



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8**

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OCT 20 2010

Ref: 8ENF-W-NP

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Herb Schmitt
Dean Kurtz Construction Company
1651 Rand Road
Rapid City, SD 57709

Re: Order for Compliance under section
309(a) of the Clean Water Act

Dear Herb Schmitt:

Enclosed is a United States Environmental Protection Agency Region 8 (EPA) Order for Compliance (Order) issued to Dean Kurtz Construction Company (DK Construction). The Order specifies the nature of the violations under the Clean Water Act, as amended, 33 U.S.C. § 1251, *et seq.* (CWA). The authority for such action is provided to EPA under section 309(a)(3) of the CWA, 33 U.S.C. § 1319(a)(3). The Order describes the actions necessary in order for DK Construction to achieve compliance with the CWA.

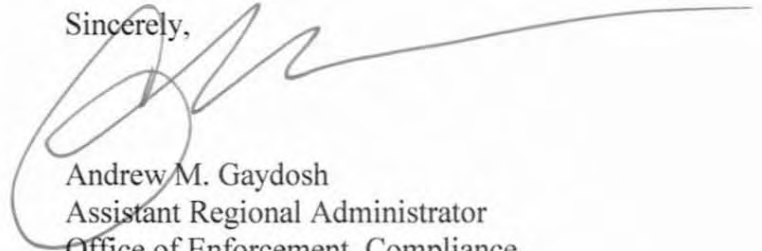
The CWA requires the Administrator of EPA to take all appropriate enforcement actions necessary to secure prompt compliance with the CWA and any orders issued thereunder. Section 309 of the CWA provides a variety of possible enforcement actions, including the filing of a civil or criminal action (33 U.S.C. §§ 1319(b), (c), (d), and (g)). Section 508 allows for debarment from Federal contracts and/or loans for any noncompliance with the CWA or with an order issued pursuant to the CWA (33 U.S.C. § 1368).

Enclosed with this Order is a copy of the report from the EPA Storm Water Compliance Evaluation Inspection at the Access Gates/Perimeter Fence construction sites on May 12, 2010. Please note that the inspectors discussed their observations and/or concerns with Herb Schmitt and David Bergeron during the exit briefing. Please refer to the timetable outlined in the Order for the timeline to respond to this inspection report.

The Access Gate/Perimeter Fence construction site encompasses three entry gates to the Ellsworth Air Force Base (AFB) and stormwater from your project impacts the AFB base lakes system and Box Elder Creek.

Please review the Order carefully. Failure to comply with the requirements of the Order shall constitute a violation of the Order. If you have any questions regarding this letter, the enclosed Order, or any other matters pertinent to compliance with the CWA, the most knowledgeable people on my staff regarding these matters are Seth Draper, Technical Enforcement, at (303) 312-6763, and Linda Kato, Enforcement Attorney, at (303) 312-6852.

Sincerely,



Andrew M. Gaydosh
Assistant Regional Administrator
Office of Enforcement, Compliance
and Environmental Justice

Enclosures

cc: Tina Artemis, Regional Hearing Clerk
Kelli Buscher, SDDENR
Douglas Baldwin, SDDENR
Jennifer Aldrich, ACOE
Jerry Stiles, 28 CES/CEV



UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

2010 OCT 20 AM 9: 57

FILED
EPA REGION VIII
HEARING CLERK

In the Matter of:)
)
Dean Kurtz Construction Company,)
a South Dakota Corporation)
)
Respondent.)

ORDER FOR COMPLIANCE

Docket No. **CWA-08-2011-0001**

LEGAL AUTHORITY

This Order for Compliance (Order) is issued pursuant to § 309(a)(3) of the Federal Water Pollution Control Act (Act), 33 U.S.C. § 1319(a)(3), which authorizes the Administrator of the United States Environmental Protection Agency (EPA) to issue an order requiring compliance by any person found to be in violation of §§ 301, 302, 306, 307, 308, 318, 402, and/or 405 of the Act, or of any permit condition or limitation implementing those sections. This authority has been properly delegated to the undersigned official.

FINDINGS OF FACT AND LAW

1. To restore and maintain the integrity of the nation's water, § 301(a) of the Act prohibits the discharge of pollutants into navigable waters of the United States, unless it is in compliance with a permit issued pursuant to the Act. 33 U.S.C. § 1311(a).
2. Section 402 of the Act establishes a National Pollutant Discharge Elimination System (NPDES) program, administered by EPA or an authorized state, to permit discharges into navigable waters, subject to specific terms and conditions. 33 U.S.C. § 1342.
3. Storm water contains "pollutants" as defined by the Act. 33 U.S.C. § 1362(6).
4. The Act requires that a discharge of storm water associated with an industrial activity to navigable waters must comply with the requirements of a NPDES permit. 33 U.S.C. § 1342(p).
5. The Act authorized, and EPA issued, regulations that further define requirements for NPDES permits for storm water discharges. 33 U.S.C. §§ 1318, 1342(p). The regulations are found at 40 C.F.R. Part 122.
6. EPA regulations define storm water discharges associated with industrial activity to include discharges associated with construction activity. 40 C.F.R. § 122.26(b)(14)(x).

7. EPA regulations require each person who discharges storm water associated with industrial activity to either apply for an individual permit or seek coverage under an existing and lawful general permit. 40 C.F.R. § 122.26(c).

8. Respondent is a corporation, incorporated in the State of South Dakota, and doing business in the State of South Dakota.

9. Respondent is a "person" within the meaning of § 502(5) of the Act and therefore, subject to the requirements of the statute and/or regulations. 33 U.S.C. § 1362(5).

10. Respondent is engaged in construction activities at a facility (facility) located at Ellsworth Air Force Base (AFB), near Rapid City, SD.

11. The AFB base lakes system at Ellsworth Air Force Base discharges through unnamed tributaries, which flow to Box Elder Creek, which flows into the Cheyenne River, a "traditionally navigable water" as defined by the Army Corps of Engineers. The Cheyenne River empties into Lake Oahe, which flows into the Missouri River, which flows southeast and along the northeast border between South Dakota and Nebraska and into Missouri. The Missouri River is an interstate, "navigable-in-fact" waterway. The tributaries of Box Elder Creek are "navigable waters" and "waters of the United States," as defined by the Act and EPA regulations, respectively. 33 U.S.C. § 1362(7); 40 C.F.R. § 122.2, definition of "Waters of the United States," subsection (e).

12. Respondent engaged in construction activities at the facility at all times relevant to this action.

13. Respondent is therefore engaged in an "industrial activity" as defined by EPA regulations. 40 C.F.R. § 122.26(b)(14).

14. Storm water, snow melt runoff, surface runoff and drainage leave the facility and flow into the AFB base lakes systems as well as unnamed tributaries surrounding the AFB.

15. The storm water run off, snow melt runoff, and surface runoff and drainage from the facility is "storm water" as defined by EPA regulations. 40 C.F.R. § 122.26(b)(13).

16. The storm water runoff is associated with Respondent's construction activities and therefore constitutes "storm water discharge associated with industrial activity" defined under 40 C.F.R. § 122(b)(14)(x).

17. On September 17, 2009, respondent submitted a Notice of Intent (NOI) application for a general South Dakota Department of Environment and Natural Resources (SDDENR) NPDES permit for storm water discharges associated with its construction activities at the facility.

18. SDDENR issued a general NPDES permit authorization (permit) for storm water discharges associated with construction activities, number SDR10E505, effective February 1, 2010. The permit set forth storm water requirements covering Respondent's construction activities at the facility.

19. The permit requires, among other things, that a person conducting construction activities associated with storm water discharges develop and implement an adequate storm water pollution prevention plan (SWPPP), conduct regular specified storm water inspections, and implement best management practices (BMPs). BMPs include structural controls (such as storm drain inlet protection) and management practices (such as minimizing any off-site pollutant discharges).

20. Authorized EPA employees entered the facility with the consent of Respondent on May 12, 2010, to inspect it for compliance with the statute, permit and regulations.

21. During the inspection, Respondent provided its SWPPP and construction activity records for the Patriot, Liberty, and Bismarck Gate project sites to inspectors.

22. At the time of the inspection, and as described in detail in the Summary of Findings, Exhibit A, incorporated herein by reference, the authorization letter and cover page of the permit were not posted at the construction site in a prominent place for public viewing.

23. At the time of the inspection, and as described in detail in the Summary of Findings, Exhibit A, Respondent's SWPPP was deficient for the following reasons:

- a. The site map did not include all required items, or items were not up to date.
- b. The SWPPP did not include all required items, such as dates of major site activities, information regarding control measures, updated information after problems were detected, permit language in the BMP, and information regarding allowable nonstormwater discharges.
- c. The SWPPP and site map did not include up to date site conditions.
- d. The locations of required items were not up to date on the site map.
- e. Respondent's inspections did not identify BMP deficiencies.
- f. Respondent's inspection reports did not include corrective actions and maintenance items.

24. At the time of the inspection, and as described in detail in Exhibit A, Respondent failed to implement BMPs at the storm drains to minimize pollutants from entering the storm drain and failed to implement/modify the BMPs at the construction sites to provide responsible stormwater management from the construction sites.

VIOLATIONS

COUNT I

(Failure to Post Authorization Letter and Cover Page)

25. Respondent's failure to post the authorization letter and cover page of the General Permit at the construction site in a prominent place for public viewing as required by the permit constitutes a violation of the Act. 33 U.S.C. §§ 1311, 1342.

COUNT II

(Failure to Develop and Maintain Adequate SWPPP)

26. Respondent's failure to develop and update its SWPPP as required by the permit constitutes a violation of the Act. 33 U.S.C. §§ 1311, 1342.

COUNT III

(Failure to Implement and Modify BMPs)

27. Respondent's failure to implement and modify BMPs as required by the permit constitutes a violation of the Act. 33 U.S.C. §§ 1311, 1342.

ORDER

Respondent is ordered to perform the following actions:

28. Within 10 days of receipt of this Order, submit a written notice of intent to comply with the requirements of this Order to EPA and SDDENR. The written notice may be transmitted by electronic correspondence, followed by telephone confirmation of receipt, to: Seth Draper at Draper.Seth@epa.gov, (303-312-6763); Darcy O'Connor at Oconnor.Darcy@epa.gov, (303-312-6392); Douglas Baldwin at Douglas.Baldwin@state.sd.us, (605-394-2229)

29. Within 20 days of receipt of this Order, post a copy of the Secretary's authorization letter and the cover page of the General Permit at the construction site in a prominent place for public viewing.

30. Within 10 days of receipt of this Order, install and maintain BMPs at all of the areas of construction activities. The BMPs must be inspected daily and after each precipitation event to ensure their effectiveness.

31. Within 7 days of completing the installation of BMPs referenced in paragraph 30, update the SWPPP for these activities.

32. Within five (5) days of completing the installation of BMPs required by paragraph 30, provide the updated section of the SWPPP referenced in paragraph 31, and photographic documentation of the BMPs installed pursuant to paragraphs 30 to Seth Draper, EPA, and Douglas Baldwin, SDDENR, at the addresses listed in paragraph 36.

33. Within 3 days of receipt of this Order, address the deficiencies outlined in the Summary of Findings, attached as Exhibit A, unless a shorter time frame has been established in the order. Respondent must implement all conditions in its revised SWPPP in accordance with its Permit.

34. Within 20 days of receipt of this Order, review the inspection form and modify as needed to capture which BMPs are evaluated during ground disturbance activities at Patriot Gate, Bismarck Gate, and Liberty Gate; the condition of the BMPs evaluated; what repairs/replacement are needed; and when the repair/replacement of the BMP occurred.

35. Within 20 days of receipt of this Order, conduct a meeting with the 28 Civil Engineering Squadron/Civil Environmental Management (CES/CEV) to review any impact to the AFB's Base Lakes System that may have occurred as a result of ground disturbance activities at Patriot Gate, Bismarck Gate, and Liberty Gate. Respondent shall correct any impact and revise the SWPPP to include any necessary future coordination with the 28 CES/CEV or corrective action implementation process to minimize and/or prevent impacts to the AFB's base lakes system.

OTHER PROVISIONS

36. All related correspondence, plans, schedules, and reports, shall be sent to the following addresses:

Seth Draper (8ENF-W-NP)
U.S. EPA Region 8
Office of Enforcement, Compliance
and Environmental Justice
Technical Enforcement Program
1595 Wynkoop Street
Denver, Colorado 80202-1129

And


Douglas Baldwin
Natural Resources Engineer
Surface Water Quality Program
South Dakota Department of Environment
and Natural Resources
2050 West Main, Suite 1
Rapid City, South Dakota 57702-2493

37. Any failure to comply with the requirements of this Order shall constitute a violation of the Order and may subject Respondent to penalties as provided under the Act. 33 U.S.C. § 1319.

38. This Order does not constitute a waiver or modification of the terms and conditions of Respondent's Federal NPDES Permit which remains in full force and effect, or of any other legal responsibilities or liability.

39. This Order does not constitute a waiver of or election by EPA to forego any civil or criminal action to seek penalties, fines or other relief under the Act. The Act authorizes the assessment of civil penalties of up to \$37,500 per day for each violation of the Act, and fines and imprisonment for willful or negligent violations. 33 U.S.C. § 1319.

Date: October 20, 2010 By:



Andrew M. Gaydosh
Assistant Regional Administrator
Office of Enforcement, Compliance, and
Environmental Justice

ATTACHMENT A
Summary of Findings and Corrective Actions

Facility: Access Gates/Perimeter Fence, Ellsworth AFB
Permit #: SDR10E051
Inspection Date: 05/12/10

Findings	Requirement and Corrective Action Needed
<p>1) The authorization letter and the cover page of the General Permit were not displayed for public viewing.</p>	<p>Part 2.4 (3) of the South Dakota Department of Environment and Natural Resources (DENR) General Permit for Storm Water Discharges Associated with Construction Activities (SW General Permit) states “A copy of the Secretary’s authorization letter and the cover page of the General Permit shall be posted at the construction site in a prominent place for public viewing (such as alongside a building permit) from the date construction activities are initiated until final stabilization is achieved and coverage under this General Permit is terminated.”</p> <p>Please review Part 2.0, Coverage Under This Permit, of the SW General Permit. Provide United States Environmental Protection Agency (EPA) and DENR a statement of how Dean Kurtz Construction Company, intends to comply with the requirements of the permit.</p>
<p>2) The locations of the following items were not included or were not up to date on the site maps:</p> <ul style="list-style-type: none"> a) Drainage patterns with flow directions marked with arrows; b) Areas of disturbance; c) BMPs shown on the site map were inaccurate with site conditions; d) The dates BMPs were installed were not recorded; e) Surface waters; f) Discharges to surface water; g) Stormwater outfalls, and; h) Areas of concern, including waste storage and concrete washout area. 	<p>Part 4.2.1.g. of the SW General Permit states the Stormwater Pollution Prevention Plan (SWPPP) shall provide “A site map indicating: (1) Drainage patterns with flow directions marked with arrows, (2) Approximate slopes anticipated after major grading activities; (3) Areas of soil disturbance, noting any phasing of construction activities; (4) Location of major structural and nonstructural controls identified in the SWPPP; (5) Location of areas where stabilization practices are expected to occur; (6) Surface waters, including an aerial extent of wetland acreage; (7) Locations where storm water is discharged to surface water; (8) Locations of any spills, leaks, or soil contamination that could impact the storm water runoff from the site; and (9) Areas of concern including, but not limited to: fueling stations, waste storage, and concrete washout areas. The permittee shall provide designated areas for these activities.</p> <p>Provide EPA and DENR an updated site map that includes the items required by the SW General Permit.</p>

- 3) The site SWPPP did not include the following required items:
- a) Record of dates of major site activities, when construction activities will temporarily or permanently cease and when stabilization measures will be initiated;
 - b) Control measures for each major activity, including timeframe and operator responsible;
 - c) The SWPPP and site map are not updated within 7 days after inspection reveals problems. At the time of the inspection the SWPPP and site map were not up to date;
 - d) The maintenance schedule of BMPs does not include the permit language; and,
 - e) The SWPPP does not discuss allowable nonstormwater discharges.

The SW General Permit states the required items of the site SWPPP, specifically:

Part 4.2.2.a.(1) states “The SWPPP shall also include a record of the dates when major grading activities occur, when construction activities temporarily or permanently cease on a portion of the site, and when stabilization measures will be initiated.”

Part 4.2.2 states “For each major activity identified in the site description, the SWPPP shall describe the necessary control measures, along with the timeframe for implementing the controls and who is responsible for implementation.”

Part 3.3, states “The permittee shall maintain all sediment controls in effective working order. If any controls are not operating effectively, the permittee shall perform maintenance on the controls as necessary to maintain the continued effectiveness of the storm water controls and before the next anticipated storm event or within seven (7) days of identifying the need for maintenance, whichever comes first.”

Part 3.12.5 states “The SWPPP shall be revised if the site inspections identify any non-compliance with the effluent limits. The changes shall be implemented at the site within seven (7) calendar days following the inspection.”

Part 4.2.2.c.(2) states “The SWPPP shall include a description of chemicals, construction materials, and waste materials expected to be stored on-site, with updates as appropriate. The SWPPP shall also include a description of controls to minimize pollutants from these materials, including storage practices to minimize exposure of the materials to storm water, and spill prevention measures and response.”

Part 3.2.5.c. states “Non-storm water discharges shall be identified in the SWPPP, along with an explanation of pollution prevention measures that will be implemented.”

Provide EPA and DENR an updated copy of the site SWPPP including all of the requirements of the SW General Permit.

<p>4) The site SWPPP and site map did not reflect current site conditions.</p>	<p>Part 4.3.1 of the SW General Permit states “The permittee shall amend the SWPPP whenever there is a change in design, construction, operation, or maintenance that has a significant effect on the potential for the discharge of pollutants to the waters of the state. The SWPPP shall also be amended if the SWPPP proves to be ineffective at minimizing pollutants present in the storm water.”</p> <p>Provide EPA and DENR and updated copy of the SWPPP and site map representing current site conditions.</p>
<p>5) The locations of the following items were not up to date on the site map:</p> <ul style="list-style-type: none"> a) Silt fence (photos 274, 276, 277); b) Hay bales (photo 323); c) Stormwater inlets and protection (photo 345, 347, 10, 11, 15, 16, 17, 23, 24, 25, 35, 36, 37, and 68); d) Straw wattles (photos 323, 324, 325); e) Vehicle entrances (photos 7, 9, 10, 19-25, 26-32, 33, 343, 344, and 346); f) Concrete washout (photo 302); g) Soil stockpiles (photos 332, 333, 334, 335), and; h) Existing vegetation. 	<p>Part 4.2.1.g.(4) states the SWPPP shall provide a site map indicating “(4) Location of major structural and nonstructural controls identified in the SWPPP; (5) Location of areas where stabilization practices are expected to occur; and (9) Areas of concern including, but not limited to: fueling stations, waste storage, and concrete washout areas. The permittee shall provide designated areas for these activities.”</p> <p>Provide EPA and DENR an updated site map illustrating the current site conditions, including the required items described in the SW General Permit.</p>
<p>6) The inspection reports completed by Herb Schmitt did not identify BMP deficiencies. During the EPA site inspection, there were BMP deficiencies observed.</p>	<p>Part 3.12.3. of the SW General Permit states “The inspection shall include disturbed areas of the construction site that have not been finally stabilized, areas used for storage of materials, structural control measures, and locations where vehicles enter or exit the site. These areas shall be inspected for evidence of, or the potential for, pollutants entering the drainage system, and erosion and sediment control measures identified in the SWPPP shall be observed to ensure that they are operating correctly and sediment is not tracked off-site.”</p> <p>Please review Part 3.0, Storm Water Pollution Prevention Plan, of the SW General Permit. Provide EPA and DENR a statement of how Dean Kurtz Construction intends to comply with the requirements of the permit.</p>
<p>7) Corrective actions and maintenance items are not included on the inspection reports.</p>	<p>Part 3.12.4.d. of the SW General Permit states “The permittee shall maintain records of each inspection and resulting maintenance activities, including: d. Corrective actions taken.”</p> <p>Provide EPA and DENR the inspection reports from May and August 2010 to ensure inspection reports include a description of corrective actions.</p>

8) The following BMP deficiencies were observed:

- a) Silt fence was downed or damaged in areas (photos 274, 276, 277);
- b) Silt fence was not installed correctly (photo 268, 317, 323, 324),
- c) The silt fence above the stormwater inlet is damaged (photo 336);
- d) Hay bales appeared to be degraded to a point where they were no longer effective (photo 323);
- e) The inlet does not have inlet protection. Sediment was observed above the inlet and in the gutter flowing to the inlet (photo 345, 347, 10, 11, 15, 16, 17, 23, 24, 25, 35, 36, 37, 41, 47, 48, 52, 54, 68, 345, 347,);
- f) Several areas of the site were being accessed without stabilized vehicle entrances (photos 7, 9, 10, 19-25, 26-32, 33, 343, 344, and 346);
- g) The two stabilized vehicle entrances needed maintenance (photos 264-266, 271, 280-283, 311, 312, and 348-351);
- h) The stockpiles were not stabilized or protected (photos 3, 64, 65, 303, 327, 328, 332, 333, 335, and 349);
- i) Sediment trackout/buildup was observed in various areas of the site (photos 7, 9-18, 19, 20, 22, 23, 25, 26, 35, 36, 37, 38, 68, 343, 344-349, and 351); and
- j) Runoff from unprotected areas bypassed BMPs (photos 268, 317, 318, 320-323, 325, and 326).
- k) The disturbed slope on the south side of Bismark Gate construction site was not stabilized and was eroding (photo 320, 321, 322, 327, 328); and
- l) Disturbed areas along Shriever Rd. were not stabilized (photos 54 and 63).

Part 3.3 of the SW General Permit states “The permittee shall maintain all sediment controls in effective working order. If any controls are not operating effectively, the permittee shall perform maintenance on the controls as necessary to maintain the continued effectiveness of the storm water controls and before the next anticipated storm event or within seven (7) days of identifying the need for maintenance, whichever comes first.”

Dean Kurtz Construction must review all BMPs and management practices on site and correct any deficiencies. Documentation, including photos, on when and how the BMPs and management practices were corrected, must be provided to EPA and DENR.