

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 7  
11201 RENNER BOULEVARD  
LENEXA, KANSAS 66219

BEFORE THE ADMINISTRATOR

IN THE MATTER OF )  
 )  
Fremont at 84, LLC ) Docket No. CWA-07-2019-0265  
 )  
 )  
Respondent ) AMENDED FINDINGS OF VIOLATION  
 ) AND ORDER FOR COMPLIANCE  
 )  
Proceedings under Section 309(a)(3) of the )  
Clean Water Act, 33 U.S.C. § 1319(a)(3) )  
\_\_\_\_\_ )

**Preliminary Statement**

1. The following Findings of Violation are made and Order for Compliance (“Order”) is issued pursuant to the authority of Section 309(a)(3) of the Clean Water Act (“CWA”), 33 U.S.C. § 1319(a)(3). The authority to take action under Section 309(a)(3) of the CWA, 33 U.S.C. § 1319(a)(3), is vested in the Administrator of the U.S. Environmental Protection Agency (“EPA”). The Administrator has delegated this authority to the Regional Administrator, EPA Region 7, who in turn has delegated it to the Director of the Enforcement and Compliance Assurance Division of EPA Region 7.

2. The Respondent in this case is Fremont at 84, LLC (“Respondent”).

**Statutory and Regulatory Framework**

3. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants, unless such discharge is in compliance with, *inter alia*, Section 402 of the CWA, 33 U.S.C. § 1342, which provides that pollutants may be discharged only in accordance with the terms of a National Pollutant Discharge Elimination System permit.

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 502(7) of the CWA, 33 U.S.C. § 1362(7), defines “navigable waters” as the “waters of the United States,” which in turn has been defined to include, *inter alia*, all waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, and tributaries to such waters. 40 C.F.R. § 122.2.

6. 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 stormwater. Section 402(p) of the CWA requires, in part, that a discharge of stormwater associated with an industrial activity must comply with the requirements of an NPDES permit issued pursuant to Sections 301 and 402 of the CWA.

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 that set forth the NPDES permit requirements for stormwater discharges.

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 acres of total land area which are part of a larger common plan of development or sale.

9. 40 C.F.R. §§ 122.26(a)(1)(ii), 122.26(c) requires dischargers of stormwater associated with industrial activity to apply for an individual permit or to seek coverage under a promulgated stormwater general permit.

10. The Nebraska Department of Environment and Energy (“NDEE”) is the state agency with the authority to administer the federal NPDES program in Nebraska pursuant to Section 402 of the CWA. EPA maintains concurrent enforcement authority with authorized states for violations of the CWA.

### **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 residential construction site known as The Villas on Fremont, comprised of approximately 22.78 acres, and located at the intersection of 84th Street and Fremont Street in Lincoln, Nebraska (“Site”).

13. At the time of the EPA inspection, described below, Respondent had cleared and graded most of the 22.78 acres that form the construction project, and was conducting construction activities on a phase of the project consisting of approximately 7 acres.

14. Stormwater, snow melt, surface drainage, and runoff water leave Respondent's Site and discharge into Stevens Creek and/or into a drainage way to the north of the Site boundary, which is also referred to as the open channel municipal separate storm sewer system ("MS4"), that drains to the east and into Stevens Creek.

15. The Site has "stormwater discharges associated with industrial activity" as defined by 40 C.F.R. § 122.26(b)(14), is a "point source" as defined by Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

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

17. Stevens Creek is a perennial stream and a tributary to Salt Creek, which is a tributary to the Platte River, which is a tributary to the Missouri River, a traditionally navigable water. Stevens Creek is a "water of the United States."

18. Stormwater runoff from Respondent's industrial activity at the 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).

19. Respondent's discharge of pollutants associated with an industrial activity, as defined by 40 C.F.R. § 122.26(b)(14), requires a permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

20. NDEE issued authorization to Respondent on November 8, 2016 for construction stormwater discharges under NPDES general permit NER160000, with permit tracking number CSW-201600792 ("Respondent's NPDES Permit"). The construction stormwater general permit was signed by the Nebraska Department of Environmental Quality on September 30, 2016 and is effective between November 1, 2016 and October 31, 2021. This NPDES general permit governs Respondent's stormwater discharges that are associated with industrial activity at the Site, including clearing, grading and excavation.

21. The principal requirement of Respondent's NPDES Permit is for the owner to develop and implement a Stormwater Pollution Prevention Plan ("SWPPP"). The SWPPP must identify potential sources of pollution which may reasonably be expected to affect the quality of the stormwater discharge from the construction activities, describe and ensure the implementation of best management practices ("BMPs") that will be used to reduce the pollutants in stormwater discharge associated with industrial activity for construction activities at the construction site, and to assure compliance with the terms and conditions of the Permit.

22. On July 16, 2019, EPA personnel, under the authority of Section 308(a) of the CWA, 33 U.S.C. § 1318(a), inspected the Site to determine Respondent's compliance with its NPDES permit and the CWA (the "EPA Inspection"). During the EPA Inspection, the inspector reviewed and obtained copies of documents related to the Permit, including without limitation, the Site's

SWPPP and self-inspection reports, toured the Site, and photographed various stormwater-related areas.

23. During the EPA Inspection, the inspector observed and documented significant sediment accumulation offsite in the drainageway / open channel MS4, from the Site's northeast outfall continuing up to Stevens Creek. The failure to select, install, and maintain BMPs and to take corrective actions when deficiencies were noted during self-inspections contributed to the sediment observed offsite and in the MS4.

24. At the conclusion of the EPA Inspection, the inspector issued Respondent a Notice of Potential Violation ("NOPV") citing, *inter alia*, Respondent's failure to maintain controls to minimize offsite sediment deposition to the MS4.

25. On or about July 23, 2019, Respondent emailed a response to the NOPV to the inspector, including photographs showing that some, but not all, BMP deficiencies were addressed by Respondent following the EPA Inspection.

## **FINDINGS OF VIOLATION**

### **Count 1**

#### **Failure to Minimize Pollutants in Stormwater, Promptly Remove Offsite Sediment Deposition, and Review Adequacy of Controls**

26. The paragraphs above are re-alleged and incorporated herein by reference.

27. Part III.E.2 of Respondent's NPDES Permit requires that the facility minimize pollutants, including sediment, in stormwater discharges from the site. Part III.F.7 of Respondent's NPDES permit states: "When sediment escapes the construction site boundaries, the offsite accumulations must be removed promptly to minimize the disturbance. In addition, the erosion controls for that portion of the project must be reviewed for adequacy of design and/or implementation to prevent reoccurrence with updates or modifications to the SWPPP as appropriate."

28. During the EPA Inspection, the inspector observed and documented significant sediment deposition in the drainageway / open channel MS4 beyond the Site's north boundary and draining east to Stevens Creek. The accumulated sediment extended in the conveyance for approximately 34 stream yards between the Site's north outfall and the Site's northeast outfall, and for approximately 387 stream yards downstream of the Site's northeast outfall leading up to its discharge point into Stevens Creek.

29. Respondent's alleged failure to minimize pollutants in stormwater, promptly remove offsite sediment accumulations and review adequacy of erosion controls for that portion of the project is a violation of the NPDES permit that resulted in the discharge of pollutants to

navigable waters, and as such, is a violation of Sections 301(a) and 402(p) of the CWA, 33 U.S.C. §§ 1311(a), 1342(p).

Count 2

**Failure to Properly Select, Install and/or Maintain Best Management Practices and Failure to Fully Implement the Provisions of the SWPPP**

30. The paragraphs above are re-alleged and incorporated herein by reference.

31. Part III of Respondent's NPDES Permit requires that a SWPPP be prepared and describes the required contents for the SWPPP which must, *inter alia*, describe structural and non-structural controls to be used on site in order to minimize erosion and reduce pollutants in storm water. Part III.A.4 of Respondent's NPDES Permit requires that "the Permittee must implement the SWPPP and modifications to the SWPPP from commencement of construction activity until final stabilization is complete."

32. Part III.C.2 of Respondent's NPDES Permit requires that the SWPPP describe "all temporary construction stormwater management practices that retain/detain flows or otherwise limit runoff and the discharge of pollutants from exposed areas of the construction site." Part III.F.8 of Respondent's NPDES permit requires that all temporary control measures be "properly selected, installed, and maintained."

33. During the EPA Inspection, the inspector observed and documented several areas of the Site that required different or additional BMPs and several BMPs described in the SWPPP that were not in place on the Site, including:

- a. Two areas on the west side of the active construction area, along the Site's north and south perimeters were lacking a combined total of 237 feet of fabric silt fence;
- b. Ten fabric fence "J" hooks identified in the SWPPP plans to be incorporated into the perimeter fence to reduce stormwater velocity were not in place;
- c. Approximately 339 feet on the Site's west side where City streets were in place was lacking back-of-curb protection or other controls; and
- d. Riprap protection identified in the SWPPP plans at the outfall along the Site's eastern boundary was not in place.

34. During the EPA Inspection, the inspector observed and documented several BMPs on the Site in need of maintenance, including:

- a. Approximately 335 linear feet of downed or damaged fabric silt fence along the Site's perimeter;
- b. Approximately 20 feet of fabric silt fence that was undercut along the Site's east perimeter;
- c. Three street inlet controls, including one on Fremont Street that had completely

- collapsed into the inlet structure, another inlet opposite it that was filling in with sediment, and an inlet control on the west side of the active construction area that was collapsing inward and was undercut;
- d. Three other inlets, which are future street inlets but were acting as area inlets, that had stormwater controls that were badly damaged or overwhelmed with sediment deposition;
  - e. An area inlet with a broken inlet riser pipe and no other controls, allowing sediment and other pollutants in stormwater to escape offsite to the MS4; and
  - f. Riprap protection at the outfall on the Site's northeast boundary that had washed out and was no longer functioning as intended, allowing sediment and other pollutants in stormwater to escape offsite, including the sediment deposition observed where the outfall flowed to the MS4 open channel.

35. Part III.C.5.d. of Respondent's NPDES permit requires that “[w]here sediment has been tracked-out from your site on to the surface of off-site streets, other paved areas, and sidewalks, the deposited sediment must be removed by the end of the same work day in which the track-out occurs or by the end of the next work day if track-out occurs on a non-work day.”

36. During the EPA Inspection, the inspector observed and documented sediment deposition on City streets and a Site representative indicated that the Site does not always clean the streets every work day as required by the NPDES Permit.

37. Part III.C.4.a. of Respondent's NPDES permit requires that the SWPPP describe, and permittees implement, controls to prevent prohibited discharges from “wastewater from washout of concrete, unless managed by an appropriate control implemented according to industry standards.” Furthermore, Part III.E.5.a. of Respondent's NPDES permit requires the “design, installation, implementation, and maintenance of effective pollution prevention measures (that) at a minimum minimize the discharge of pollutants from equipment and vehicle washing, wheel wash water, and other wash waters.”

38. During the EPA Inspection, the inspector observed and documented that the Site's concrete washout or mason's area was lacking stormwater controls as described in the SWPPP to prevent migration of stormwater pollutants from the immediate area.

39. Part III.C.6. of Respondent's NPDES permit requires the SWPPP to describe “construction materials, products and waste materials expected to be stored at the construction site or supporting areas,” including “controls and storage practices to minimize exposure of the materials to stormwater and storm water runoff.”

40. During the EPA Inspection, the inspector observed and documented dumpsters in the active construction area; however, the inspector also observed and documented construction debris scattered throughout the Site and within the offsite open channel MS4 beyond to the Site's north boundary.

41. Respondent's alleged failure to properly select, install and/or maintain BMPs at the Site and failure to fully implement the provisions of the SWPPP is a violation of the conditions or limitations of the NPDES permit, and as such, is a violation of Section 402(p) of the CWA, 33 U.S.C. § 1342(p).

Count 3

**Failure to Document Adequate Inspections and Take Appropriate Corrective Action**

42. The paragraphs above are re-alleged and incorporated herein by reference.

43. Part III.J. of Respondent's NPDES Permit requires regular site inspections and provides the timeframes, conditions, areas to be inspected, and requirements for the contents of the inspection report, and the timeframe for maintaining inspection reports. Specifically, Part III.J.6 of Respondent's NPDES Permit provides that inspection reports must include weather information for the period since the last inspection, including approximate rainfall amount and whether any discharges occurred, locations of BMPs that need to be maintained, failed to operate as designed or proved inadequate, and where additional BMPs are needed, and corrective action that required changes to the SWPPP and dates the changes were inspected.

44. Part III.F.8.b of Respondent's NPDES Permit requires that as to temporary construction control BMPs, "[i]f periodic inspections or other information indicates a control has been installed incorrectly or if the control implemented as planned is ineffective, the operator must either correct the deficiencies of the existing control or modify that portion of the SWPPP plan and implement effective controls as soon as practicable. Further, Part III.F.8.c of Respondent's NPDES Permit requires that corrective action be completed within seven (7) days or before the next storm event, whichever is practicable.

45. Based on a review of the facility's self-inspection reports and observations made during the EPA Inspection, the inspection reports did not have the required content and when deficiencies were noted in the reports, corrective actions were not taken in a timely manner, including:

- a. Many of the self-inspection reports do not include the required weather data for the day self-inspections were performed in addition to rainfall events that happened prior to each self-inspection;
- b. Self-inspection reports conducted on May 20, 2019, May 24, 2019, June 17, 2019, and July 16, 2019 identified BMPs in need of maintenance, including certain deficiencies that had been documented in previous inspection reports but remained unaddressed, and did not note that any corrective action was taken; and
- c. In many instances, no corrective action was taken for deficiencies noted in the self-inspection reports until after the EPA Inspection.

46. Respondent's alleged failure to document adequate inspections and take appropriate corrective action is a violation of the conditions or limitations of the NPDES permit, and as such, is a violation of Section 402(p) of the CWA, 33 U.S.C. § 1342(p).

### **ORDER FOR COMPLIANCE**

Based on the findings set forth above, and pursuant to Section 309(a)(3) of the CWA, 33 U.S.C. § 1319(a)(3), Respondent is hereby ORDERED as follows:

47. Within seven (7) 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 its NPDES permit.

48. Within thirty (30) days of the effective date of this Order, Respondent shall provide EPA and NDEE a written description of the actions it has taken to correct the deficiencies and eliminate and prevent recurrence of the violations cited above.

49. Respondent shall continue to operate and maintain construction control BMPs, conduct self-inspections and properly document observations in inspection reports, take corrective actions and update the SWPPP when necessary in order to maintain compliance with its SWPPP and NPDES Permit.

50. Respondent shall submit to EPA, on a monthly basis, starting thirty (30) days after the Effective Date, until written termination of the Order, the following information and documentation: copies of completed site inspection reports as required by its NPDES permit; description and photo documentation of corrective actions taken; any SWPPP amendments. After a period of one year, Respondent may request termination of this requirement, if not terminated sooner.

51. All required documents, including certifications, shall be submitted to:

sans.cynthia@epa.gov

Cynthia Sans  
U.S. Environmental Protection Agency – Region 7  
Enforcement and Compliance Assurance Division  
11201 Renner Boulevard  
Lenexa, Kansas 66219.

52. Electronic submissions will be deemed submitted on the date they are transmitted electronically. Any report, notification, certification, or other communication that cannot be submitted electronically shall be submitted in hard-copy.



53. All documents required to be submitted to NDEE pursuant to this Order shall be submitted by mail to:

Mr. Reuel Andersen, Unit Chief  
NPDES Permits and Compliance Unit  
Water Quality Division  
Nebraska Department of Environment and Energy  
1200 N Street, Suite 400  
PO Box 98922  
Lincoln, NE 68509-8922

### **GENERAL PROVISIONS**

#### **Opportunity to Confer**

54. Within five days of receipt of this Order, Respondent may request a conference regarding the Order or to submit information to EPA. If Respondent requests a conference or wish to submit information, the conference or submission of information shall take place within 10 days of receipt of this Order. EPA shall deem a failure to request a conference or to submit information as a waiver of the opportunity to confer.

55. Requests for a conference shall be made in writing to the EPA contact identified in Paragraph 51.

#### **Effect of Compliance with the Terms of This Order**

56. This Order shall not constitute a permit under the CWA. Compliance with the terms of this Order shall not relieve Respondent of its responsibility to obtain any required local, state, and/or federal permits.

57. 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 Section 309 of the CWA, 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 CWA for any violation whatsoever.

#### **Amendments**

58. EPA may subsequently amend this Order in accordance with the authority of the CWA. For example, EPA may amend this Order to address any non-compliance with the CWA, including, but not limited to, any non-compliance with the requirements of Section 402 of the CWA. In the event of any such subsequent amendment to this Order, all requirements for

performance of this Order not affected by the amendment shall remain as specified by this original Order.

### **Access and Requests for Information**

59. Nothing in this Order shall limit EPA's right to obtain access to, and/or to inspect property operated by Respondent 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**

60. 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.

### **Parties Bound**

61. This Order shall apply to and be binding upon Respondent, its agents, successors and assigns. Respondent shall ensure that any directors, officers, employees, contractors, consultants, firms or other persons or entities acting under or for them with respect to matters included herein comply with the terms of this Order.

### **Confidential Business Information**

62. Pursuant to 40 C.F.R. §§ 2.201-2.311, Respondent may assert a business confidentiality claim covering any portion of the submitted information which is entitled to confidential treatment and which is not effluent data. For any such claim, describe the basis for the claim under the applicable regulation. Any material for which business confidentiality is claimed should be placed in a separate envelope labeled, "Confidential Business Information." Failure to assert a claim in the manner described in 40 C.F.R. § 2.203(b) allows EPA to release the submitted information to the public without further notice. EPA may disclose information subject to the business confidentiality claim only to the extent set forth in the above-cited regulations. Special rules governing information obtained under the CWA appear in 40 C.F.R. § 2.302.

### **Failure to Comply**

63. Notice is hereby given that violation of, or failure to comply with, any of the provisions of the foregoing Order may subject Respondent to (1) civil penalties of up to \$54,833 per day for each violation, pursuant to Section 309(d) of the CWA, 33 U.S.C. § 1319(d); or (2) civil action in federal court for injunctive relief, pursuant to Section 309(b) of the CWA, 33 U.S.C. § 1319(b).

### **Judicial Review**

64. Respondent has the right to seek immediate federal judicial review of the Order pursuant to Chapter 7 of the Administrative Procedure Act, 5 U.S.C. §§ 701-706. Section 706, which is set forth at <http://uscode.house.gov/download/pls/05C7.txt>, provides the grounds for such review.

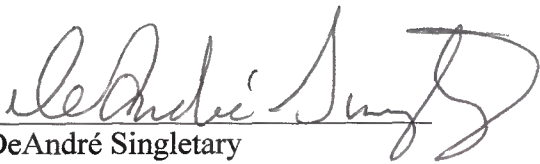
### **Effective Date**

65. The terms of this Order shall be effective and enforceable against Respondent upon its receipt. All time periods herein shall be calculated therefrom unless otherwise provided in this Order.


### **Termination**

66. This Order shall remain in effect until a written notice of termination is issued by an authorized representative of EPA.

**For the Complainant, United States Environmental Protection Agency Region 7:**

  
DeAndré Singletary  
Acting Director  
Enforcement and Compliance Assurance Division

9-12-19  
DATE

  
Shane McCoin  
Assistant Regional Counsel  
Office of Regional Counsel

9-16-19  
DATE

**CERTIFICATE OF SERVICE**

I certify that on the date noted below I hand delivered the original and one true copy of this Administrative Order for Compliance on Consent to the Regional Docket Clerk, U.S. Environmental Protection Agency, 11201 Renner Boulevard, Lenexa, Kansas 66219.

I further certify that on the date noted below I mailed the foregoing Findings of Violation and Order for Compliance by certified mail, return receipt requested, to: .

Fremont at 84, LLC  
c/o Registered Agent: Randy Chevalier  
7211 S. 27th Street  
Lincoln, Nebraska 68512;

And by First Class Mail to:

Mr. Reuel Andersen Unit Chief  
NPDES Permits and Compliance Unit  
Water Quality Division  
Nebraska Department of Environment and Energy  
1200 N Street, Suite 400  
PO Box 98922  
Lincoln, Nebraska 68509-8922.

9/16/19

Date

*Shane McLoon*