

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)

Brainstorm Development Group LLC)
3031 SW Wanamaker Road)
Topeka, Kansas 66614)

Respondent)

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

) Docket No. CWA-07-2007-0079

) FINDINGS OF VIOLATION,
) ORDER FOR COMPLIANCE

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 Brainstorm Development Group LLC, a company incorporated under the laws of Kansas and authorized to conduct business in the State of Kansas.

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 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. The EPA maintains concurrent enforcement authority with delegated states for violations of the CWA.

10. KDHE issued a general permit for the discharge of storm water under the NPDES, Permit No. S-MCST-0701-1. The general permit governs storm water discharges associated with construction or land disturbance activity. The general permit became effective on January 2, 2007 and expires on December 31, 2011.

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 owner and/or operator of a construction site known as Lauren’s Bay Villas, located south of SW 41st Street along SW Lincolnshire Road and SW Shenandoah Road, Topeka, 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.

13. Storm water, snow melt, surface drainage, and runoff water leaves Respondent's facility and flows into an unnamed lake and tributary of Shunganunga Creek, a tributary of 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).

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

15. The Site has "storm water 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).

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

17. 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).

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. KDHE assigned Respondent Permit No. KS-R103950 (Respondent's Permit), which was issued on February 5, 2007.

20. On April 17, 2007, 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 Develop an Adequate Storm Water Pollution Prevention Plan

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

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

Site Description: The SWPPP shall include all information provided in the Notice of Intent (NOI) and shall expand upon the NOI in order for contractors and construction workers to use the SWPPP as a guide for installation and maintenance of Best Management Practices (BMPs).

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

23. The inspection referenced in paragraph 20 above, revealed that Respondent's SWPPP failed to include a site description and a description of additional site management BMPs, and a description of site inspections.

24. 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 2

Failure to Install Appropriate Best Management Practices

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

26. 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 movement, such as a sedimentation basin, sediment trap, silt fence, etc., prior to leaving the construction site. Part VII of the Respondent's permit also states that the permittee shall ensure that BMPs are properly installed at the locations and relative times specified in the SWPPP. In addition, Part VII of Respondent's permit requires Respondent to prevent contamination of stormwater runoff.

27. At the time of the inspection referenced in paragraph 20 above, Respondent had not installed silt fences where land had been disturbed by construction activities.

28. At the time of the inspection referenced in paragraph 20 above, Respondent had not installed gravel bags to protect drive openings, as required by Respondent's SWPPP.

29. At the time of the inspection referenced in paragraph 20 above, Respondent had not installed appropriate site management BMPs to prevent contamination of stormwater runoff. Specifically, Respondent failed to control the discharge of wash and/or rinse waters from concrete mixing equipment including ready mix concrete trucks.

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 11 through 20 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 20 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).

Order For Compliance

35. 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 35 through 40.

36. 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.

37. 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.

38. 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

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

Stacie Tucker
Water, Wetlands and Pesticides Division
U.S. Environmental Protection Agency - Region VII
901 North Fifth Street
Kansas City, Kansas 66101

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

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

General Provisions

Effect of Compliance with the Terms of this Order for Compliance

41. 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.

42. 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. The EPA retains the right to seek any and all remedies available under Sections 309 of the Act, 33 U.S.C. § 1319, 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

43. 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

44. 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.

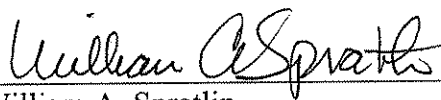
Effective Date

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

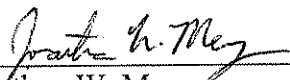
Termination

46. 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.

Issued this 14 day of MARCH, 2008.



William A. Spratlin
Director
Water, Wetlands and Pesticides Division



Jonathan W. Meyer
Assistant Regional Counsel

CERTIFICATE OF SERVICE

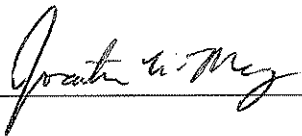
I certify that on the date note below I filed the original and one true and correct copy of the signed original Findings of Violation and Order of Compliance with the Regional Hearing Clerk, Region VII.

I further certify that I sent by certified mail, return receipt requested, a true and correct copy of the signed original Findings of Violation and Order for Compliance together with cover letter and small business assistance information, to the following address:

Eugene Jani, Jr., Registered Agent
Brainstorm Development Group LLC
3031 SW Wanamaker Rd.
Topeka, Kansas 66614

I further certify that on the date noted below, I sent by first class mail, a true and correct copy of the signed original Findings of Violation and Order for Compliance to the following representative of the State of Kansas:

Karl Mueldener
Kansas Department of Health and Environment
Charles Curtis State Office Building
1000 SW Jackson
Topeka, Kansas 66612-1367



3-14-08
Date