

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VII
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)
)
) Docket No. CWA-07-2008-0072
)
Price Brothers Construction Company)
12721 Metcalf Avenue Suite 200)
Overland Park, Kansas 66213)
) FINDINGS OF VIOLATION,
) ORDER FOR COMPLIANCE
)
)
Respondent.)
)
)
Proceedings under Section 309(a) of the)
Clean Water Act, 33 U.S.C. § 1319(a))
)
_____)

Preliminary Statement

1. The following Findings of Violation and Order for Compliance (“Order”) are made and issued pursuant to the authority of Section 309(a)(3) of the Clean Water Act (“CWA”), 33 U.S.C. § 1319(a)(3). This authority has been delegated by the Administrator of the United States Environmental Protection Agency (“EPA”) to the Regional Administrator, EPA Region VII and further delegated to the Director of Region VII’s Water, Wetlands, and Pesticides Division (“WWPD”).

2. Respondent is Price Brothers Construction Company, a company conducting business under the laws of Kansas and authorized to do business in the State of Kansas with offices located at 12721 Metcalf Avenue Suite 200, Overland Park, Kansas.

Statutory and Regulatory Framework

3. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants except in compliance with, *inter alia*, Section 402 of the CWA, 33 U.S.C. § 1342 or Section 404 of the CWA § 1344. Section 402 of the CWA, 33 U.S.C. § 1342, provides that pollutants may be discharged only in accordance with the terms of a National Pollutant Discharge Elimination System (“NPDES”) permit issued pursuant to that Section. Section 404 of the CWA, 33 U.S.C. § 1344, requires a person to obtain a permit from the Secretary of the Army acting through the Chief of Engineers, commonly referred to as the United States Army Corps of Engineers, for any discharge of “dredged or fill material” into the “navigable waters” of the United States.

4. The CWA prohibits the discharge of “pollutants” from a “point source” into a “navigable water” of the United States, as these terms are defined by Section 502 of the CWA, 33 U.S.C. § 1362.

5. Section 402(p) of the CWA, 33 U.S.C. § 1342(p), sets forth requirements for the issuance of NPDES permits for the discharge of storm water. Section 402(p) of the CWA, 33 U.S.C. § 1342(p), requires, in part, that a discharge of storm water associated with an industrial activity must conform with the requirements of an NPDES permit issued pursuant to Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342.

6. Pursuant to Section 402(p) of the CWA, 33 U.S.C. § 1342(p), EPA promulgated regulations setting forth the NPDES permit requirements for storm water discharges at 40 C.F.R. § 122.26.

7. 40 C.F.R. §§ 122.26(a)(1)(ii) and 122.26(c) requires dischargers of storm water associated with industrial activity to apply for an individual permit or to seek coverage under a promulgated storm water general permit.

8. 40 C.F.R. § 122.26(b)(14)(x) defines “storm water discharge associated with industrial activity,” in part, as construction activity including clearing, grading, and excavation, except operations that result in the disturbance of less than five (5) acres of total land area which are not part of a larger common plan of development or sale.

9. The Kansas Department of Health and Environment (“KDHE”) is the state agency with the authority to administer the federal NPDES program in Kansas pursuant to Section 402 of the CWA, 33 U.S.C. § 1342. EPA maintains concurrent enforcement authority with authorized states for violations of the CWA.

10. Effective March 1, 2003, KDHE authorized a General Permit for the discharge of storm water under the NPDES, Permit No. S-MCST-0110-1, to expire on December 31, 2006. On January 1, 2007, the previous General Permit was supplanted by General Permit No. S-MCST-0701-1 which expires on December 31, 2011. On January 24, 2006, KDHE issued Respondent Permit No. MO-14-0104, authorizing Respondent to operate under the General Permit, expiring on July 28, 2008. The General Permit governs storm water discharges associated with construction or land disturbance activity (e.g., clearing, grubbing, excavating, grading, and other activity that results in the destruction of the root zone).

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 construction site known as Avignon Villas (“Villas”), located north of the intersection of 119th Street and Greenwood Street in Olathe, Kansas. The Villas construction site was divided into four plats, or “phases.” At all times relevant to this

action, Respondent was the owner and/or operator of the construction site known as Avignon Villas Phase II ("Site") located near Hagan Street and 117th Street in Olathe, Kansas. Construction activities occurred at the Site including clearing, grading and excavation which disturbed five (5) or more acres of total land area.

13. During the periods of discharges of dredged and/or fill material into a tributary of Indian Creek, Respondent owned and/or operated on the property on which the discharges took place.

14. Storm water, snow melt, surface drainage and runoff water leaves Respondent's facility and goes into an unnamed tributary to Indian Creek and Indian Creek. The runoff and drainage from Respondent's facility is "storm water" as defined by 40 C.F.R. § 122.26(b)(13).

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

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

17. Respondent discharged pollutants into an unnamed tributary to Indian Creek and Indian Creek. The unnamed tributary and Indian Creek are "navigable waters" as defined by CWA Section 502, 33 U.S.C § 1362.

18. Storm water runoff from Respondent's construction site results in the addition of pollutants from a point source to navigable waters, and thus is the "discharge of a pollutant" as defined by CWA Section 502(12), 33 U.S.C. § 1362(12).

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

20. Respondent applied for and was issued NPDES permit coverage under the General Permit described in Paragraph 10 above. KDHE assigned Respondent permit number MO-14-0104, which was issued on July 24, 2006.

21. On May 20, 2008, through May 21, 2008, an EPA inspector performed an inspection of the Site under the authority of Section 308(a) of the CWA, 33 U.S.C. § 1318(a). The purpose of the inspection was to evaluate the Respondent's compliance with the CWA.

22. At various times starting on or about February 9, 2007, Respondent, and/or persons acting on his behalf, discharged dredged or fill material into an unnamed tributary of Indian Creek located near Hagan Street and 117th Street. The Respondent, and/or persons acting on their behalf used earth moving equipment to install rock check dams.

23. The dredged and/or fill materials discharged by Respondent into the unnamed tributary of Indian Creek includes spoil, rock, sand and dirt and are “pollutants” within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

24. The discharge of the dredged and/or fill material into the unnamed tributary to Indian Creek referenced above, constitutes the “discharge of a pollutant” within the meaning of Section 501(12) of the CWA, 33 U.S.C. § 1362(12).

25. The earth moving equipment equipment referenced above, constitutes a “point source” within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

26. Respondent’s discharges of pollutants from a point source into a water of the United States were performed without a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344.

Findings of Violation

Count 1

Failure to Install Appropriate Best Management Practices

27. The facts stated in Paragraphs 11 through 26 above are herein incorporated.

28. Part 7 of the Respondent’s permit states in part that the permittee shall develop a storm water pollution prevention plan (SWPPP) which is specific to the construction activities which are to be employed at the site authorized by the general permit to discharge storm water runoff.

29. Part 7 of Respondent’s permit additionally states that the permittee shall fully implement the provisions of the SWPPP required under this part as a condition of this general permit throughout the term of the construction project. Those provisions include but are not limited to the following:

- a. Part 7.1 states that storm water runoff from disturbed areas which leave the site shall pass through an appropriate impediment to sediment movement, such as a sedimentation basin, sediment trap, silt fence, etc., prior to leaving the construction site.
- b. Part 7.2.4 of Respondent’s permit identifies examples of structural BMPs which the permittee should consider specifying in the SWPPP plan. Those structural BMPs include but are not limited to silt fences, sediment traps, storm drain inlet protection and outlet protection, and other appropriate BMPs.

- c. Part 7.2.5 of Respondent's permit requires the SWPPP provide for a sedimentation basin for each drainage area with 10 or more acres disturbed at one time.
- d. Part 7.2.3 of Respondent's permit states the permittee's SWPPP shall require existing vegetation to be preserved where practical, and the time period for soil areas to be without vegetative cover is to be minimized to the extent practical. This part additionally describes examples of non-structural BMPs which should be considered in the SWPPP such as temporary seeding, sod stabilization, mulching, etc.
- e. Part 7.2.7 of Respondent's permit states that the permittee's SWPPP shall address other BMPs to prevent contamination of stormwater runoff, including but not limited to providing trash containers and regular site clean up for proper disposal of solid waste such as scrap building material, product/material shipping waste, food containers and cups; and providing containers and proper disposal for waste paints, solvents, and cleaning compounds, etc.

30. The EPA inspection referenced above, revealed that not all of the silt fences called for in the SWPPP were installed at all locations for storm water to pass through prior to leaving the Site. Additionally, at least three areas existed where silt fence was needed but was not designated in the SWPPP nor installed.

31. The EPA inspection referenced above revealed that the Respondent failed to properly install and operate a sedimentation basin for the drainage area with 10 or more acres of disturbed land.

32. The EPA inspection referenced above revealed that the Respondent failed to properly implement SWPPP provisions pertaining to phased grading and stabilizing disturbed areas.

33. The EPA inspection, referenced above revealed construction debris in the receiving tributary at the site and at numerous construction lots.

34. Respondent's failure to install appropriate BMPs is a violation of Respondent's General Permit, and as such, is a violation of Section 301(a) and 402(p) of the CWA, 33 U.S.C. § 1311(a) and §1342(p).

Count 2

Failure to Maintain Pollution Control Systems

35. The facts stated in Paragraphs 11 through 26 above are herein incorporated.

36. Part 10.1 of Respondent's permit states that the permittee shall effectively operate and maintain all pollution control measures and systems necessary to achieve

compliance with the terms and conditions of this general permit at all times. Part 10.1 additionally states that pollution control systems, erosion control measures or best management practices which require maintenance shall be maintained, repaired or replaced in a timely manner to avoid discharging storm water runoff laden with pollutants or sediment which adversely impacts water quality.

37. The EPA inspection referenced above revealed that Respondent's pollution control systems, including curb inlet filter socks and silt fences, were not properly maintained. Specifically, all of the curb inlet filter socks were filled with sediment and silt fencing was not adequately maintained.

38. Respondent's failure to properly maintain its pollution control systems is a violation of Respondent's General Permit, and as such, is a violation of Sections 301(a) and 402(p) of the CWA, 33 U.S.C. § 1311(a) and § 1342(p).

Count 3

Failure to Perform and Document Site Inspections

39. The facts stated in Paragraphs 11 through 26 above are herein incorporated.

40. Part 7 of Respondent's permit requires Respondent to fully implement the provisions of the Stormwater Pollution Prevention Plan ("SWPPP").

41. Part 7.2.8 of Respondent's permit requires documented site inspections at a minimum of once per month, and an increase in the frequency of inspections when construction activity increases. The SWPPP requires weekly documented inspections of the Site. In addition, the General Permit requires that any deficiencies be noted in a report and corrected within seven calendar days of the inspection. The report is to be kept on-site or at the records storage location identified in the Notice of Intent ("NOI").

42. The EPA inspection referenced above revealed that Respondent did not perform or document all the required weekly or monthly inspections of the Site. Specifically, Respondent conducted some but not all required documented inspections from January 2007 until September 2007, and conducted no documented inspections from September 2007 through the date of the EPA inspection. In addition, Respondent did not correct the deficiencies within seven calendar days of the inspection, or keep the reports on-site or at the records storage location.

43. Part 7.2.8 of Respondent's permit requires documented inspections of the construction site within twenty-four (24) hours of the end of a precipitation event which results in precipitation of 0.5 inches or greater.

44. The EPA inspection referenced above revealed that Respondent did not perform documented inspections required within twenty-four (24) hours of all precipitation events which resulted in precipitation of 0.5 inches or greater. Specifically, Respondent conducted some but not all required inspections from January 2007 until

September 2007, and conducted no documented inspections from September 2007 through the date of the EPA inspection.

45. Part 7.2.8 of Respondent's permit requires that the inspection report be signed by the person performing the inspection.

46. The EPA inspection referenced above revealed that the inspection reports were not signed by the person who performed the inspection.

47. Respondent's failure to perform and document site inspections is a violation of Respondent's General Permit, and as such, is a violation of Sections 301(a) and 402(p) of the CWA, 33 U.S.C. § 1311(a) and § 1342(p).

Count 4

Failure to Develop an Adequate SWPPP

48. The facts stated in Paragraphs 11 through 26 above are herein incorporated.

49. Part 7 of Respondent's permit states that the purpose of the SWPPP is to ensure the design, implementation, management, and maintenance of BMPs in order to minimize erosion; reduce the amount of sediment and other pollutants in storm water runoff from construction activities; comply with the Kansas Surface Water Quality Standards; and ensure compliance with the terms and conditions of the General Permit.

50. The EPA inspection referenced above revealed that the SWPPP did not provide for adequate BMPs necessary to minimize erosion and reduce the amount of sediment and other pollutants in storm water runoff from construction activities at the Site.

51. Part 7 of Respondent's permit requires in part that the SWPPP include, *inter alia*, the following items:

- 7.1 Operator/contractor certification statements: Respondent shall have each contractor sign a KDHE Contractor Certification form.
- 7.1 Include changes to site BMPs: The SWPPP shall be amended whenever there is a change in design, operation, or maintenance of BMPs.
- 7.2.1 Site description: The SWPPP shall include all of the information provided in the NOI.
- 7.2.5 Sedimentation basin: The SWPPP shall require a sedimentation basin for each drainage area with more than 10 acres disturbed at one time.

7.2.7 Additional site management BMPs: The SWPPP shall address other BMPs, as required by site activities, to prevent contamination of storm water runoff.

52. The EPA inspection referenced above revealed that the SWPPP did not address the requirements contained in Part 7 of Respondent's permit, referenced in Paragraph 51 above.

53. Respondent's failure to develop an adequate SWPPP is a violation of Respondent's General Permit, and as such, is a violation of Sections 301(a) and 402(p) of the CWA, 33 U.S.C. § 1311(a) and § 1342(p).

Count 5

Failure to Obtain Section 404 Permit for Discharges of Dredged and/or Fill Materials

54. The facts stated in Paragraphs 11 through 26 above are herein incorporated.

55. At the time of Respondent's construction and installation of rock check dams within the unnamed tributary to Indian Creek, and the resulting discharge of dredge and fill materials (i.e. pollutants), as described above, the discharge sites were within the "waters of the United States," within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7), 40 C.F.R. § 232.2 and 33 C.F.R. Part 328.

56. Respondent's discharges of dredged and/or fill material (i.e. pollutants) from a point source into a water of the United States were performed without a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, and therefore these discharges violated Section 301 of the CWA, 33 U.S.C. § 1311.

57. Each day the pollutants discharged by Respondent remain in place constitutes an ongoing violation of Section 301 and 404 of the CWA, 33 U.S.C. §§ 1311 and 1344.

Order for Compliance

58. Based on the Findings of Fact and Findings of Violation set forth above, and pursuant to the authority of Sections 308(a) and 309(a)(3) of the CWA, 33 U.S.C. §§ 1318(a) and 1319(a)(3), Respondent is hereby ORDERED to take the actions described in Paragraphs 59 through 61 below.

59. Within thirty (30) days of the effective date of this Order, Respondent shall take whatever corrective action is necessary to correct the deficiencies and eliminate and prevent recurrence of the violations cited above, and to come into compliance with all of the applicable requirements of the permit.

60. Within thirty (30) days of the effective date of this Order, Respondent shall take whatever corrective action is necessary to properly permit or remove the unpermitted rock check dams installed in the unnamed tributary to Indian Creek.

61. Within thirty (30) days of the effective date of this Order, Respondent shall submit a written report detailing the specific actions taken to correct the violations cited herein and explaining why such actions are anticipated to be sufficient to prevent recurrence of these or similar violations in the future.

62. Any request for an extension of time to correct any violation cited herein, as required by Paragraphs 59 through 61 above, shall be submitted to Delia Garcia, Ph.D., at the address listed in Paragraph 63 below. All written requests for extension of time must be made within thirty (30) days of the effective date of this Order, and include justification for the request. EPA may approve or disapprove any request for an extension of time.

Submissions

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

Delia Garcia, Ph.D.
Water, Wetlands and Pesticides Division/WENF
U.S. Environmental Protection Agency
Region VII
901 North Fifth Street
Kansas City, Kansas 66101.

General Provisions

Effect of Compliance with the Terms of this Order for Compliance

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 of the Act, 33 U.S.C. § 1319, for any violation cited in this Order. Issuance of this Order shall not be deemed an election by EPA to forgo any civil or criminal action to seek penalties, fines, or other appropriate relief under the Act for any violation whatsoever.

Access and Requests for Information

66. 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

67. If any provision or authority of this Order, or the application of this Order to Respondent, is held by federal judicial authority to be invalid, the application to Respondent of the remainder of this Order shall remain in full force and effect and shall not be affected by such a holding.

Effective Date

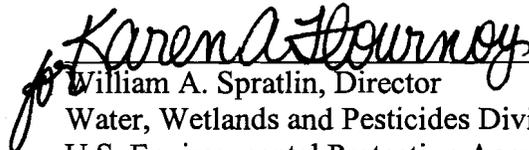
68. The terms of this Order shall be effective and enforceable against Respondent upon the date of its receipt of an executed copy of the Order.

Termination

69. 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.

*In the Matter of Price Brothers Construction Co.
Findings of Violation/Order for Compliance*

Issued this 29th day of September, 2008.


William A. Spratlin, Director
Water, Wetlands and Pesticides Division
U.S. Environmental Protection Agency
Region VII
901 North Fifth Street
Kansas City, Kansas 66101



Kelley Catlin
Office of Regional Counsel
U.S. Environmental Protection Agency
Region VII
901 North Fifth Street
Kansas City, Kansas 66101

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.

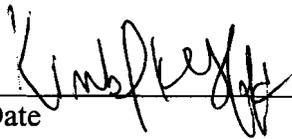
I further certify that on the date noted below I sent a copy of the foregoing Order for Compliance by first class certified mail, return receipt requested, to:

Price Brothers Construction Company
12721 Metcalf Avenue Suite 200
Overland Park, Kansas 66213

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

David Hibbs
Assistant Branch Chief/Kansas City Area Program Manager
U.S. Army Corps of Engineers
700 Federal Building
601 E. 12th Street
Attn: OD-R, Room 706
Kansas City, Missouri 64106

Date



Signature

9/30/08
