



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 7**

11201 Renner Boulevard  
Lenexa, Kansas 66219

**CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**

Article No.: 7014 1200 0000 6122 7481

Mr. Mark Schmidt  
Registered Agent, Evergreen Development, Inc.  
2625 SW 12<sup>th</sup> Street  
Lincoln, Nebraska 68522

Re: Invitation for Pre-Filing Negotiations  
In the Matter of Evergreen Development, Inc., and Mark Schmidt  
Lancaster County, Nebraska

Dear Mr. Schmidt:

This letter concerns alleged Clean Water Act violations by you and Evergreen Development, Inc., at the residential development project within the Village of Bennet in Lancaster County, Nebraska (Site). The Nebraska Department of Environment and Energy conducted stormwater inspections on September 8, 2020, November 5, 2020, and April 20, 2021, and documented violations of your National Pollutant Discharge Elimination System storm water permit at the Site. NDEE sent you a Notice of Noncompliance on September 18, 2020, and filed a Complaint on June 30, 2021, requiring you to address these violations. To date, you have not responded to the Notice of Noncompliance or the Complaint. NDEE has requested that the U.S. Environmental Protection Agency take enforcement action.

In addition, on February 18, 2021, the Army Corps of Engineers, Omaha District referred the results of its investigation of the Site to EPA for potential enforcement. On May 17, 2021, EPA and Corps representatives conducted an inspection of the Site to determine the site's compliance with the requirements of Section 404 of the Clean Water Act, 33 U.S.C. § 1344. Based on the review of information gathered during the Corps' investigation and the EPA inspection, the EPA has determined that you placed fill material into the unnamed tributary to the Little Nemaha River without obtaining a Section 404 permit. The fill material is impacting approximately 230 linear feet of the unnamed tributary to the Little Nemaha River and 0.13 acres of abutting wetlands.

The EPA's primary concern is your return to full compliance as expeditiously as possible. The EPA has continuing concerns regarding the violations and impacts to waters and would like to discuss them with you. Enclosed with this letter is a proposed Administrative Order for Compliance on Consent that outlines specific steps to return to compliance. By this letter, the EPA is offering you the opportunity to negotiate the terms of the proposed Order.

The EPA also believes that these violations are significant enough to warrant the assessment of a civil penalty. Section 309(g) of the CWA, 33 U.S.C. § 1319 (g), authorizes civil penalties for violations of the

CWA. To be fair and consistent in its assessment of penalties, the EPA evaluates the gravity of the violation(s), any prior history of the violation(s), the degree of culpability, economic benefit resulting from the violation(s), and other matters as justice may require.

By this letter the EPA is offering you the opportunity to negotiate a fair resolution of this matter before any complaint is filed. A settlement of this matter through a return to full compliance and payment of an appropriate civil penalty would be memorialized in a Consent Agreement and Final Order to be signed by you or authorized representatives of your company and the EPA. We recognize there may be information relevant to this matter we are not aware of, and the EPA will fully and fairly consider any information you provide that is relevant to the violations.

If you are interested in participating in pre-filing negotiations, please contact Shane McCoin, in the Office of Regional Counsel, within **20 calendar days** of receipt of this letter at (913) 551-7955. The EPA generally provides a period of 90 days to reach settlement before considering more formal enforcement options.

Your attention to this matter is greatly appreciated. If you have any questions, please do not hesitate to contact Ms. McCoin at the number above or [mccoin.shane@epa.gov](mailto:mccoin.shane@epa.gov), or Dr. Delia Garcia, CWA Compliance Officer, at (913) 551-7262 or [garcia.delia@epa.gov](mailto:garcia.delia@epa.gov).

Sincerely,

**WENDY  
LUBBE**

Digitally signed by  
WENDY LUBBE  
Date: 2022.03.22  
14:48:38 -05'00'

Wendy Lubbe  
Acting Director  
Enforcement and Compliance Assurance Division

Enclosure

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

IN THE MATTER OF:	)	
	)	Docket No. CWA-07-2022-0042
Evergreen Development, Inc.	)	FINDINGS OF VIOLATION AND
	)	ON CONSENT
and	)	
	)	
Mark Schmidt,	)	
	)	
Respondents	)	
	)	
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 on Consent (“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 Respondents in this case are Evergreen Development, Inc., a corporation incorporated under the laws of the state of Nebraska, and Mark Schmidt, the owner of Evergreen Development, Inc. and operator of the Site.

3. The EPA, together with Respondents, enter into this Section 309(a)(3) Order for Compliance on Consent in order to carry out the goals of the CWA, 33 U.S.C. § 1251 *et seq.*, to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”

4. It is the parties’ intent through this agreement to address discharges of pollutants in stormwater and fill material by Respondents into the waters of the United States in violation of a permit issued pursuant to Section 402 of the CWA and without a permit issued pursuant to Section 404 of the CWA. As set forth in this Order on Consent, the Parties have reached agreement regarding the timeframe for Respondents to attain compliance with the CWA.

5. By entering into this Order, Respondents (1) consent to and agree not to contest EPA’s authority or jurisdiction to issue or enforce this Order, (2) consent to personal service by electronic mail, (3) agree to undertake all actions required by the terms and conditions of this

Order, and (4) consent to be bound by the requirements set forth herein. Respondents neither admit nor deny the specific factual allegations or Findings of Violation in this Order on Consent, except that Respondents admit the jurisdictional allegations herein. Respondents also waive any and all claims for relief and otherwise available rights or remedies to judicial or administrative review which Respondents may have with respect to any issue of fact or law set forth in this Order, including, but not limited to, any right of judicial review of this Order under the Administrative Procedure Act, 5 U.S.C. §§ 701-706.

### **Statutory and Regulatory Framework**

6. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants except in compliance with, *inter alia*, Sections 402 and 404 of the CWA, 33 U.S.C. §§ 1342, 1344.

7. 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.

8. Section 404 of the CWA, 33 U.S.C. § 1344, specifically requires a person to obtain a permit from the Secretary of the Army acting through the Chief of Engineers, commonly referred to as the U.S. Army Corps of Engineers (hereinafter “Corps”), for any discharge of “dredged or fill material” into the “navigable waters” of the United States.

9. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines “navigable waters,” in part, as the “waters of the United States.”

10. 40 C.F.R. § 232.2 defines “discharge of fill material” as “the addition of fill material into waters of the United States.”

11. 40 C.F.R. § 232.2 defines “fill material” as any material that has the effect of “replacing any portion of a water of the United States with dry land or changing the bottom elevation of any portion of a water of the United States.”

12. Section 402 of the CWA provides that pollutants may be discharged in accordance with the terms of a National Pollutant Discharge Elimination System (“NPDES”) permit issued pursuant to that Section.

13. 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.

14. 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.

15. 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.

16. 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.

17. 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.

18. Section 309(a) of the CWA, 33 U.S.C. § 1319(a), authorizes the issuance of an order against any person who violates Section 301 of the CWA, 33 U.S.C. § 1311, requiring such person to comply.

### **EPA’s General Allegations**

19. Respondents are each a “person” within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

20. At all times relevant to this action, Respondents owned, operated, or otherwise controlled property and a residential construction site located in the Northwest Quarter of Section 11, Township 8 South, Range 8 East, in Lancaster County, Nebraska (hereinafter “the Site”).

21. The Site is a 16.5 acre residential development with an unnamed tributary to the Little Nemaha River that enters the Site from the north through a large box culvert underneath Bennet Road, flows through the Site, and exits the Site on the eastern boundary underneath Hackberry Street in the Village of Bennet, Nebraska.

22. Upon exiting the Site at Hackberry Street as described above, the unnamed tributary flows approximately 0.27 miles into the Little Nemaha River.

23. Starting on or about April 2019, Respondents conducted clearing and grading activities in the Site, disturbing approximately 12.1 acres, which have continued to the present.

24. Stormwater, snow melt, surface drainage, and runoff water leave Respondents’ Site and discharge into the unnamed tributary to the Little Nemaha River.

25. 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).

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

27. The Little Nemaha River is a “navigable water” within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7).

28. Stormwater runoff from Respondents’ 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).

29. Respondents’ 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.

30. NDEE issued authorization to Respondents on March 22, 2019, for construction stormwater discharges under NPDES general permit NER160000, with permit tracking number CSW-201903475 (“Respondent’s NPDES Permit”). The construction stormwater general permit was signed by the Nebraska Department of Environmental Quality on September 30, 2016, and was effective between November 1, 2016, and October 31, 2021, and was renewed with effective dates of December 1, 2021, through November 20, 2026.

31. The principal requirement of Respondents’ 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.

32. NDEE conducted stormwater inspections on September 8, 2020, November 5, 2020, and April 20, 2021, and documented violations of Respondents’ NPDES Permit, including lack of BMPs and failure to maintain BMPs. NDEE sent Respondents a Notice of Noncompliance on September 18, 2020, requesting Respondents take corrective action, and filed a Complaint on June 30, 2021, requiring Respondents to address these violations; Respondents did not respond to the Notice of Noncompliance or the Complaint.

33. In or around September through October 2020, Respondents directed, caused, or conducted earthmoving work in the unnamed tributary to the Little Nemaha River that flows through the Site using a trackhoe, backhoe, bulldozer, and/or other heavy equipment that widened and deepened the channel and placed fill material in the unnamed tributary and adjacent wetlands.

34. On September 20, 2020, and November 5, 2020, Corps personnel conducted road-side investigations and observed fill material in the unnamed tributary to the Little Nemaha River as it flowed into the Site from Bennet Road and determined a violation of the CWA had occurred.

35. On February 18, 2021, after receiving no response from Respondents to correspondence regarding the violations, the Corps Omaha District referred the results of the investigation to EPA Region 7 for potential enforcement.

36. On May 17, 2021, in the presence of Respondent Mr. Schmidt as the representative for Evergreen Development, Inc., EPA and Corps representatives conducted a site inspection and observed impacts in the unnamed tributary to the Little Nemaha River immediately downstream of the box culver under Bennet Road and continuing along approximately 230 linear feet and to approximately 0.13 acres of abutting wetlands.

37. The fill material discharged by Respondents into the unnamed tributary to the Little Nemaha River is a “pollutant” within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

38. The heavy equipment used to place the fill material into the unnamed tributary to the Little Nemaha River constitutes a “point source” within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

39. The discharge of the fill material into the unnamed tributary to the Little Nemaha River constitutes the “discharge of a pollutant” within the meaning of Section 502(12) of the CWA, 33 U.S.C. § 1362(12).

### **EPA’s Findings of Violation**

#### **Count 1**

#### **Failure to Install BMPs / Failure to Implement the SWPPP**

40. The facts stated above are herein incorporated by reference.

41. Part III of Respondents’ NPDES Permit requires that a SWPPP be prepared that describes BMPs to be implemented on the Site to control pollutants in storm water. Part III.A.4 of Respondents’ 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.”

42. Part III.C of Respondents’ NPDES Permit requires that the SWPPP describe, among other things, the interim and permanent stabilization practices and a schedule for their implementation, 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, measures to minimize vehicle tracking of sediments offsite include stabilization techniques at points of exit, controls for construction materials, products, and waste materials stored at the site and for equipment and vehicles maintained at the site, such as spill kits, drip pans, and absorbents.

43. Part III.E.2 of Respondents’ NPDES Permit requires that Respondents control stormwater to minimize erosion, disturbance of steep slopes, and discharge of sediment from the Site, and provide and maintain natural buffers around Waters of the United States.

44. Parts III.E.3, III.F.1, and III.F.2 of Respondents' NPDES Permit require Respondents to stabilize disturbed areas immediately unless infeasible, and requires stabilization when clearing, grading, excavating, or other earth disturbing activities have permanently ceased or temporarily ceased and will not resume for a period exceeding 14 calendar days.

45. Part III.L.2 of Respondents' NPDES Permit requires a sign or other notice posted conspicuously near the entrance of the construction site, unless infeasible, containing a copy of the SWPPP.

46. Section 1.5 of Respondents' SWPPP provides the sequence of construction activity and BMP implementation, including that during site grading in weeks 2-6, Respondents will install silt fences around stockpiles and temporarily stabilize the stockpiles and areas where construction will cease for more than 14 days and in weeks 7-14, Respondents will construct a combined staging and materials storage area and install dumpsters for the Site.

47. Section 2.2 of Respondents' SWPPP describes the temporary erosion and sediment control BMPs to be installed at the Site, including that erosion checks and silt fences where sediment control is required, silt fence or biologs on the downhill side of all construction areas, temporary mulch cover or hydro-mulching where construction ceases for more than 14 days, and crushed rock or stone at construction entrances and exits.

48. Section 2.3 of Respondents' SWPPP describes the good housekeeping BMPs to be implemented at the Site, including collecting all waste materials in trash receptacles in the material storage area, making absorbent and spill cleanup material kits available and placing drip pans under all equipment parked overnight or not in use for a period of time.

49. During the NDEE Inspection on September 8, 2020, the inspector observed and documented several areas of the Site that were missing BMPs, including disturbed areas missing temporary construction control BMPs and flow control measures, missing buffers for streams and wetlands, and missing BMPs for stockpiles. The inspector also observed that the construction entrances were not rocked and were missing SWPPP signage.

50. During the NDEE Inspection on November 5, 2020, the inspector observed and documented the continued failure to install BMPs, including at construction entrances, recently graded areas, and slide slopes, and the continued failure to install SWPPP signage.

51. During the NDEE Inspection on April 20, 2021, the inspector observed and documented several areas of the Site that lacked erosion checks or complete silt fencing and where there was evidence of erosion rills and gullies, construction equipment and materials not stored in the material storage area, waste material not collected in receptacles and exposed to stormwater, and lack of drip pans, absorbents, and spill kits in areas where heavy equipment was stored overnight. The inspector also observed and documented that the timeline and sequence of activity identified in the SWPPP was not being followed.

52. Respondents' alleged failure to properly install 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 2**

**Failure to Maintain BMPs / Failure to Conduct Adequate Periodic Inspections**

53. The facts stated above are herein incorporated by reference.

54. Part III.F.8 of Respondents' NPDES Permit requires that all temporary control measures be properly selected, installed, and maintained, and if periodic inspections or other information indicates a control is installed incorrectly or is ineffective, corrective actions must be completed within 7 days or before the next storm event, whichever is practicable.

55. Part III. J of Respondents' NPDES Permit requires that Respondents conduct inspections at least once every 14 days, and within 24 hours of the end of a storm event of 0.5 inches or greater, in order to inspect and record any BMPs that need to be maintained or proved inadequate and locations where additional BMPs are needed, take corrective action. Part III.K of Respondents' NPDES Permit requires the SWPPP to be amended when inspections determine the SWPPP is ineffective at eliminating or significantly minimizing pollutants in stormwater discharges from the Site.

56. During the NDEE Inspection on September 8, 2020, the inspector observed and documented that grading had destroyed the integrity of the silt fence along the perimeter.

57. During the NDEE Inspection on April 20, 2021, the inspector observed and documented several areas of unmaintained sediment control fences where they had fallen, were installed incorrectly, or were full of sediment.

58. Given the conditions of the Site during each NDEE Inspection, and continued failure to maintain BMPs, Respondents failed to conduct adequate periodic inspections.

59. Respondents' alleged failure to properly maintain BMPs at the Site and failure to conduct adequate periodic inspections 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**

**Unauthorized Discharge of Fill Material**

60. The facts stated above are herein incorporated by reference.

61. Respondents did not obtain a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, prior to the performance of the fill placement described herein, nor did Respondents perform the work described herein under any prior permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344.

62. Respondents' discharge of pollutants from a point source into waters of the United States occurred 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.

### **Order for Compliance on Consent**

Based on EPA's Findings set forth above, and pursuant to Section 309(a)(3) of the CWA, 33 U.S.C. § 1319(a)(3), the EPA hereby ORDERS, and Respondents hereby AGREE to take, the actions described below:

#### **CWA Section 402 Compliance**

63. Within seven (7) days of the effective date of this Order, Respondents shall take whatever corrective action is necessary to correct the stormwater deficiencies and eliminate and prevent recurrence of the violations of CWA Section 402 cited above, and to come into compliance with all of the applicable requirements of its NPDES permit.

64. Corrective Action Report. Within thirty (30) days of the effective date of this Order, Respondents shall provide EPA and NDEE a written description of the actions it has taken to correct the stormwater deficiencies and eliminate and prevent recurrence of the violations of CWA Section 402 cited above.

65. Monthly Reports. Respondents shall submit to EPA, on a monthly basis, starting thirty (30) days after the Effective Date of this Order until termination, 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; and any SWPPP amendments. After a period of one year, Respondents may request termination of this requirement, if not terminated sooner.

#### **CWA Section 404 Compliance Plan**

66. Respondents shall comply with CWA Section 404 by immediately ceasing the placement of fill material into the unnamed tributary to the Little Nemaha River and taking steps to ensure that they do not place fill material into the unnamed tributary to the Little Nemaha River in the future.

67. Work Plan: Within thirty (30) days of the Effective Date of this Order, Respondents shall submit a Work Plan to the EPA for review and approval that shall describe Respondents' proposed plan to achieve restoration of the Site. The Work Plan shall include:

- a. Information concerning the methods and equipment proposed to accomplish the work;
- b. Where any removed fill material will be placed;
- c. Erosion control measures;
- d. Information about any planned vegetation that will be planted including species information, size, spacing, and quantities; and
- e. A schedule, including milestones, to achieve restoration or mitigation no later than twelve (12) months after the approval of the Work Plan and in accordance with the specifications set forth in the Work Plan.

68. Review and Approval. The EPA will review and approve the Work Plan as follows:

- a. If EPA approves the Work Plan, it shall be implemented according to the schedule for implementation in the approved work plan.
- b. Respondents shall identify and apply for all local, state, and federal permits required to implement the Work Plan within fifteen (15) days of the EPA's approval of the Work Plan.
- c. If the EPA does not approve the Work Plan, Respondents shall address the comments and resubmit the work plan for review within thirty (30) days of receipt of the EPA's disapproval.
- d. Upon resubmission, the EPA, in its sole discretion, may either approve the Work Plan, or if the EPA determines that the Work Plan does not adequately address the comments provided by the EPA, the EPA may modify the work plan and will provide Respondents with a copy of the work plan as modified. Respondents shall implement the modified Work Plan according to the schedule contained therein.

69. Once approved by the EPA, the Work Plan identified above shall be incorporated by reference and fully enforceable under the terms of this Order.

70. Completion Report. Within thirty (30) days of completion of the work identified in the Work Plan, Respondents agree to submit a completion report, which shall include photographic evidence, copies of relevant documents, and a signed statement indicating that the work is complete.

71. Annual Monitoring Reports. Respondents agree to submit annual monitoring reports to the EPA, beginning on the date of the first anniversary of the completion of the Work Plan, for a period of five years. These reports shall include photos of the site, a narrative description of the status of the site, and any corrective actions, if any, that will be taken to correct the deficiencies to maintain proper stream functions. Annual monitoring reports must be submitted by December 1st of each year.

72. The submission of documents by Respondents, as identified above, shall include the following written statement, followed by signature of duly authorized representatives of Respondents:

*I certify under penalty of law that the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.*

73. All documents to be submitted to the EPA under this Order shall be submitted by electronic mail to:

Dr. Delia Garcia, PhD, or her delegate  
*garcia.delia@epa.gov*  
Enforcement and Compliance Assurance Division  
U.S. Environmental Protection Agency Region 7

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

Mr. Reuel Andersen Unit Chief  
*reuel.anderson@nebraska.gov*  
NPDES Permits and Compliance Unit  
Water Quality Division  
Nebraska Department of Environment and Energy

#### General Provisions

75. Respondents' failure to comply with the terms of this Section 309(a)(3) Compliance Order may result in liability for statutory civil penalties under Section 309(d) of the Act, 33 U.S.C. § 1319(d), as modified by 40 C.F.R. Part 19. Should the EPA commence an action seeking penalties for violations of this Compliance Order, a United States District Court may impose civil penalties if the court determines that Respondents have violated the Act and failed to comply with the terms of the Order.

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

77. 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. The EPA retains the right to seek any and all remedies available under Sections 309(b), (c), (d) or (g) of the CWA, 33 U.S.C. § 1319(b), (c), (d) or (g), for any violation cited in this Order. The EPA reserves the right to enforce the terms of this Order by initiating a judicial or administrative action pursuant to Section 309 of the CWA, 33 U.S.C. § 1319.

#### Access and Requests for Information

78. Nothing in this Order shall limit the EPA's right to obtain access to, and/or to inspect property owned or operated by Respondents and/or to request additional information from Respondents, pursuant to the authority of Section 308 of the CWA, 33 U.S.C. § 1318 and/or any other authority.

### Severability

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

### Parties Bound

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

### Effective Date

81. The terms of this Order shall be effective and enforceable on the Effective Date, which is the date this Order is signed by the EPA. All time periods herein shall be calculated therefrom unless otherwise provided in this Order.

### Termination

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

### Signatories

83. The undersigned for each party have the authority to bind each respective Party to the terms and conditions of this Order. The Order may be signed in part and counterpart by each Party.



**For the Complainant, U.S. Environmental Protection Agency Region 7:**

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WENDY LUBBE  
Acting Director  
Enforcement and Compliance Assurance Division

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SHANE MCCOIN  
Assistant Regional Counsel  
Office of Regional Counsel

**For Respondent Mark Schmidt**

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SIGNATURE

---

DATE



**For Respondent Evergreen Development, Inc.**

---

SIGNATURE

---

DATE

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NAME/TITLE

## **CERTIFICATE OF SERVICE**

I certify that on the date noted below I delivered this Findings of Violation and Administrative Order for Compliance on Consent 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 a copy of the foregoing Order for Compliance on Consent by electronic mail to the following:

For Respondents

Mark Schmidt  
Evergreen Development, Inc.  
2625 SW 12<sup>th</sup> Street  
Lincoln, Nebraska 68522  
mts9j@yahoo.com

For Complainant, U.S. Environmental Protection Agency Region 7:

garcia.delia@epa.gov  
Delia Garcia, PhD, Enforcement and Compliance Assurance Division

mccoin.shane@epa.gov  
Shane McCain, Office of Regional Counsel

For Nebraska Department of Environment and Energy

reuel.anderson@nebraska.gov  
Reuel Andersen Unit Chief, NPDES Permits and Compliance Unit

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Signature

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY  
Region 7  
11201 Renner Boulevard  
Lenexa, Kansas 66219

OFFICIAL BUSINESS  
Penalty for Private Use \$300

OF THE RETURN ADDRESS, FOLD AT DOTTED LINE

**CERTIFIED MAIL™**



7014 1200 0000 6122 7481

Mr. Mark Schmitt  
Registered Agent, Evergreen Development, Inc.  
2605 SW 11th St  
Minneapolis, NE 68522

10/12/22 (4112)

NIXIE 681 DE 1 0004/16/22

RETURN TO SENDER  
UNCLAIMED  
UNABLE TO FORWARD

685206821989 6866

RC: 66219960101 \*0628-07296-75-33



**SENDER: COMPLETE THIS SECTION**

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Mr. Mark Schmitt  
Registered Agent, Evergreen Dev-  
elopment, Inc.  
2625 SW 22<sup>nd</sup> St  
Miami, NE 68522

2. Article Number  
(Transfer from service label)

7014 1200 0000 6122 7481

PS Form 3811, July 2013

**COMPLETE THIS SECTION ON DELIVERY**

A. Signature

**X**

☐ Agent

☐ Addressee

B. Received by (Printed Name)

C. Date of Delivery

D. Is delivery address different from item 1? ☐ Yes  
If YES, enter delivery address below: ☐ No

3. Service Type

☒ Certified Mail®

☐ Priority Mail Express™

☐ Registered

☒ Return Receipt for Merchandise

☐ Insured Mail

☐ Collect on Delivery

4. Restricted Delivery? (Extra Fee) ☐ Yes

Domestic Return Receipt



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 7**

11201 Renner Boulevard  
Lenexa, Kansas 66219

**CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**

Article No.: 7014 1200 0000 6122 7498

Mr. Mark Schmidt  
Registered Agent, Evergreen Development, Inc.  
8500 Lincoln Street  
Lincoln, Nebraska 68526

Re: Invitation for Pre-Filing Negotiations  
In the Matter of Evergreen Development, Inc., and Mark Schmidt  
Lancaster County, Nebraska

Dear Mr. Schmidt:

This letter concerns alleged Clean Water Act violations by you and Evergreen Development, Inc., at the residential development project within the Village of Bennet in Lancaster County, Nebraska (Site). The Nebraska Department of Environment and Energy conducted stormwater inspections on September 8, 2020, November 5, 2020, and April 20, 2021, and documented violations of your National Pollutant Discharge Elimination System storm water permit at the Site. NDEE sent you a Notice of Noncompliance on September 18, 2020, and filed a Complaint on June 30, 2021, requiring you to address these violations. To date, you have not responded to the Notice of Noncompliance or the Complaint. NDEE has requested that the U.S. Environmental Protection Agency take enforcement action.

In addition, on February 18, 2021, the Army Corps of Engineers, Omaha District referred the results of its investigation of the Site to EPA for potential enforcement. On May 17, 2021, EPA and Corps representatives conducted an inspection of the Site to determine the site's compliance with the requirements of Section 404 of the Clean Water Act, 33 U.S.C. § 1344. Based on the review of information gathered during the Corps' investigation and the EPA inspection, the EPA has determined that you placed fill material into the unnamed tributary to the Little Nemaha River without obtaining a Section 404 permit. The fill material is impacting approximately 230 linear feet of the unnamed tributary to the Little Nemaha River and 0.13 acres of abutting wetlands.

The EPA's primary concern is your return to full compliance as expeditiously as possible. The EPA has continuing concerns regarding the violations and impacts to waters and would like to discuss them with you. Enclosed with this letter is a proposed Administrative Order for Compliance on Consent that outlines specific steps to return to compliance. By this letter, the EPA is offering you the opportunity to negotiate the terms of the proposed Order.

The EPA also believes that these violations are significant enough to warrant the assessment of a civil penalty. Section 309(g) of the CWA, 33 U.S.C. § 1319 (g), authorizes civil penalties for violations of the

CWA. To be fair and consistent in its assessment of penalties, the EPA evaluates the gravity of the violation(s), any prior history of the violation(s), the degree of culpability, economic benefit resulting from the violation(s), and other matters as justice may require.

By this letter the EPA is offering you the opportunity to negotiate a fair resolution of this matter before any complaint is filed. A settlement of this matter through a return to full compliance and payment of an appropriate civil penalty would be memorialized in a Consent Agreement and Final Order to be signed by you or authorized representatives of your company and the EPA. We recognize there may be information relevant to this matter we are not aware of, and the EPA will fully and fairly consider any information you provide that is relevant to the violations.

If you are interested in participating in pre-filing negotiations, please contact Shane McCoin, in the Office of Regional Counsel, within **20 calendar days** of receipt of this letter at (913) 551-7955. The EPA generally provides a period of 90 days to reach settlement before considering more formal enforcement options.

Your attention to this matter is greatly appreciated. If you have any questions, please do not hesitate to contact Ms. McCoin at the number above or [mccoin.shane@epa.gov](mailto:mccoin.shane@epa.gov), or Dr. Delia Garcia, CWA Compliance Officer, at (913) 551-7262 or [garcia.delia@epa.gov](mailto:garcia.delia@epa.gov).

Sincerely,

WENDY  
LUBBE

Digitally signed by  
WENDY LUBBE  
Date: 2022.05.11  
07:29:22 -05'00'

Wendy Lubbe  
Acting Director  
Enforcement and Compliance Assurance Division

Enclosure

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

IN THE MATTER OF:	)	
	)	Docket No. CWA-07-2022-0042
Evergreen Development, Inc.	)	FINDINGS OF VIOLATION AND
	)	ON CONSENT
and	)	
	)	
Mark Schmidt,	)	
	)	
Respondents	)	
	)	
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 on Consent (“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 Respondents in this case are Evergreen Development, Inc., a corporation incorporated under the laws of the state of Nebraska, and Mark Schmidt, the owner of Evergreen Development, Inc. and operator of the Site.

3. The EPA, together with Respondents, enter into this Section 309(a)(3) Order for Compliance on Consent in order to carry out the goals of the CWA, 33 U.S.C. § 1251 *et seq.*, to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”

4. It is the parties’ intent through this agreement to address discharges of pollutants in stormwater and fill material by Respondents into the waters of the United States in violation of a permit issued pursuant to Section 402 of the CWA and without a permit issued pursuant to Section 404 of the CWA. As set forth in this Order on Consent, the Parties have reached agreement regarding the timeframe for Respondents to attain compliance with the CWA.

5. By entering into this Order, Respondents (1) consent to and agree not to contest EPA’s authority or jurisdiction to issue or enforce this Order, (2) consent to personal service by electronic mail, (3) agree to undertake all actions required by the terms and conditions of this

Order, and (4) consent to be bound by the requirements set forth herein. Respondents neither admit nor deny the specific factual allegations or Findings of Violation in this Order on Consent, except that Respondents admit the jurisdictional allegations herein. Respondents also waive any and all claims for relief and otherwise available rights or remedies to judicial or administrative review which Respondents may have with respect to any issue of fact or law set forth in this Order, including, but not limited to, any right of judicial review of this Order under the Administrative Procedure Act, 5 U.S.C. §§ 701-706.

### **Statutory and Regulatory Framework**

6. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants except in compliance with, *inter alia*, Sections 402 and 404 of the CWA, 33 U.S.C. §§ 1342, 1344.

7. 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.

8. Section 404 of the CWA, 33 U.S.C. § 1344, specifically requires a person to obtain a permit from the Secretary of the Army acting through the Chief of Engineers, commonly referred to as the U.S. Army Corps of Engineers (hereinafter “Corps”), for any discharge of “dredged or fill material” into the “navigable waters” of the United States.

9. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines “navigable waters,” in part, as the “waters of the United States.”

10. 40 C.F.R. § 232.2 defines “discharge of fill material” as “the addition of fill material into waters of the United States.”

11. 40 C.F.R. § 232.2 defines “fill material” as any material that has the effect of “replacing any portion of a water of the United States with dry land or changing the bottom elevation of any portion of a water of the United States.”

12. Section 402 of the CWA provides that pollutants may be discharged in accordance with the terms of a National Pollutant Discharge Elimination System (“NPDES”) permit issued pursuant to that Section.

13. 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.

14. 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.



15. 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.

16. 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.

17. 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.

18. Section 309(a) of the CWA, 33 U.S.C. § 1319(a), authorizes the issuance of an order against any person who violates Section 301 of the CWA, 33 U.S.C. § 1311, requiring such person to comply.

### **EPA’s General Allegations**

19. Respondents are each a “person” within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

20. At all times relevant to this action, Respondents owned, operated, or otherwise controlled property and a residential construction site located in the Northwest Quarter of Section 11, Township 8 South, Range 8 East, in Lancaster County, Nebraska (hereinafter “the Site”).

21. The Site is a 16.5 acre residential development with an unnamed tributary to the Little Nemaha River that enters the Site from the north through a large box culvert underneath Bennet Road, flows through the Site, and exits the Site on the eastern boundary underneath Hackberry Street in the Village of Bennet, Nebraska.

22. Upon exiting the Site at Hackberry Street as described above, the unnamed tributary flows approximately 0.27 miles into the Little Nemaha River.

23. Starting on or about April 2019, Respondents conducted clearing and grading activities in the Site, disturbing approximately 12.1 acres, which have continued to the present.

24. Stormwater, snow melt, surface drainage, and runoff water leave Respondents’ Site and discharge into the unnamed tributary to the Little Nemaha River.

25. 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).

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

27. The Little Nemaha River is a “navigable water” within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7).

28. Stormwater runoff from Respondents’ 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).

29. Respondents’ 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.

30. NDEE issued authorization to Respondents on March 22, 2019, for construction stormwater discharges under NPDES general permit NER160000, with permit tracking number CSW-201903475 (“Respondent’s NPDES Permit”). The construction stormwater general permit was signed by the Nebraska Department of Environmental Quality on September 30, 2016, and was effective between November 1, 2016, and October 31, 2021, and was renewed with effective dates of December 1, 2021, through November 20, 2026.

31. The principal requirement of Respondents’ 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.

32. NDEE conducted stormwater inspections on September 8, 2020, November 5, 2020, and April 20, 2021, and documented violations of Respondents’ NPDES Permit, including lack of BMPs and failure to maintain BMPs. NDEE sent Respondents a Notice of Noncompliance on September 18, 2020, requesting Respondents take corrective action, and filed a Complaint on June 30, 2021, requiring Respondents to address these violations; Respondents did not respond to the Notice of Noncompliance or the Complaint.

33. In or around September through October 2020, Respondents directed, caused, or conducted earthmoving work in the unnamed tributary to the Little Nemaha River that flows through the Site using a trackhoe, backhoe, bulldozer, and/or other heavy equipment that widened and deepened the channel and placed fill material in the unnamed tributary and adjacent wetlands.

34. On September 20, 2020, and November 5, 2020, Corps personnel conducted road-side investigations and observed fill material in the unnamed tributary to the Little Nemaha River as it flowed into the Site from Bennet Road and determined a violation of the CWA had occurred.

35. On February 18, 2021, after receiving no response from Respondents to correspondence regarding the violations, the Corps Omaha District referred the results of the investigation to EPA Region 7 for potential enforcement.

36. On May 17, 2021, in the presence of Respondent Mr. Schmidt as the representative for Evergreen Development, Inc., EPA and Corps representatives conducted a site inspection and observed impacts in the unnamed tributary to the Little Nemaha River immediately downstream of the box culver under Bennet Road and continuing along approximately 230 linear feet and to approximately 0.13 acres of abutting wetlands.

37. The fill material discharged by Respondents into the unnamed tributary to the Little Nemaha River is a “pollutant” within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

38. The heavy equipment used to place the fill material into the unnamed tributary to the Little Nemaha River constitutes a “point source” within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

39. The discharge of the fill material into the unnamed tributary to the Little Nemaha River constitutes the “discharge of a pollutant” within the meaning of Section 502(12) of the CWA, 33 U.S.C. § 1362(12).

### **EPA’s Findings of Violation**

#### **Count 1**

#### **Failure to Install BMPs / Failure to Implement the SWPPP**

40. The facts stated above are herein incorporated by reference.

41. Part III of Respondents’ NPDES Permit requires that a SWPPP be prepared that describes BMPs to be implemented on the Site to control pollutants in storm water. Part III.A.4 of Respondents’ 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.”

42. Part III.C of Respondents’ NPDES Permit requires that the SWPPP describe, among other things, the interim and permanent stabilization practices and a schedule for their implementation, 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, measures to minimize vehicle tracking of sediments offsite include stabilization techniques at points of exit, controls for construction materials, products, and waste materials stored at the site and for equipment and vehicles maintained at the site, such as spill kits, drip pans, and absorbents.

43. Part III.E.2 of Respondents’ NPDES Permit requires that Respondents control stormwater to minimize erosion, disturbance of steep slopes, and discharge of sediment from the Site, and provide and maintain natural buffers around Waters of the United States.

44. Parts III.E.3, III.F.1, and III.F.2 of Respondents' NPDES Permit require Respondents to stabilize disturbed areas immediately unless infeasible, and requires stabilization when clearing, grading, excavating, or other earth disturbing activities have permanently ceased or temporarily ceased and will not resume for a period exceeding 14 calendar days.

45. Part III.L.2 of Respondents' NPDES Permit requires a sign or other notice posted conspicuously near the entrance of the construction site, unless infeasible, containing a copy of the SWPPP.

46. Section 1.5 of Respondents' SWPPP provides the sequence of construction activity and BMP implementation, including that during site grading in weeks 2-6, Respondents will install silt fences around stockpiles and temporarily stabilize the stockpiles and areas where construction will cease for more than 14 days and in weeks 7-14, Respondents will construct a combined staging and materials storage area and install dumpsters for the Site.

47. Section 2.2 of Respondents' SWPPP describes the temporary erosion and sediment control BMPs to be installed at the Site, including that erosion checks and silt fences where sediment control is required, silt fence or biologs on the downhill side of all construction areas, temporary mulch cover or hydro-mulching where construction ceases for more than 14 days, and crushed rock or stone at construction entrances and exits.

48. Section 2.3 of Respondents' SWPPP describes the good housekeeping BMPs to be implemented at the Site, including collecting all waste materials in trash receptacles in the material storage area, making absorbent and spill cleanup material kits available and placing drip pans under all equipment parked overnight or not in use for a period of time.

49. During the NDEE Inspection on September 8, 2020, the inspector observed and documented several areas of the Site that were missing BMPs, including disturbed areas missing temporary construction control BMPs and flow control measures, missing buffers for streams and wetlands, and missing BMPs for stockpiles. The inspector also observed that the construction entrances were not rocked and were missing SWPPP signage.

50. During the NDEE Inspection on November 5, 2020, the inspector observed and documented the continued failure to install BMPs, including at construction entrances, recently graded areas, and slide slopes, and the continued failure to install SWPPP signage.

51. During the NDEE Inspection on April 20, 2021, the inspector observed and documented several areas of the Site that lacked erosion checks or complete silt fencing and where there was evidence of erosion rills and gullies, construction equipment and materials not stored in the material storage area, waste material not collected in receptacles and exposed to stormwater, and lack of drip pans, absorbents, and spill kits in areas where heavy equipment was stored overnight. The inspector also observed and documented that the timeline and sequence of activity identified in the SWPPP was not being followed.

52. Respondents' alleged failure to properly install 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 2**

### **Failure to Maintain BMPs / Failure to Conduct Adequate Periodic Inspections**

53. The facts stated above are herein incorporated by reference.

54. Part III.F.8 of Respondents' NPDES Permit requires that all temporary control measures be properly selected, installed, and maintained, and if periodic inspections or other information indicates a control is installed incorrectly or is ineffective, corrective actions must be completed within 7 days or before the next storm event, whichever is practicable.

55. Part III. J of Respondents' NPDES Permit requires that Respondents conduct inspections at least once every 14 days, and within 24 hours of the end of a storm event of 0.5 inches or greater, in order to inspect and record any BMPs that need to be maintained or proved inadequate and locations where additional BMPs are needed, take corrective action. Part III.K of Respondents' NPDES Permit requires the SWPPP to be amended when inspections determine the SWPPP is ineffective at eliminating or significantly minimizing pollutants in stormwater discharges from the Site.

56. During the NDEE Inspection on September 8, 2020, the inspector observed and documented that grading had destroyed the integrity of the silt fence along the perimeter.

57. During the NDEE Inspection on April 20, 2021, the inspector observed and documented several areas of unmaintained sediment control fences where they had fallen, were installed incorrectly, or were full of sediment.

58. Given the conditions of the Site during each NDEE Inspection, and continued failure to maintain BMPs, Respondents failed to conduct adequate periodic inspections.

59. Respondents' alleged failure to properly maintain BMPs at the Site and failure to conduct adequate periodic inspections 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**

### **Unauthorized Discharge of Fill Material**

60. The facts stated above are herein incorporated by reference.

61. Respondents did not obtain a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, prior to the performance of the fill placement described herein, nor did Respondents perform the work described herein under any prior permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344.

62. Respondents' discharge of pollutants from a point source into waters of the United States occurred 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.

### **Order for Compliance on Consent**

Based on EPA's Findings set forth above, and pursuant to Section 309(a)(3) of the CWA, 33 U.S.C. § 1319(a)(3), the EPA hereby ORDERS, and Respondents hereby AGREE to take, the actions described below:

#### **CWA Section 402 Compliance**

63. Within seven (7) days of the effective date of this Order, Respondents shall take whatever corrective action is necessary to correct the stormwater deficiencies and eliminate and prevent recurrence of the violations of CWA Section 402 cited above, and to come into compliance with all of the applicable requirements of its NPDES permit.

64. Corrective Action Report. Within thirty (30) days of the effective date of this Order, Respondents shall provide EPA and NDEE a written description of the actions it has taken to correct the stormwater deficiencies and eliminate and prevent recurrence of the violations of CWA Section 402 cited above.

65. Monthly Reports. Respondents shall submit to EPA, on a monthly basis, starting thirty (30) days after the Effective Date of this Order until termination, 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; and any SWPPP amendments. After a period of one year, Respondents may request termination of this requirement, if not terminated sooner.

#### **CWA Section 404 Compliance Plan**

66. Respondents shall comply with CWA Section 404 by immediately ceasing the placement of fill material into the unnamed tributary to the Little Nemaha River and taking steps to ensure that they do not place fill material into the unnamed tributary to the Little Nemaha River in the future.

67. Work Plan: Within thirty (30) days of the Effective Date of this Order, Respondents shall submit a Work Plan to the EPA for review and approval that shall describe Respondents' proposed plan to achieve restoration of the Site. The Work Plan shall include:

- a. Information concerning the methods and equipment proposed to accomplish the work;
- b. Where any removed fill material will be placed;
- c. Erosion control measures;
- d. Information about any planned vegetation that will be planted including species information, size, spacing, and quantities; and
- e. A schedule, including milestones, to achieve restoration or mitigation no later than twelve (12) months after the approval of the Work Plan and in accordance with the specifications set forth in the Work Plan.

68. Review and Approval. The EPA will review and approve the Work Plan as follows:

- a. If EPA approves the Work Plan, it shall be implemented according to the schedule for implementation in the approved work plan.
- b. Respondents shall identify and apply for all local, state, and federal permits required to implement the Work Plan within fifteen (15) days of the EPA's approval of the Work Plan.
- c. If the EPA does not approve the Work Plan, Respondents shall address the comments and resubmit the work plan for review within thirty (30) days of receipt of the EPA's disapproval.
- d. Upon resubmission, the EPA, in its sole discretion, may either approve the Work Plan, or if the EPA determines that the Work Plan does not adequately address the comments provided by the EPA, the EPA may modify the work plan and will provide Respondents with a copy of the work plan as modified. Respondents shall implement the modified Work Plan according to the schedule contained therein.

69. Once approved by the EPA, the Work Plan identified above shall be incorporated by reference and fully enforceable under the terms of this Order.

70. Completion Report. Within thirty (30) days of completion of the work identified in the Work Plan, Respondents agree to submit a completion report, which shall include photographic evidence, copies of relevant documents, and a signed statement indicating that the work is complete.

71. Annual Monitoring Reports. Respondents agree to submit annual monitoring reports to the EPA, beginning on the date of the first anniversary of the completion of the Work Plan, for a period of five years. These reports shall include photos of the site, a narrative description of the status of the site, and any corrective actions, if any, that will be taken to correct the deficiencies to maintain proper stream functions. Annual monitoring reports must be submitted by December 1st of each year.

72. The submission of documents by Respondents, as identified above, shall include the following written statement, followed by signature of duly authorized representatives of Respondents:

*I certify under penalty of law that the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.*

73. All documents to be submitted to the EPA under this Order shall be submitted by electronic mail to:

Dr. Delia Garcia, PhD, or her delegate  
*garcia.delia@epa.gov*  
Enforcement and Compliance Assurance Division  
U.S. Environmental Protection Agency Region 7

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

Mr. Reuel Andersen Unit Chief  
*reuel.anderson@nebraska.gov*  
NPDES Permits and Compliance Unit  
Water Quality Division  
Nebraska Department of Environment and Energy

#### General Provisions

75. Respondents' failure to comply with the terms of this Section 309(a)(3) Compliance Order may result in liability for statutory civil penalties under Section 309(d) of the Act, 33 U.S.C. § 1319(d), as modified by 40 C.F.R. Part 19. Should the EPA commence an action seeking penalties for violations of this Compliance Order, a United States District Court may impose civil penalties if the court determines that Respondents have violated the Act and failed to comply with the terms of the Order.

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

77. 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. The EPA retains the right to seek any and all remedies available under Sections 309(b), (c), (d) or (g) of the CWA, 33 U.S.C. § 1319(b), (c), (d) or (g), for any violation cited in this Order. The EPA reserves the right to enforce the terms of this Order by initiating a judicial or administrative action pursuant to Section 309 of the CWA, 33 U.S.C. § 1319.

#### Access and Requests for Information

78. Nothing in this Order shall limit the EPA's right to obtain access to, and/or to inspect property owned or operated by Respondents and/or to request additional information from Respondents, pursuant to the authority of Section 308 of the CWA, 33 U.S.C. § 1318 and/or any other authority.



### Severability

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

### Parties Bound

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

### Effective Date

81. The terms of this Order shall be effective and enforceable on the Effective Date, which is the date this Order is signed by the EPA. All time periods herein shall be calculated therefrom unless otherwise provided in this Order.

### Termination

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

### Signatories

83. The undersigned for each party have the authority to bind each respective Party to the terms and conditions of this Order. The Order may be signed in part and counterpart by each Party.



**For the Complainant, U.S. Environmental Protection Agency Region 7:**

---

WENDY LUBBE  
Acting Director  
Enforcement and Compliance Assurance Division

---

SHANE MCCOIN  
Assistant Regional Counsel  
Office of Regional Counsel

**For Respondent Mark Schmidt**

---

SIGNATURE

---

DATE

**For Respondent Evergreen Development, Inc.**

---

SIGNATURE

---

DATE

---

NAME/TITLE

## **CERTIFICATE OF SERVICE**

I certify that on the date noted below I delivered this Findings of Violation and Administrative Order for Compliance on Consent 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 a copy of the foregoing Order for Compliance on Consent by electronic mail to the following:

For Respondents

Mark Schmidt  
Evergreen Development, Inc.  
2625 SW 12<sup>th</sup> Street  
Lincoln, Nebraska 68522  
mts9j@yahoo.com

For Complainant, U.S. Environmental Protection Agency Region 7:

garcia.delia@epa.gov  
Delia Garcia, PhD, Enforcement and Compliance Assurance Division

mccoin.shane@epa.gov  
Shane McCoin, Office of Regional Counsel

For Nebraska Department of Environment and Energy

reuel.anderson@nebraska.gov  
Reuel Andersen Unit Chief, NPDES Permits and Compliance Unit

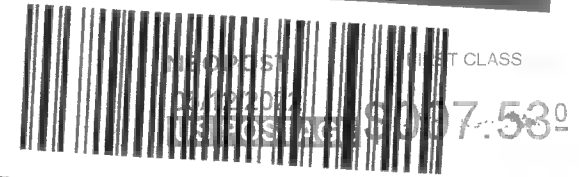
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Signature

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY  
Region 7  
11201 Renner Boulevard  
Lenexa, Kansas 66219

OFFICIAL BUSINESS  
Penalty for Private Use \$300

CERTIFIED MAIL™



7014 1200 0000 0122 7458 P 6621  
041M1145668

*SA  
531*

*LN-5/16*

Mr. Mark Schmidt  
Registered Agent, Eilamreen Development Inc  
8500 Lincoln  
Lincoln, Nebr

NIXIE 681 DE 1 0006/07/22

RETURN TO SENDER  
UNCLAIMED  
UNABLE TO FORWARD

6852  
66219966101 \*0478-04806-13-00

**SENDER: COMPLETE THIS SECTION**

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Mark Schmidt  
8500 Lincoln St  
Lincoln, NE 68526

2. Article Number

(Transfer from service label)

7014 1200 0000 6122 7498

PS Form 3811, July 2013

**COMPLETE THIS SECTION ON DELIVERY**

A. Signature

X

☐ Agent

☐ Addressee

B. Received by (Printed Name)

C. Date of Delivery

D. Is delivery address different from item 1? ☐ Yes

If YES, enter delivery address below: ☐ No

3. Service Type

☒ Certified Mail®

☐ Priority Mail Express™

☐ Registered

☒ Return Receipt for Merchandise

☐ Insured Mail

☐ Collect on Delivery

4. Restricted Delivery? (Extra Fee)

☐ Yes

Domestic Return Receipt