

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 7

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)

The City of Topeka, Kansas)

Respondent)

Proceedings under Section 309(a) of the
Clean Water Act, 33 U.S.C. § 1319(a))

Docket No. CWA-07-2010-0129

FINDINGS OF VIOLATION AND
ORDER FOR COMPLIANCE

Preliminary Statement

1. The following Findings of Violation and Order for Compliance (“Order”) are made and issued pursuant to Section 309(a) of the Clean Water Act (“CWA”), 33 U.S.C. § 1319(a). This Authority has been delegated by the Administrator of the United States Environmental Protection Agency (“EPA”) to the Regional Administrator, EPA Region 7 and further delegated to the Director of Region 7’s Water, Wetlands and Pesticides Division.

2. Respondent is the City of Topeka, Kansas (“Respondent”), a municipality chartered under the laws of the State of Kansas. Respondent is the owner and/or operator of the Publicly Owned Treatment Works (“POTW”) and the Municipal Separate Storm Sewer System (“MS4”), located within the corporate boundary of the City of Topeka (the “City”), Kansas, Shawnee County, Kansas.

Statutory and Regulatory Framework

3. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), makes it unlawful for any person to discharge any pollutant from a point source to waters of the United States, except, inter alia, with the authorization of, and in compliance with, a National Pollutant Elimination System (“NPDES”) permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

4. Section 402(a) of the CWA, 33 U.S.C. § 1342(a), provides that the Administrator of EPA may issue permits under the NPDES program for the discharge of pollutants from point sources to waters of the United States. Any such discharge is subject to all applicable requirements of the CWA, and regulations promulgated thereunder, as expressed in the specific terms and conditions prescribed in the applicable permit. Regulations implementing the NPDES permit program under the CWA include, but are not limited to, 40 CFR Parts 122 and 403.

5. Section 402(p) of the CWA, 33 U.S.C § 1342(p), sets forth requirements for the issuance of wastewater treatment permits for the discharge of stormwater. Section 402(p)(2)(D) of the CWA, 33 U.S.C. § 1342(p)(2)(D), requires an NPDES permit to be issued for the discharge of stormwater from MS4s serving populations of 100,000 or more but less than 250,000.

6. Section 402(p)(3)(B), 33 U.S.C. § 1342(p)(3)(B), requires that wastewater treatment permits for discharges from municipal storm sewers shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers and shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.

7. Pursuant to Section 402(p) of the CWA, 33 U.S.C. § 1342(p), EPA promulgated regulations at 40 C.F.R. § 122.26 setting forth the NPDES permit requirements for stormwater discharges from large and medium MS4s. These regulations include the following:

- a. 40 C.F.R. § 122.26(b)(8) defines “municipal separate storm sewer” as a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains);
- b. 40 C.F.R. § 122.26(b)(7)(i) defines “medium municipal separate storm sewer system,” in part, as being located in an incorporated place with a population of 100,000 or more but less than 250,000;
- c. 40 C.F.R. § 122.26(b)(3) defines “incorporated place,” in part, as a city, town, township, or village that is incorporated under the laws of the state in which it is located; and
- d. 40 C.F.R. § 122.26(a)(1)(iv) and 122.26(d) require the operator of a discharge from a medium MS4 to apply for a jurisdiction-wide or system-wide permit.

8. The Kansas Department of Health and Environment (“KDHE”) is the 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.

Factual Background

9. The Respondent is a municipality chartered under the laws of the state of Kansas, and as such, the Respondent is a “person,” as that term is defined in Section 502(5) of the CWA, 33 U.S.C. § 1362(5), and 40 C.F.R. § 122.2, and is an “incorporated place” as that term is defined in 40 C.F.R. § 122.26(b)(3).

10. At all times relevant to this Order, Respondent owned and/or operated the POTW and the MS4, located within the corporate boundary of the City, Shawnee County, Kansas and was, therefore, an “owner or operator” within the meaning of 40 C.F.R. § 122.2.

11. The POTW discharges to the Kansas River. The MS4 discharges stormwater to receiving waters of all areas, except agricultural lands, within the corporate boundaries of the City, served by a MS4 owned or operated by Respondent. The Kansas River and other receiving waters are considered “waters of the United States” within the meaning of Section 502 of the CWA, 33 U.S.C. § 1362, and 40 C.F.R. § 122.2.

12. The POTW and the MS4 are each a “point source” that “discharges pollutants” into “navigable waters” as defined by Section 502 of the CWA, 33 U.S.C. § 1362.

13. Respondent’s discharge of pollutants from the POTW and MS4 require permits issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

Wastewater Treatment Permits

14. The Respondent applied for and was issued wastewater treatment permits (“the wastewater treatment permits”) for the Topeka North Wastewater Treatment Plant (No.KS0042714) and the Topeka Oakland Wastewater Treatment Plant (No.KS0042722) under Section 402(a) of CWA, 33 U.S.C. § 1342(a). The current permit for the Topeka North Wastewater Treatment Plant was issued on February 1, 2005. This permit expired on January 31, 2010, but has been administratively extended by KDHE and therefore remains in effect. The current permit for the Topeka Oakland Wastewater Treatment Plant was issued on July 1, 2008. This permit expired on December 31, 2008, but has been administratively extended by KDHE and therefore remains in effect. At all relevant times, the Respondent was authorized to discharge from the POTW owned or operated by Respondent to waters of the United States only in accordance with the specific terms and conditions of the wastewater treatment permits.

15. The POTW includes all service devices and systems used in wastewater storage, treatment, recycling and reclamation, including sewers, pipes and other conveyances, within the meaning of 40 C.F.R. § 403.3(q).

16. On or about November 18 through 20, 2008, EPA conducted a compliance inspection of the POTW for the City, pursuant to the authority of Section 308 of the CWA, 33 U.S.C. § 1318 (hereafter the “POTW inspection”).

17. On or about July 30, 2009, Respondent responded to an Information Request issued by EPA. In the response, Respondent provided documentation concerning the operation of the POTW. The documents included a Sanitary Sewer Overflow (“SSO”) Response Plan and SOP dated December 2008.

MS4 Permit

18. The Respondent applied for and was issued NPDES Permit No. KS0093327 for the MS4 (“the MS4 permit”) under Section 402(p) of CWA, 33 U.S.C. § 1342(p). The current MS4 permit was issued on October 1, 2006 and expires December 31, 2010. At all relevant times, the Respondent was authorized to discharge stormwater from the MS4 owned or operated by Respondent, to waters of the United States, only in accordance with limitations, conditions and requirements set forth in the MS4 permit, and associated Stormwater Discharge Regulations set forth in 40 C.F.R. § 122.26.

19. On June 17 through 19, 2008, EPA conducted a compliance audit of the MS4 for the City, pursuant to the authority of Section 308 of the CWA, 33 U.S.C. § 1318 (hereafter the “MS4 audit”).

20. On or about July 30, 2009, Respondent responded to an Information Request issued by EPA. In the response, Respondent provided documentation concerning the operation of the MS4. The documents included the 2008 MS4 annual report, documentation regarding the construction, post-construction and illicit discharge and industrial and high-risk runoff components of the program, a description of enforcement escalation plans and procedures, and a copy of the stormwater management plan.

Findings of Violation

21. The facts stated in Paragraphs 9 through 20 are herein incorporated.

Wastewater Treatment Permit Violations

22. The wastewater treatment permits authorize discharges from the POTW in compliance with the Effluent Limitations and Monitoring Requirements specifically identified within the wastewater treatment permits.

23. Paragraph 8 of the Standard Conditions attached to and incorporated into the wastewater treatment permits requires that the permittee shall, at all times, maintain in good working order, and efficiently and effectively operate all treatment, collection, control systems or facilities to achieve compliance with the terms of the wastewater treatment permits.

24. Paragraph 11 of the Standard Conditions attached to and incorporated into the wastewater treatment permits requires that the permittee shall provide an alternative power source sufficient to operate the waste water control facilities or otherwise control pollution and all discharges upon the loss of the primary source of power to the wastewater control facilities.

25. The POTW inspection and submitted documentation, referenced in Paragraph 17, revealed that since at least January 2006, Respondent has experienced releases of untreated wastewater from the manholes, pump stations, lift stations, sewer line breaks, and/or other

locations within the Respondent's wastewater collection system. These releases are also known as sanitary sewer overflows ("SSOs").

26. Records included in Respondent's July 30, 2009, response to EPA's information request indicated that on at least 31 occasions from January 2006 through June 2009, Respondent discharged pollutants from its wastewater collection system as the result of pump station power failures, and sewer line blockages due to tree roots, debris, grease and sewer line breaks. At least 20 of the 31 occasions where Respondent discharged pollutants were due to power failures and blockages at Respondent's pump stations.

27. Each discharge of pollutants by Respondent, including untreated wastewater from any location in Respondent's wastewater collection and treatment system other than those authorized in the wastewater treatment permits is a violation of the terms and conditions of Respondent's wastewater treatment permits.

28. Each release of untreated wastewater from Respondent's wastewater collection system due to blockages is a violation of Standard Condition 8 of Respondent's wastewater treatment permits.

29. Each release of untreated wastewater from Respondent's wastewater collection system due to power failure at Respondent's pump stations is a violation of Standard Condition 11 of Respondent's wastewater treatment permits.

30. Respondent's violations of the requirements of the wastewater treatment permits are violations of the Section 301(a) of the CWA, 33 U.S.C. § 1301(a), and the permits issued under Section 402 of the CWA, 33 U.S.C. § 1342.

MS4 Violations

31. Part V(C)5 of the MS4 permit states that "[t]he permittee shall develop, implement, and enforce a program to address post-construction stormwater runoff from new development and redevelopment projects that disturb greater than or equal to one acre...that discharge into the MS4." The program must include, *inter alia*, "enact[ing] an ordinance to address post-construction runoff from new development and redevelopment projects to the extent allowable under State and local law."

32. The MS4 audit and submitted documentation, referenced in Paragraph 20 above, revealed that Respondent has not enacted an ordinance addressing post-construction runoff from new development and redevelopment projects.

33. Part V(C)(3)(c) of the MS4 permit states that the permittee shall "enact an ordinance to prohibit non-stormwater discharges...into the storm sewer system and implement appropriate enforcement procedures and actions...."

34. The MS4 audit and submitted documentation, referenced in Paragraph 20 above, revealed that Article V of Respondent's ordinance does not provide adequate legal authority to conduct inspections/monitoring at locations other than certain identified industrial facilities and to pursue enforcement for illicit non-stormwater discharges.

35. Part V(C)(4)(a) of the MS4 permit states that "[t]he permittee shall develop, implement, and enforce a program to reduce pollutants in any stormwater runoff to the MS4 from construction activities that result in a land disturbance of greater than or equal to one acre." The program must include, *inter alia*, "enactment of an ordinance to require erosion and sediment controls, as well as sanctions to ensure compliance, to the extent allowable under State and local law."

36. The MS4 audit and submitted documentation, referenced in Paragraph 20 above, revealed that Respondent's ordinance does not provide adequate legal authority to inspect, monitor, and enforce against construction sites operating in violation of their permit.

37. Respondent's violations of the requirements of the MS4 permit are violations of the Section 301(a) of the CWA, 33 U.S.C. § 1301(a), and a permit issued under Section 402 of the CWA, 33 U.S.C. § 1342.

Order For Compliance

38. Based on the Findings of Fact and Findings of Violation set forth above, and pursuant to the authority of 309(a) of the CWA, 33 U.S.C. §§ 1318(a) and 1319(a), Respondent is hereby ORDERED to take the actions described below.

POTW Compliance Actions

39. 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 Respondent's wastewater treatment permits.

40. Within 180 days of the Effective Date of this Order for Compliance, Respondent shall:

- a. provide backup power for all pump stations within Respondent's POTW. Backup power shall include one or more of the following: dual power source, on-site generator, or portable generator connection with written procedures for Respondent to provide a portable generator as expeditiously as practicable upon power loss;

- b. provide automatic monitors for each pump station within Respondent's POTW. The automatic monitors shall be systems such as audible alarms or SCADA systems which will notify Respondent or persons in the vicinity of each pump station that a power failure has occurred. Audible alarms shall, at a minimum, be loud enough to be heard at normal conversation levels (approximately 60 decibels) at the nearest private property. For each pump station with an audible alarm, Respondent shall also include signs providing a phone number for contacting Respondent. Respondent shall respond as expeditiously as practicable to all power failures; and
- c. submit a report documenting activities conducted since January 2010 in implementing the Sanitary Sewer Overflow Response Plan and SOP dated December 2008.

41. Within 180 days of the Effective Date of this Order, the Respondent shall submit a written report documenting the specific actions taken to correct the violations cited herein, including those actions described in Paragraph 40, above, and explaining why such actions are anticipated to be sufficient to prevent recurrence of these or similar violations.

42. In the event that Respondent believes completion of these actions is not possible within 180 days of the Effective Date of this Order, Respondent shall, within 30 days, submit a comprehensive written plan (hereafter the "POTW Plan") for the elimination of the cited POTW violations. Such POTW Plan shall describe in detail the specific actions to be taken and why such actions are sufficient to correct the violations. The POTW Plan shall include a detailed schedule for the elimination of the POTW violations within the shortest possible time, as well as measures to prevent these or similar violations from recurring.

MS4 Compliance Actions

43. 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 Respondent's MS4 permit.

44. Within ninety (90) days of the Effective Date of this Order for Compliance, Respondent shall:

- a. enact an ordinance to address post-construction runoff from new development and redevelopment projects to the extent allowable under State and local law; and
- b. revise existing Construction and Illicit Discharge ordinances to provide the City with adequate legal authority to conduct inspections, monitoring and pursue enforcement.

45. Within ninety (90) days of the Effective Date of this Order, the Respondent shall submit a written report documenting the specific actions taken to correct the violations cited herein, including those actions described in Paragraph 44, above, and explaining why such actions are anticipated to be sufficient to prevent recurrence of these or similar violations.

46. In the event that Respondent believes completion of these actions is not possible within 90 days of the Effective Date of this Order, Respondent shall, within 30 days, submit a comprehensive written plan (hereafter the "MS4 Plan") for the elimination of the cited MS4 violations. Such MS4 Plan shall describe in detail the specific actions to be taken and why such actions are sufficient to correct the violations. The MS4 Plan shall include a detailed schedule for the elimination of the MS4 violations within the shortest possible time, as well as measures to prevent these or similar violations from recurring.

Submissions

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

a. For POTW-related submissions:

Mr. Anthony Petruska
Water, Wetlands and Pesticides Division
U.S. Environmental Protection Agency - Region 7
901 North Fifth Street
Kansas City, Kansas 66101.

b. For MS4-related submissions:

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

48. All documents required to be submitted to KDHE by this Order shall be submitted by mail to:

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

General Provisions

Effect of Compliance with the Terms of this Order for Compliance

49. 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.

50. This Order does not constitute a waiver or a modification of any requirements of the CWA, 33 U.S.C. § 1251 *et seq.*, all of which remain in full force and effect. EPA retains the right to seek any and all remedies available under Sections 309(b), (c), (d), or (g) of the CWA, 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 CWA for any violation whatsoever.

Access and Requests for Information

51. 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

52. If any provision or authority of this Order, or the application of this Order to Respondent, is held by federal judiciary 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.

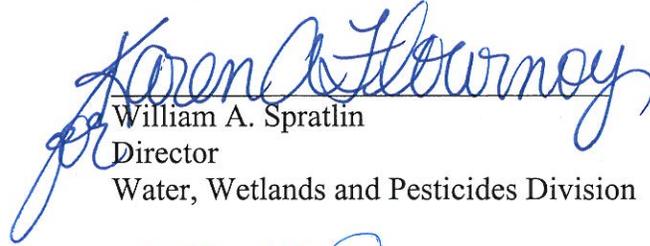
Effective Date

53. The terms of this Order shall be effective and enforceable against Respondent on the Effective Date, which is the date this Order is signed by EPA.

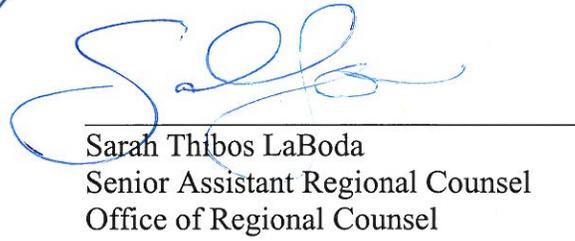
Termination

54. This Order shall remain in effect until a written notice of termination is issued by an authorized representative of EPA. Such notice shall not be given until all of the requirements of this Order have been met.

Issued this 1st day of October, 2010.



William A. Spratlin
Director
Water, Wetlands and Pesticides Division



Sarah Thibos LaBoda
Senior Assistant Regional Counsel
Office of Regional Counsel

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:

The Honorable Bill Bunten
Mayor, City of Topeka, Kansas
215 SE 7th, Room 352
Topeka, Kansas 66603

Mr. Bob Sample
Superintendent
Water Pollution Control Department
City of Topeka
1115 NE Poplar Street
Topeka, Kansas 66616

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

10/4/10
Date


Signature