date of this Order, Respondent shall take whatever corrective action is necessary to correct the deficiencies and eliminate and prevent recurrence of the violations cited above, and to come into compliance with all of the applicable requirements of the permit.

35. Within thirty (30) days of the effective date of this Order, the Respondent shall submit a written report detailing the specific actions taken to correct the violations cited herein and explaining why such actions are anticipated to be sufficient to prevent recurrence of these or similar violations.

36. In the event that Respondent believes complete correction of the violations cited herein is not possible within thirty (30) days of the effective date of this Order, the Respondent shall, within those thirty (30) days, submit a comprehensive written plan for the elimination of the cited violations. Such plan shall describe in detail the specific corrective actions to be taken and why such actions are sufficient to correct the violations. The plan shall include a detailed schedule for the elimination of the violations within the shortest possible time, as well as measures to prevent these or similar violations from recurring.

Submissions

37. All documents required to be submitted to EPA by this Order, shall be submitted by mail to:

Cynthia Sans
Water, Wetlands and Pesticides Division
U.S. Environmental Protection Agency - Region 7
901 North Fifth Street
Kansas City, KS 66101

38. A copy of documents required to be submitted to MDNR by this Order, shall be submitted by mail to:

Mr. Kevin Mohammadi, Chief
Enforcement Section
Water Pollution Control Program
Missouri Dept. of Natural Resources
P.O. Box 176
Jefferson City, Missouri 65102

General Provisions

Effect of Compliance with the Terms of this Order for Compliance

39. Compliance with the terms of this Order shall not relieve Respondent of liability for, or preclude EPA from, initiating an administrative or judicial enforcement action to recover penalties for any violations of the CWA, or to seek additional injunctive relief, pursuant to Section 309 of the CWA, 33 U.S.C. § 1319.

40. This Order does not constitute a waiver or a modification of any requirements of the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, all of which remain in full force and effect. The EPA retains the right to seek any and all remedies available under Sections 309(b), (c), (d) or (g) of the Act, 33 U.S.C. § 1319(b), (c), (d) or (g), for any violation cited in this Order. Issuance of this Order shall not be deemed an election by EPA to forgo any civil or criminal action to seek penalties, fines, or other appropriate relief under the Act for any violation whatsoever.

Access and Requests for Information

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

Severability

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

Effective Date

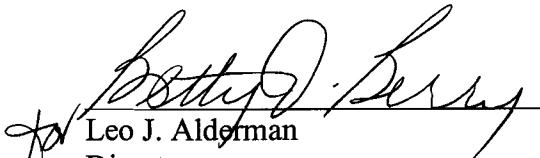
43. The terms of this Order shall be effective and enforceable against Respondent upon its receipt of an executed copy of the Order.

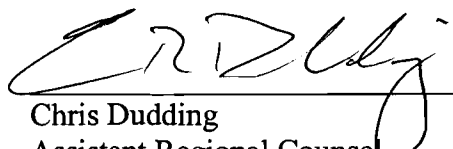
Termination

44. This Order shall remain in effect until a written notice of termination is issued by an authorized representative of the U.S. Environmental Protection Agency. Such notice shall not be given until all of the requirements of this Order have been met.

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Issued this 3rd day of October, 2005.


Leo J. Alderman
Director
Water, Wetlands and Pesticides Division


Chris Dudding
Assistant Regional Counsel

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CERTIFICATE OF SERVICE

I certify that on the date noted below I hand delivered the original and one true copy of this Findings of Violation and Administrative Order for Compliance to the Regional Hearing Clerk, United States Environmental Protection Agency, 901 North Fifth Street, Kansas City, Kansas 66101.

I further certify that on the date noted below I sent a copy of the foregoing Order for Compliance by first class certified mail, return receipt requested, to:

Leonard Kaplan
Kaplan Development / L.K. Properties II, LLC
5140 N. Service Road I-70
Box 340
St. Peters, Missouri 63376

Mr. Kevin Mohammadi, Chief
Enforcement Section
Water Pollution Control Program
Missouri Department of Natural Resources
P.O. Box 176
Jefferson City, Missouri 65102

10/5/05

Date

