

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

Received by  
EPA Region 7  
Hearing Clerk

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	Docket No. CWA-07-2023-0028
Clearwater USA, Inc.	)	
	)	COMPLAINT AND NOTICE OF
Respondent	)	OPPORTUNITY FOR HEARING
	)	
Proceedings under Section 309(g) of the	)	
Clean Water Act, 33 U.S.C. § 1319(g)	)	
_____	)	

**COMPLAINT**

**Jurisdiction**

1. This is an administrative action for the assessment of civil penalties instituted pursuant to Section 309(g) of the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act (“CWA”), 33 U.S.C. § 1319(g), and in accordance with the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (“Consolidated Rules”), 40 C.F.R. Part 22.

2. This Complaint and Consent Agreement/Final Order serves as notice that the U.S. Environmental Protection Agency (“EPA”) has reason to believe that Respondent has violated the limits and conditions of its National Pollutant Discharge Eliminations System (“NPDES”) permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342, and regulations promulgated thereunder.

3. The authority to take action under Section 309(g) of the CWA, 33 U.S.C. § 1319(g), is vested in the Administrator of the EPA. The Administrator has delegated this authority to the Regional Administrator, EPA Region 7, who in turn has delegated the authority to the Director of the Enforcement and Compliance Assurance Division of EPA Region 7 (collectively referred to as the “Complainant”).

4. Respondent Clearwater USA, Inc. (“Respondent”) is and was at all relevant times a corporation incorporated under the laws of the state of Kansas.

**Statutory and Regulatory Framework**

5. 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 provides that pollutants may be discharged in accordance with the conditions or limitations of a NPDES permit issued pursuant to that Section.

6. 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.

7. 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.

8. 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.

9. Pursuant to Section 402(p) of the CWA, the EPA promulgated regulations setting forth the NPDES permit requirements for stormwater discharges at 40 C.F.R. § 122.26.

10. 40 C.F.R. §§ 122.26(a)(1)(ii) and 122.26(c) require dischargers of stormwater associated with industrial activity to apply for an individual permit or to seek coverage under a promulgated stormwater general permit.

11. 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.”

12. The Kansas Department of Health and Environment (“KDHE”) is the state agency within the state of Kansas that has been authorized by the EPA to administer the federal NPDES program 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**

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

14. At all times relevant to this action, Respondent was the owner and/or operator of a residential construction site known as Triple Creek Farms, comprised of approximately 49.4 acres, approximately 13 of which was disturbed, and located at the intersection of 175<sup>th</sup> Street and Antioch Road in Overland Park, Kansas (“Site”).

15. At the time of the EPA inspection, described below, the Site was in the building construction phase, in various phases of construction from clearing and excavating to home

building, and had already been cleared, graded, and had infrastructure installed. All curb and gutter and stormwater inlets had been installed.

16. Stormwater, snow melt, surface drainage, and runoff water leave Respondent's Site and discharge into Coffee Creek.

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

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

19. Coffee Creek is a perennial stream and a tributary to the Blue River, which is a tributary to the Missouri River, a traditionally navigable water. Coffee Creek is a "water of the United States" and therefore a "navigable water" within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7).

20. Coffee Creek is listed on the State's CWA Section 303(d) List as impaired for aquatic life use, food procurement, and primary contact recreation uses, and total maximum daily loads have been developed for fecal coliform, biochemical oxygen demand, nitrogen, phosphorous, and total suspended solids.

21. 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).

22. 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.

23. On September 27, 2019, KDHE issued authorization to Respondent under Permit Authorization No. KSR115082, under the Kansas Construction Stormwater General Permit No. KSR100000 ("Respondent's NPDES Permit"). The Construction Stormwater General Permit was effective between August 1, 2017 and July 31, 2022. This NPDES General Permit governs Respondent's stormwater discharges that are associated with industrial activity at the Site, including clearing, grading and excavation.

24. The principal requirement of Respondent's NPDES Permit is for the permittee to develop and implement a Stormwater Pollution Prevention Plan ("SWPPP"). The purpose of the SWPPP is to ensure the design, implementation, management, and maintenance of Best Management Practices ("BMPs") in order to eliminate or minimize erosion, sediment, and other pollutants in stormwater runoff from construction activities; comply with the Kansas Surface Water Quality Standards; and ensure compliance with the terms and conditions of the NPDES general permit.

25. On September 21, 2021, 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 the NPDES permit and the CWA (the "EPA Inspection"). During the EPA inspection, the inspector toured the Site and photographed various stormwater-related areas.

26. During the EPA Inspection, the inspector observed and documented significant failures to select, install, and maintain BMPs, including vehicle trackout, several large unstabilized stockpiles of soil, a dewatering hose lacking a filter prior to the discharge point, and multiple stormwater drain inlet controls and silt fences in need of repair or replacement.

27. During the EPA Inspection, the inspector requested copies of documents related to the Permit, including without limitation, the Site's SWPPP and self-inspection reports, but did not receive any of the requested documents during the EPA Inspection.

28. At the conclusion of the EPA inspection, the inspector again requested Site records, including the SWPPP, erosion control map, notice of intent, and Site inspection reports. After follow-up efforts by the EPA on September 21, 2021, September 28, 2021, and October 9, 2021, on October 9, 2021, Respondent provided EPA with the SWPPP, erosion control map, and notice of intent. To date, EPA has not received any site inspection reports. On November 17, 2021, EPA issued Respondent a notice of preliminary findings that identified compliance concerns.

### **Findings of Violation**

#### **Count 1**

#### **Failure to Properly Select, Install and/or Maintain BMPs and Fully Implement the Provisions of the SWPPP**

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

30. Part 3.8 of Respondent's NPDES Permit requires that dewatering activities be controlled in accordance with the Permit, including employing bag filters or equivalent technology.

31. Part 7 of Respondent's NPDES Permit requires that a SWPPP be prepared and fully implemented. Part 7.1 of Respondent's NPDES Permit further requires that BMPs and/or pollution controls are properly installed and maintained at the locations and relative timeframes specified in the SWPPP and that any stormwater runoff from disturbed areas leaving the Site must first pass through an appropriate sediment control.

32. Part 7.2.3 of Respondent's NPDES Permit requires Respondent to design, install and maintain BMPs to, among other things, minimize sediment discharges from the site, control discharge from sediment or soil stockpiles, minimize off-site tracking of soils by cleaning any off-site track out by the end of the work day, and provide storm drain inlet protection for inlets down gradient of disturbed project areas that are not fully stabilized.

33. Part 7.2.5 of Respondent's NPDES Permit requires that exposed soils where activities have been inactive for 14 days or more need to be stabilized with mulch or other similarly effective soil stabilizing BMPs.

34. Part 11.1 of Respondent's NPDES Permit requires all stormwater controls to be maintained and effective.

35. During the EPA Inspection, the inspector observed and documented several areas of the Site that lacked BMPs, including:

- a. Vehicle trackout was present on the roadway near Lot 10 of the Site;
- b. Several large stockpiles of exposed soil that had been inactive for more than 14 days and had not been stabilized with mulch or another soil stabilizer; and
- c. A pump had been utilized to dewater a pit that had been excavated for the foundation of a home on Lot 10. The water had been pumped to a manhole, but there was no bag filter or other filtering device on the end of the dewatering hose prior to the discharge point.

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

- a. At least five (5) of the Site's stormwater drain inlet controls needed maintenance or replacement, including inlet controls full of sediment, gravel, and debris; and
- b. At least two (2) instances of silt fence needing maintenance or replacement.

37. Respondent's alleged failure to properly design, 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 issued pursuant to Section 402(p) of the CWA, 33 U.S.C. § 1342(p).

**Count 2  
Failure to Conduct and/or Document Inspections**

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

39. Part 7.2.10 of Respondent's NPDES Permit requires regular Site inspections a minimum of once every 14 days and an inspection by the end of the next day following a rain event which results in a rainfall total of 0.5 inches or greater, with certain exceptions not applicable here. A report of each regularly scheduled inspection and required rain event inspection shall be documented.

40. Part 7.2.10 of Respondent's NPDES Permit requires any deficiencies in the operation or maintenance, effectiveness, adequacy or coverage extent of all installed BMPs, temporary stabilization measures and other pollution control measures identified during the inspection to be noted in the inspection report and corrected within seven (7) calendar days of the

inspection unless infeasible and, if infeasible, the reason shall be noted in the inspection report with a specific timeframe for completing all needed maintenance and repairs.

41. Part 10.1 of Respondent's NPDES Permit requires Respondent to maintain all Site inspection records for a period of three years following the date of the notice of termination of the construction project, and that all records must be kept on-site or in a readily available location identified in the Site's notice of intent until final stabilization has been completed.

42. During the EPA Inspection, the Inspector requested the Site inspection records. To date, Respondent has not provided any Site inspection records.

43. Based on a review of relevant rainfall data, Respondent did not conduct and/or document required inspections every 14 days or by the end of the next day following rain events of 0.5 inches or greater on sixty-eight (68) occasions in 2020 and 2021.

44. Respondent's alleged failure to conduct and/or document required inspections is a violation of the conditions or limitations of the NPDES permit issued pursuant to Section 402(p) of the CWA, 33 U.S.C. § 1342(p).

**Count 3  
Failure to Maintain SWPPP Onsite**

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

46. Part 7 of the NPDES Permit requires Respondent, before initiating construction activities at the Site, to develop a SWPPP that is specific to the construction activities that are to be employed at the Site.

47. Part 10.1 of Respondent's NPDES Permit requires Respondent to maintain the SWPPP for a period of three years following the date of the notice of termination of the construction project, and that the SWPPP must be kept on-site or in a readily available location identified in the Site's notice of intent until final stabilization has been completed.

48. During the EPA Inspection, the inspector requested a copy of the SWPPP; however, a copy was not at the Site nor was it maintained at a readily available location. The SWPPP was not provided to EPA until 18 days after the EPA Inspection after repeated efforts by the EPA.

49. Respondent's alleged failure to maintain a SWPPP onsite or in a readily available location is a violation of the conditions or limitations of the NPDES permit issued pursuant to Section 402(p) of the CWA, 33 U.S.C. § 1342(p).

**Relief**

50. For violations of CWA Section 402, 33 U.S.C. § 1342, Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), authorizes the administrative assessment of civil penalties

in an amount not to exceed \$10,000 per day for each day during which the violation continues, up to a maximum total penalty of \$125,000. Pursuant to the Civil Monetary Penalty Inflation Adjustment Rule of 2022, as mandated by the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended through the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, and the EPA's implementing regulations at 40 C.F.R. Section 19.4, civil administrative penalties of up to \$25,847 per day for each day during which a violation continues, up to a maximum of \$323,081, may be assessed for violations pursuant to CWA Section 309(g), 33 U.S.C. § 1319(g), that occur after November 2, 2015.

51. Based on the foregoing Finding of Violations, and pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), EPA Region 7 hereby proposes to issue a Final Order Assessing an Administrative Penalty against the Respondents for the violations cited above, in the amount of **Fifty-Eight Thousand Thirteen Dollars (\$58,013)**.

52. The proposed penalty is based upon the facts stated in this Complaint, the nature, circumstances, extent, and gravity of the violation, and with respect to the violator, ability to pay, any prior history of such violation, the degree of culpability, economic benefit or savings resulting from the violation, and such other matters as justice may require.

53. The penalty proposed in this Complaint is based upon the best information available to EPA at the time that this Complaint was issued. The penalty may be adjusted if the Respondents establishes bona fide issues of ability to pay, or other defenses relevant to the appropriate amount of the proposed penalty.

## **NOTICE OF OPPORTUNITY TO REQUEST A HEARING**

### **Answer and Request for Hearing**

54. As required by Section 309(g)(4) of the CWA, 33 U.S.C. § 1319(g)(4), prior to the assessment of a civil penalty, EPA will provide public notice of the proposed penalty, and reasonable opportunity for the public to comment on the matter, and present evidence in the event a hearing is held.

55. EPA has notified the state of Kansas regarding this proposed action by e-mailing a copy of this document to the KDHE.

56. Respondent may request a hearing to contest any material fact contained in this Complaint above or to contest the appropriateness of the proposed penalty set forth therein. Such a hearing will be held and conducted in accordance with the Consolidated Rules, a copy of which is enclosed herein.

57. To avoid being found in default, which constitutes an admission of all facts alleged in this Complaint and a waiver of the right to hearing, Respondent must file a written answer and request for hearing within thirty (30) days of service of this Complaint and Notice of Opportunity for Hearing. The answer shall clearly and directly admit, deny, or explain each of the factual allegations contained in this Complaint with regard to which Respondent has any

knowledge, or shall clearly state that Respondent has no knowledge as to particular factual allegations in this Complaint. The answer shall also state (a) the circumstances or arguments which are alleged to constitute the grounds of defense; (b) the facts that Respondent disputes; (c) the basis for opposing any proposed relief; and (d) whether a hearing is requested. The answer shall be filed with the following:

Regional Hearing Clerk  
U. S. Environmental Protection Agency Region 7  
11201 Renner Boulevard  
Lenexa, Kansas 66219

Or

R7\_Hearing\_Clerk\_Filings@epa.gov

58. Failure to admit, deny or explain any material factual allegation in this Complaint constitutes an admission of the allegation.

59. A hearing upon the issues raised by this Complaint and the answer may be held if requested by Respondent in the answer. If Respondent does not request a hearing, the Presiding Officer may hold a hearing if issues appropriate for adjudication are raised in the answer.

60. In any hearing on the proposed penalty for this Complaint, members of the public to whom EPA is obligated to give notice of this proposed penalty action, will have the right, under Section 309(g)(4)(B) of CWA, 33 U.S.C. § 1319(g)(4)(B), to be heard and present evidence on the merits of the proposed CWA penalty assessment. If no hearing is held, EPA will issue a Final Order Assessing Administrative Penalties pursuant to the CWA, and only members of the public who submitted timely comments on the proposed penalty assessment will have an additional thirty (30) days to petition to set aside the said Order and to hold a hearing thereon. EPA will grant the petition and will hold a hearing only if the petitioners' evidence is material and was not considered by EPA in the issuance of the Final Order.

61. If Respondent fails to file a written answer within thirty (30) days of service of this Complaint and Notice of Opportunity for Hearing, Respondent may be found in default. Such default by Respondent constitutes an admission of all facts alleged in this Complaint and a waiver of Respondent's right to contest such factual allegations. A Default Order may thereafter be issued by the Presiding Officer and the civil penalties proposed herein shall become due and payable unless the record clearly demonstrates that the requested relief is inconsistent with the CWA.

62. Whether or not Respondent requests a hearing, an informal conference may be requested in order to discuss the facts of this case, the proposed penalty, and the possibility of settlement. To request a settlement conference, please contact:



Cathie Chiccine  
Assistant Regional Counsel  
United States Environmental Protection Agency Region 7  
11201 Renner Boulevard  
Lenexa, Kansas 66219  
Telephone: (913) 551-7917  
Email: Chiccine.catherine@epa.gov

63. Please note that a request for an informal settlement conference does not extend the thirty (30) day period during which a written answer and request for a hearing must be submitted.

64. EPA encourages all parties against whom a civil penalty is proposed to pursue the possibilities of settlement as a result of an informal conference. Any settlement which may be reached as a result of such a conference shall be embodied in a written Consent Agreement and Final Order (“CAFO”) issued by the Regional Judicial Officer, EPA Region 7. The issuance of such a CAFO shall constitute a waiver of Respondent's right to request a hearing on any matter stipulated therein.

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

**DAVID  
COZAD**

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David Cozad  
Director  
Enforcement and Compliance Assurance Division

**CATHERINE  
CHICCINE**

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Catherine R.M. Chiccine  
Assistant Regional Counsel  
Office of Regional Counsel

**CERTIFICATE OF SERVICE**


I certify that on the date noted below I delivered this Complaint and Notice of Opportunity for Hearing to the Regional Hearing Clerk, U.S. Environmental Protection Agency, by electronic mail to: R7\_Hearing\_Clerk\_Filings@epa.gov.

I further certify that on the date noted below I sent by electronic mail a copy of the signed Complaint and Notice of Opportunity for Hearing to:

Mr. Tom Stiles, Director  
Kansas Department of Health and Environment, Bureau of Water  
Tom.stiles@ks.gov

I further certify that on the date noted below a true and correct copy of the foregoing Complaint and Notice of Opportunity for Hearing together with a copy of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits, 40 C.F.R. Part 22, were sent by certified mail, return receipt requested, to the following:

Daniel Quinn  
Respondent and Registered Agent  
Clearwater USA, Inc.  
10823 W. 164<sup>th</sup> St.  
Overland Park, Kansas 66221

  
Signature 4/11/2023