

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 Asbury, Iowa)

Respondent)

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

) Docket No. CWA-07-2011-0012

) 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 Sections 308(a) and 309(a) of the Clean Water Act (“CWA”), 33 U.S.C. §§ 1318(a) and 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 Asbury, Iowa (“Respondent” or “the City”), a municipality chartered under the laws of the State of Iowa (“Iowa”). Respondent is the owner and/or operator of the Municipal Separate Storm Sewer System (“MS4”), located within the corporate boundary of the City, in Dubuque County, Iowa.

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 Discharge 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.

5. Section 402(p) of the CWA, 33 U.S.C. § 1342(p), sets forth requirements for the issuance of NPDES permits for various categories of stormwater discharges. Section 402(p)(2) requires permits for five categories of stormwater discharges. Section 402(p)(6) of the CWA, 33 U.S.C. § 1342(p)(6), requires permitting for additional categories of stormwater discharges based on the results of studies conducted pursuant to Section 402(p)(5) of the CWA, 33 U.S.C. § 1342(p)(5).

6. Pursuant to Section 402(p)(6) of the CWA, 33 U.S.C. § 1342(p)(6), EPA promulgated regulations (“Phase II stormwater regulations”) at 40 C.F.R. Part 122 setting forth the additional categories of stormwater discharges to be permitted and the requirements of the Phase II program.

7. 40 C.F.R. § 122.26(a)(9)(i)(A) states that on or after October 1, 1994, for discharges composed entirely of stormwater . . . operators shall be required to obtain a NPDES permit . . . if the discharge is from a small municipal separate storm sewer system required to be regulated pursuant to 40 C.F.R. § 122.32.

8. 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):

- (i) owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, stormwater, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the CWA that discharges to waters of the United States;
- (ii) designed or used for collecting or conveying stormwater;
- (iii) which is not a combined sewer; and
- (iv) which is not part of a Publicly Owned Treatment Works (“POTW”) as defined at 40 C.F.R. § 122.2.

9. 40 C.F.R. § 122.26(b)(16) defines “small municipal separate storm sewer system,” in part, as all separate storm sewers that are:

- (i) owned or operated by the United States, a State, city, town, borough, county, parish, district, association, or other public body . . . having jurisdiction over disposal of sewage, industrial wastes, stormwater, or other wastes [. . .];
- (ii) not defined as “large” or “medium” municipal separate storm sewer systems pursuant to paragraphs (b)(4) and (b)(7), or designated under paragraph (a)(1)(v) of this section.

10. 40 C.F.R. § 122.32(a) provides that a small MS4 is regulated if:

- (i) the small MS4 is located in an urbanized area as determined by the latest Decennial Census by the Bureau of the Census; or

- (ii) the MS4 is designated by the NPDES permitting authority, including where the designation is pursuant to §§ 123.35(b)(3) and (b)(4), or is based upon a petition under § 122.26(f).

11. The Iowa Department of Natural Resources (“IDNR”) is the agency with the authority to administer the federal NPDES program in Iowa 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

12. Respondent is a municipality chartered under the laws of Iowa, and as such, 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.

13. Respondent operates a stormwater drainage system consisting of, among other things, drain inlets, storm sewers, and outfalls, and as such is a “municipal separate storm sewer” as that term is defined in 40 C.F.R. § 122.26(b)(8).

14. At all times relevant to this Order, Respondent owned and/or operated a municipal separate storm sewer system, which does not meet the criteria to be a large or medium MS4, and thus is the owner and/or operator of a “small municipal separate storm sewer system,” as defined by 40 C.F.R. § 122.26(b)(4)(i).

15. Respondent’s small MS4 is located in the Dubuque, Iowa/Illinois “urbanized area” as defined by the 2000 Census, and therefore, at all times relevant to this Order, Respondent’s small MS4 is subject to regulation.

16. Respondent’s small MS4 is a “point source” as defined by Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

17. Respondent discharged pollutants into “navigable waters” as defined by Section 502(7) of the CWA, 33 U.S.C § 1362(7).

18. Discharges from Respondent’s small MS4 result in the addition of pollutants from a point source to navigable waters, and thus are the “discharges of a pollutant” as defined by Section 502(12) of the CWA, 33 U.S.C. § 1362(12).

19. Respondent’s discharges from a small MS4 require a permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342, and 40 C.F.R. § 122.32.

20. IDNR issued a Final Permit for discharges from Respondent’s small MS4 under the NPDES, Permit No. IA0078905. This Final Permit was issued on October 8, 2004, expired on October 7, 2009, and has been administratively extended.

21. On July 16 and 17, 2009, EPA personnel conducted a compliance evaluation inspection of Respondent's MS4.

22. On February 3, 2010, the City submitted its annual report for 2008-2009.

Findings of Violation

23. The facts stated in Paragraphs 12 through 22, above, are herein incorporated.

Illicit Discharge Detection and Elimination Violations

24. Part II.C.1 of the City's NPDES permit, which addresses the development and enforcement of a discharge detection and elimination program, requires that the City adopt or amend an ordinance that prohibits anything other than stormwater for which an NPDES permit has been issued from entering the MS4. The ordinance must include language that enables the City to inspect private property if an illicit discharge is suspected, and it must provide penalties for noncompliance. The permit requires the ordinance to be adopted or amended no later than October 1, 2005, and enforced by the City for the remainder of the permit's duration.

25. The inspection referenced in Paragraph 21 above revealed that though the City's relevant ordinance, titled "95.19 Standard for Discharge into Public Storm Sewer System" at Chapter 95 of the City's *Code of Ordinances, Asbury, Iowa*, prohibits the discharge of anything other than stormwater to the MS4, it does not include language that enables the City to inspect private property if an illicit discharge is suspected. Nor does the ordinance allow penalties for noncompliance with its terms.

26. Part II.C.2 of the City's NPDES permit requires the City to develop a program to identify and eliminate illicit discharge to the MS4. The program must include annual dry weather flow inspections of all known outfalls, sampling and analysis of dry weather flows, procedures to identify the sources of the dry weather flows, and procedures for disconnecting illicit connections. These requirements must be implemented by the City no later than October 1, 2004, and completed no later than the expiration date of the permit.

27. The inspection referenced in Paragraph 21 and the annual report submitted February 3, 2010, reveal that the City has not performed dry weather flow inspections or sampling and analysis of dry weather flows. Neither has the City developed procedures to identify sources of the dry weather flows or procedures for disconnecting illicit connections. The annual report confirms that "the City has made no progress on an Illicit Discharge Detection and Elimination Program."

28. The City's failure to incorporate the required investigation and enforcement authority in the language of the ordinance, and its failure to perform dry weather screening, sampling, and analysis are violations of its permit and, as such, are violations of Section 402 of the CWA.

Construction Site Storm Water Runoff Control Violations

29. Part II.D.1 of the City's NPDES permit requires the City to adopt (or amend) and enforce an ordinance that requires proper soil erosion and sediment control. The ordinance must address waste at construction sites that may cause adverse impacts to water quality (e.g., building materials, concrete truck washout, chemicals, solid waste and sanitary waste). The ordinance must also require compliance with IDNR's Storm Water General Permit No. 2. The City's permit requires the City to adopt or amend an ordinance no later than October 1, 2006, and to enforce the ordinance for the remainder of the permit's duration.

30. The inspection referenced in Paragraph 21 above revealed that the City's relevant ordinance, titled "Erosion and Sedimentation Control," at Chapter 155 of the City's *Code of Ordinances, Asbury, Iowa*, fails to address construction site waste that may cause adverse impacts to water quality. The ordinance also fails to require compliance with IDNR's Stormwater General Permit No. 2. The annual report submitted February 3, 2010, confirms that "the City has made no progress on a Construction Site Erosion Control Ordinance."

31. Part II.D.2 of the City's NPDES permit requires the City to develop and implement a construction site review and inspection program that requires the City to review and approve a site plan and a pollution prevention plan before issuing any permits for a site for construction activities requiring an NPDES permit. The program must require compliance with IDNR's Storm Water General Permit No. 2, and the City must conduct inspections of all sites for which coverage under General Permit No. 2 is required at least once each calendar quarter. Finally, the permit requires the City to fully implement the review program no later than October 1, 2006.

32. The inspection referenced in Paragraph 21 above revealed that the City failed to develop and implement a construction site review and inspection program that meets the permit requirements. Regarding construction site review, the City does not review pollution prevention plans. Regarding construction site inspections, the City has not developed a construction site inspection program. The inspection revealed that the City's current procedure is to drive through active construction sites approximately once per month, but that the City does not evaluate construction sites for adequacy or effectiveness of stormwater controls.

33. Part II.D.2 of the City's NPDES permit requires the City to adopt a BMP design manual that includes design criteria for structural controls to be implemented at construction sites. The BMP manual was to be designed and made available no later than October 1, 2006.

34. At the time of the inspection referenced in Paragraph 21 above, the City had not adopted a BMP design manual for structural controls at construction sites. The annual report submitted February 3, 2010, includes an update as of January 29, 2010, stating that "the City has made no progress on an Erosion Control BMP Menu."

35. The City's failure to fully comply with the construction site stormwater runoff control permit requirements is a violation of its permit, and, as such, is a violation of Section 402 of the CWA.

Post-construction Stormwater Management Violations

36. Part II.E.1 of the City's NPDES permit requires the City to adopt and implement a post-construction ordinance that includes several components, including submittal to the City of certain information and calculations listed in II.E.1(1-7) and (1-3). The ordinance must require the installation of dry detention basins in new developments. The permit requires the ordinance to be adopted or amended no later than October 1, 2005, and enforced by the City for the remainder of the permit's duration.

37. The inspection referenced in Paragraph 21 above revealed that the ordinance adopted does not require submittal of the information and calculations listed in Part II.E.1 of the permit, nor does it require the installation of dry basins in new developments. The annual report submitted February 3, 2010 includes an update as of January 29, 2010, stating that the City has made "no progress" on a Post-Construction Stormwater Runoff Control Ordinance.

38. Part II.E.2 of the City's NPDES permit requires that municipally owned stormwater control devices and structures must be inspected and reviewed for proper maintenance. This provision also requires the City to develop and make available to landowners educational materials that outline proper maintenance procedures. The permit mandates that inspections are to begin no later than October 1, 2006, and that educational materials must be developed no later than October 1, 2007, and made available for the permit's duration.

39. The inspection referenced in Paragraph 21 above and the annual report submitted February 3, 2010, revealed that the City has not conducted adequate inspections of all municipally owned stormwater control devices. The only stormwater control devices the City inspects are inlets to detention basins. The inspection also revealed that the City had not developed the requisite educational materials for landowners regarding proper maintenance of stormwater control structures.

40. Part II.E.3 of the City's NPDES permit requires the City to develop a watershed assessment program and comprehensive land use plan that outline measures to be implemented that reduce flooding and erosion in ditches and streams, improve water quality, and reduce degradation of habitat for fish and wildlife. The permit requires the City to establish the program no later than October 1, 2007 and implement it for the remainder of the permit's duration.

41. The inspection referenced in Paragraph 21 above showed that the City has failed to develop and implement a formal watershed assessment program and comprehensive land use plan.

42. Part II.E.4 of the City's NPDES permit requires the City to adopt a BMP design manual that includes design criteria for structural controls to be implemented for post-construction runoff control. The permit requires the City to design the manual and make it available no later than October 1, 2006.

43. At the time of the inspection referenced in Paragraph 21 above, the City had not adopted a BMP design manual for post-construction runoff control.

44. The City's failure to fully comply with the post-construction stormwater management permit requirements is a violation of its permit and, as such, is a violation of Section 402 of the CWA.

Pollution Prevention/Good Housekeeping Violations

45. Part II.F.1 of the City's NPDES permit requires the City to implement a program for inspecting, maintaining and cleaning all components of the MS4, including street sweeping. The permit also requires the City to inspect all above-ground components of the MS4 once each year and maintain them as appropriate. The permit requires the City to implement the program no later than October 1, 2005.

46. The inspection referenced in Paragraph 21 above revealed that the City has not implemented a program for inspecting, maintaining, or cleaning its MS4. According to city staff, the City has never cleaned or inspected a storm sewer line.

47. Part II.F.2 of the City's NPDES permit requires the City to develop, implement, and enforce a pesticide and fertilizer management program. The program must reduce pollutant discharge associated with the storage, application, and disposal of pesticides and fertilizers for municipal operations. The permit requires the City to identify all municipal entities that apply pesticides and fertilizers. The City must also gather data regarding the application rates of pesticides and fertilizers and evaluate the data to determine if lower rates would be equally or nearly as effective. The permit requires the City to develop the program no later than October 1, 2005, and fully implement it no later than October 1, 2006.

48. The inspection referenced in Paragraph 21 above shows that the City has not developed a pesticide and fertilizer management program, identified municipal entities that apply pesticides and fertilizers, or conducted a formal assessment of application rates of fertilizers and pesticides in order to evaluate if the amounts applied could be reduced.

49. Part II.F.3 of the City's NPDES permit requires the City to develop a program for training municipal employees regarding practices to be implemented in city operations to reduce pollutants in stormwater. The permit requires the City to have developed and implemented the training program no later than October 1, 2006.

50. The inspection referenced in Paragraph 21 above revealed that the City has not developed a training program or provided its staff with formal training regarding pollution prevention and good housekeeping to reduce pollutants from municipal operations.

51. Part II.F.4 of the City's NPDES permit requires the City to develop and implement a program to assess BMPs that would reduce pollutants in stormwater from city facilities. The

BMPs must then be implemented whenever practical. The permit requires the City to implement this program no later than October 1, 2006.

52. The inspection referenced in Paragraph 21 above revealed that the City has not developed and implemented a program to assess BMPs at city facilities.

53. The City's failure to fully comply with the good housekeeping and pollution prevention permit requirements is a violation of its permit and, as such, is a violation of Section 402 of the CWA.

Reporting Requirements Violation

54. Part III of the City's NPDES permit requires the City to prepare an annual report and submit it to IDNR no later than October 31 of each calendar year, with the first report due October 31, 2005.

55. The City has not timely submitted its annual report to IDNR by October 31 of each calendar year of its permit term.

56. The City's failure to timely submit its annual reports each year is a violation of its permit and, as such, is a violation of Section 402 of the CWA.

Order for Compliance

57. 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) of the CWA, 33 U.S.C. §§ 1318(a) and 1319(a), the City is hereby ORDERED to take the actions described below.

58. Within thirty (30) days of the effective date of this Order, the City 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 requirements of its NPDES permit.

59. Within sixty (60) days of the effective date of this Order, the City shall provide to EPA and IDNR a written description of the actions the City has taken to correct the deficiencies and eliminate and prevent recurrence of the violations cited above.

60. In the event that the City believes complete correction of the violations cited herein is not possible within thirty (30) days of the effective date of this Order, the City 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. The City shall also submit quarterly progress reports documenting actions taken to correct remaining deficiencies, with the first report due May 15, 2011.

Submissions

61. All documents required to be submitted to EPA pursuant to Paragraphs 62 and 63 of this Order shall be submitted by mail to:

Ms. Cynthia Sans
Water, Wetlands and Pesticides Division
U.S. Environmental Protection Agency – Region 7
901 North Fifth Street
Kansas City, Kansas 66101-2907.

62. All documents required to be submitted to IDNR pursuant to Paragraph 62 of this Order shall be submitted by mail to:

Mr. Joe Sanfilippo
Field Office #1
Iowa Department of Natural Resources
909 West Main Street, Suite #4
Manchester, Iowa 52057-1522.

General Provisions

Effect of Compliance with the Terms of this Order for Compliance

63. 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.

64. 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.

65. 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

67. 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

68. 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.

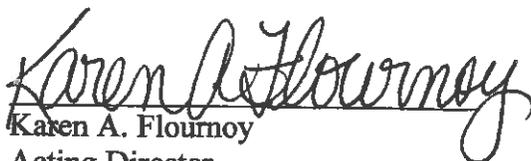
Effective Date

69. 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.

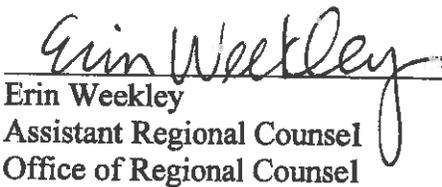
Termination

70. 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 22nd day of February, 2011.



Karen A. Flournoy
Acting Director
Water, Wetlands and Pesticides Division



Erin Weekley
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 Jim Adams
Mayor, City of Asbury
5080 Asbury Road
Asbury, Iowa 52002-2522,

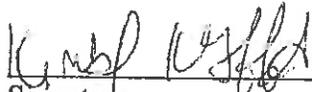
and via first class mail to:

Mr. Joe Sanfilippo
Field Office #1
Iowa Department of Natural Resources
909 West Main Street, Suite #4
Manchester, Iowa 52057-1522

and

Mr. Dennis Ostwinkle
Field Office #6
Iowa Department of Natural Resources
1023 W. Madison St.
Washington, Iowa 52353-1623.

Feb 23, 2011
Date


Signature