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-07-2008-0026
M & T Development, Inc.	)	
1808 East Fifth Street	)	FINDINGS OF VIOLATION,
Washington, Missouri 63090	)	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.

2. Respondent is M & T Development, Inc., a company registered under the laws of Missouri and authorized to conduct business in the State of Missouri.

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. 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.

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 Missouri Department of Natural Resources ("MDNR") is the state agency with the authority to administer the federal NPDES program in Missouri pursuant to Section 402 of the CWA, 33 U.S.C. § 1342. EPA maintains concurrent enforcement authority with delegated states for violations of the CWA.

10. The MDNR issued a General Permit for the discharge of storm water under the NPDES, Permit No. MOR101-R108. This General Permit became effective on February 8, 2002, and expired on February 7, 2007 and was renewed on February 8, 2007. This 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).

11. The MDNR issued a General Permit for the discharge of storm water under the NPDES, Permit No. MOR109xxx. This General Permit became effective on March 8, 2007 and expires on March 7, 2012. This General Permit governs Construction or land disturbance activity (e.g., clearing, grubbing, excavating, grading, and other activity that results in the destruction of the root zone and/or land disturbance activity that is reasonably certain to cause pollution to waters of the state). This General Permit also applies to land disturbance activities near valuable resource waters.

Factual Background

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

13. At all times relevant to this action, Respondent was the owner and/or operator of a construction site known as Lake Labadie ("Site") located at the intersection of Highway T and Broken Arrow Drive in Labadie, Missouri. Construction activities occurred at the Site including clearing, grading and excavation which disturbed five (5) or more acres of total land area or which disturbed less than five (5) acres of total land area that was part of a larger common plan of development or sale.

14. Storm water, snow melt, surface drainage, and runoff water from Respondent's facility goes into an unnamed tributary of Labadie Creek. Labadie Creek empties into the Missouri River. 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 discharges 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 "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, for a 43-acre portion of the development, generally described as Phases I and II. MDNR assigned Respondent permit number MO-R106697, which was issued on August 20, 2004.

21. On November 8, 2006, EPA inspectors 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 treatment and disposal of storm water at the site in accordance with the CWA.

22. Respondent applied for and was issued NPDES permit coverage under the General Permit described in paragraph 11, above, for the entire 80-acre development. MDNR assigned Respondent permit number MO-R109Z94, which was issued on May 21, 2007.

Findings of Violation

Count 1

Failure to Maintain Best Management Practices (BMPs)

23. The facts stated in paragraphs 12 through 22 above are herein incorporated.

24. Part 11 of the Requirements and Guidelines section of Respondent's permit requires that the Respondent shall at all times maintain all pollution control measures and systems in good order to achieve compliance with the terms of the General Permit.

25. The EPA inspection referenced in paragraph 21 above, revealed that Respondent had not adequately maintained silt fencing.

26. The EPA inspection referenced in paragraph 21 above, revealed that Respondent had not adequately maintained curb inlet protection mechanisms.

27. Respondent's failure to properly maintain its pollution control measures 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 2

Discharge Without a Permit

28. The facts stated in paragraphs 12 through 22 above are herein incorporated

29. Part 1 of the Applicability section of Respondent's permit states that any owner/operator of a site that will disturb one (1) or more acres and who disturbs land prior to permit issuance from MDNR is in violation of State and Federal law.

30. The inspection referenced in paragraph 21 above revealed that Respondent commenced construction and land disturbance activities in the northern portion of the site, generally described as Phase III, prior to obtaining authorization.

31. Respondent's failure to obtain a permit before commencing land disturbing activities resulted in an unauthorized discharge of stormwater without a 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 Install Appropriate Best Management Practices

32. The facts stated in paragraphs 12 through 22 above are herein incorporated.

33. Part 8(e) of the Requirements and Guidelines section of Respondent's permit states that storm water runoff from disturbed areas which leave the site boundary shall pass through an appropriate impediment to sediment movement, such as a sedimentation basin, sediment trap, silt fence, etc., prior to leaving the land disturbance site. Part 8(h) of the Requirements and Guidelines section of Respondent's permit states that the SWPPP shall require a sedimentation basin for each drainage area with ten (10) or more acres disturbed at one time.

34. At the time of the EPA inspection referenced in paragraph 21 above, Respondent had not installed all necessary BMPs on site. Specifically, Respondent failed to install a sediment basin, or other equivalent BMPs, for the 25-acre drainage area north of the dam in Phase III.

35. Respondent's failure to install appropriate impediments to sediment movement 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 Properly Implement SWPPP

36. The facts stated in paragraphs 12 through 22 above are herein incorporated.

37. Part 7 of the Requirements and Guidelines section of Respondent's permit requires that Respondent fully implement the provisions of the SWPPP throughout the term of the land disturbance project.

38. The EPA inspection referenced in paragraph 21 above, revealed that Respondent failed to implement the SWPPP. Specifically, Respondent failed to implement SWPPP provisions pertaining to implementation and maintenance of best management practices.

39. Respondent's failure to implement the 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 Perform and Document Site Inspections

40. The facts stated in paragraphs 12 through 22 above are herein incorporated.

41. Part 10 of the Requirements and Guidelines section of Respondent's permit requires that documented inspections be performed at a minimum of once per week on disturbed areas which have not been finally stabilized. In addition, it requires that any deficiencies be noted in a report and corrected within seven calendar days of the inspection. The report is to be kept at a site which is readily available from the permitted site until final stabilization is achieved.

42. The EPA inspection referenced in paragraph 21 above, revealed that Respondent did not perform documented site inspections at a minimum of once per week for each week during active land disturbance and did not keep all reports at a site which is readily available from the permitted site.

43. Part 10 of the Requirements and Guidelines section of Respondent's permit requires that documented inspections be performed within a reasonable time period (not to exceed 72 hours) following heavy rains.

44. The EPA inspection referenced in paragraph 21 above, revealed that Respondent did not perform documented inspections in response to every heavy rain event.

45. 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 6

Failure to Develop an Adequate SWPPP

46. The facts stated in paragraphs 12 through 22 above are herein incorporated.

47. Part 8 of the Requirements and Guidelines section of Respondent's permit requires in part that the storm water pollution prevention plan ("SWPPP") include, *inter alia*, the following items:

8(a) Site Description: In order to identify the site, the SWPPP shall include the facility and outfall information provided in the application form. The SWPPP shall have sufficient information to be of practical use to contractors and site construction workers to guide the installation and maintenance of BMPs.

8(c) Description of Best Management Practices: The SWPPP shall include a description of both structural and non-structural BMPs that will be used at the site. The SWPPP shall provide the following general information for each BMP which will be used one or more times at the site:

(i) Physical description of the BMP,
(ii) Site and physical conditions that must be met for effective use of the BMP,
(iii) BMP installation/construction procedures, including typical drawings, and
(iv) Operation and maintenance procedures for the BMP.

The SWPPP shall provide the following information for each specific instance where the BMP is to be installed:

(i) Whether the BMP is temporary or permanent,
(ii) Where, in relation to other site features, the BMP is to be located,
(iii) When the BMP will be installed in relation to each phase of the land disturbance procedures to complete the project, and
(iv) What site conditions must be met before removal of the BMP if the BMP is not a permanent BMP.

8(i) Additional Site Management BMPs: The SWPPP shall address other BMPs, as required by site activities, to prevent contamination of storm water runoff.

8(j) Permanent Stormwater Management: The SWPPP shall include a description of the measures that will be installed during land disturbance to control pollutants in storm water discharges that will occur after land disturbance activity has been completed.

48. At the time of the EPA inspection referenced in paragraph 21, above, the SWPPP did not address all of the requirements contained in paragraphs 8(a), 8(c), 8(i), and 8(j) of Respondent's permit.

49. 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).

Order For Compliance

50. 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 51 through 53.

51. 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 Respondent's current permit, MO-R109Z94, which was issued to M&T Development on May 21, 2007.

52. Within thirty (30) days of the effective date of this Order, the 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.

53. In the event that Respondent believes complete correction of the violations cited herein is not possible within thirty (30) days of the effective date of this Order, the Respondent shall, within those thirty (30) days, submit a comprehensive written plan for the elimination of the cited violations. Such plan shall describe in detail the specific corrective actions to be taken and why such actions are sufficient to correct the violations. The plan shall include a detailed schedule for the elimination of the violations within the shortest possible time, as well as measures to prevent these or similar violations from recurring.

Submissions

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

Mr. Michael Boeglin
Water, Wetlands and Pesticides Division
U.S. Environmental Protection Agency - Region VII
901 North Fifth Street
Kansas City, Kansas 66101.

55. A copy of documents required to be submitted to MDNR by this Order, shall be submitted by mail to:

Mr. Kevin Mohammadi, Chief
Enforcement Section
Water Pollution Control Program
Missouri Dept. of Natural Resources
P.O. Box 176
Jefferson City, Missouri 65102.

General Provisions

Effect of Compliance with the Terms of this Order for Compliance

56. 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.

57. This Order does not constitute a waiver or a modification of any requirements of the Clean Water Act, 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 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

58. 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

59. 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

60. 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

61. This Order shall remain in effect until a written notice of termination is issued by an authorized representative of the U.S. Environmental Protection Agency. Such notice shall not be given until all of the requirements of this Order have been met.

Issued this 17th day of January, 2008.

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

Sarah Thibos LaBoda
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:

Mr. Mike Nadler, Manager
M & T Development, Inc.
1808 East Fifth Street
Washington, Missouri 63090

Sent via first class mail to:

Mr. Kevin Mohammadi, Chief
Water Pollution Control Program
Missouri Dept. of Natural Resources
P.O. Box 176
Jefferson City, Missouri 65102

Mr. Mike Struckhoff, Director
MDNR, St. Louis Regional Office
7545 S. Lindbergh, Suite 210
St. Louis, Missouri 63125

1/18/08
Date

Kimberly Kistler