

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 7

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)

Dial Ridgewood, L.L.C.)
11506 Nicholas Street, Suite 200)
Omaha, Nebraska 68154)

Respondent)

Proceedings under Section 309(a) of the)
Clean Water Act, 33 U.S.C. § 1319(a))

) Docket No. CWA-07-2008-0088

) FINDINGS OF VIOLATION,
) ORDER FOR COMPLIANCE

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 7 and further delegated to the Director of Region 7’s Water, Wetlands and Pesticides Division.

2. Respondent is Dial Ridgewood, L.L.C., a limited liability company registered under the laws of Nebraska and authorized to conduct business in the state of Nebraska.

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 stormwater. Section 402(p) of the CWA, 33 U.S.C. § 1342(p), requires, in part, that a discharge of stormwater 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 stormwater 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 stormwater associated with industrial activity to apply for an individual permit or to seek coverage under a promulgated stormwater general permit.

8. 40 C.F.R. § 122.26(b)(14)(x) defines “stormwater 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 Nebraska Department of Environmental Quality (“NDEQ”) is the state agency with the authority to administer the federal NPDES program in Nebraska 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. NDEQ issued a General Permit for the discharge of stormwater under the NPDES, Permit No. NER100000. This General Permit became effective on August 1, 1997 and expired on December 31, 2007. Following the expiration of NER100000, NDEQ issued General Permit NER110000, which became effective on January 1, 2008, and expires on December 31, 2012. The General Permit governs stormwater 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) of greater than one acre and less than one acre if part of a larger common plan of development or sale.

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 Ridgewood Subdivision (“site”) located between Highway 36, Bennington Road, and 153rd Circle Road in Bennington, Nebraska. 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.

13. Stormwater, snow melt, surface drainage, and runoff water from Respondent's site goes into two tributaries of Big Papillion Creek. The runoff and drainage from Respondent's site is "stormwater" as defined by 40 C.F.R. § 122.26(b)(13).

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

15. The site has "stormwater 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).

16. Respondent discharged pollutants into "navigable waters" as defined by CWA Section 502, 33 U.S.C § 1362.

17. Stormwater 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).

18. 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.

19. Respondent applied for and was issued NPDES permit coverage under the General Permit 100000 described in paragraph 10 above. NDEQ assigned Respondent permit number NER104882, which was issued on June 6, 2006. Respondent applied for and was issued NPDES permit coverage under the General Permit 110000 described in paragraph 10 above. NDEQ assigned Respondent permit number NER110195, which was issued on February 26, 2008.

20. On July 23-24, 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 management of stormwater at the site in accordance with the CWA.

Findings of Violation

Count 1

Failure to Maintain Best Management Practices ("BMPs")

21. The facts stated in paragraphs 11 through 20 above are herein incorporated.

22. Part IV, Section C.1 of Respondent's permit requires that Respondent select, install, implement, and maintain BMPs that minimize pollutants in the discharge as to meet applicable water quality standards. Part III, Section E.1 of Respondent's permit requires that all erosion and sediment control measures identified in the SWPPP must be maintained in effective operating condition.

23. The EPA inspection, referenced in paragraph 20 above, revealed that Respondent failed to maintain silt fencing at the site.

24. The EPA inspection, referenced in paragraph 20 above, revealed that Respondent failed to maintain stormwater inlet protection at the site.

25. Part III, Section E.3, of Respondent's permit requires that sediment from sediment traps or sedimentation ponds must be removed when design capacity has been reduced by 50 percent.

26. The EPA inspection, referenced in paragraph 20 above, revealed that Respondent failed to remove sediment from sedimentation basins as required by the permit. Specifically, two basins on the site were filled with sediment. The remaining four basins were overgrown and filled with sediment such that they could not be identified during the EPA inspection.

27. Part III, Section E.1 of Respondent's permit states that if required site self-inspections identify BMPs that are not operating effectively, maintenance must be performed within seven (7) days and before the next storm event whenever practicable to maintain the continued effectiveness of stormwater controls. Part III, Section I.1 of Respondent's permit states that any delay in the replacement or maintenance of non-functional BMPs beyond seven (7) days shall be documented in the SWPPP with sufficient detail as to explain the reason for the delay.

28. Documents gathered during the EPA inspection referenced in paragraph 20 above, revealed that Respondent failed to perform maintenance on ineffective BMPs within seven (7) days. Specifically, Respondent failed to perform maintenance on construction entrances and sedimentation basins at the site within seven (7) days of the self-inspection and failed to document the delay in the SWPPP.

29. Respondent's failure to maintain its BMPs is a violation of Respondent's 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

Failure to Install BMPs

30. The facts stated in paragraphs 11 through 20 above are herein incorporated.

31. Part IV, Section C.1 of Respondent's permit requires that Respondent select, install, implement, and maintain BMPs that minimize pollutants in the discharge as to meet applicable water quality standards.

32. The EPA inspection, referenced in paragraph 20 above, revealed that Respondent failed to install storm drain inlet protections at the site.

33. The EPA inspection, referenced in paragraph 20 above, revealed that Respondent failed to install erosion control measures to prevent sediment-laden stormwater from leaving the site via stormwater outfalls.

34. Respondent's failure to install BMPs 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 Implement Stormwater Pollution Prevention Plan ("SWPPP")

35. The facts stated in paragraphs 11 through 20 above are herein incorporated.

36. Part III, Section A.4, of Respondent's permit requires that Respondent must implement the SWPPP as written from commencement of construction activity until final stabilization is complete.

37. The General Erosion Control Phasing Notes section of Respondent's SWPPP requires that Respondent install and maintain the erosion control features listed in the SWPPP. Specifically, Respondent's SWPPP describes, *inter alia*, requirements for the installation and maintenance of silt fencing and stabilization and maintenance of construction entrances.

38. The EPA inspection, referenced in paragraph 20 above, revealed that Respondent failed to install silt fencing as prescribed in the SWPPP.

39. The EPA inspection, referenced in paragraph 20 above, revealed that Respondent failed to maintain stabilized construction entrances as prescribed in the SWPPP.

40. 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 4

Failure to Perform and Document Site Inspections

41. The facts stated in paragraphs 11 through 20 above are herein incorporated.

42. Part III, Sections I.1, I.4, I.6, of Respondent's permit require that Respondent conduct documented inspections of all areas of the site disturbed by construction activity and areas used for storage of materials that are exposed to precipitation. Respondent must conduct documented site inspections at least once every fourteen (14) calendar days, and within 24 hours of the end of a storm event of 0.5 inches or greater.

43. The EPA inspection, referenced in paragraph 20 above, revealed that Respondent failed to conduct documented site inspections once every 14 calendar days, and failed to conduct documented site inspections within 24 hours of the end of a storm event of 0.5 inches or greater.

44. 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 5

Failure to Develop an Adequate Stormwater Pollution Prevention Plan ("SWPPP")

45. The facts stated in paragraphs 11 through 20 above are herein incorporated.

46. Part III of Respondent's permit requires that the SWPPP include, *inter alia*, the following items:

- B.1 Description of the nature of the construction activity.
- C.2 Description and schedule of the interim and permanent stabilization practices for the site.
- C.3 Records of dates when major grading activities occur, when construction activities temporarily or permanently cease on a portion of the site, and when stabilization measures are initiated.
- C.4 Description of structural practices to divert flows, retain/detain flows, and limit runoff and discharge of pollutants from the site.

- C.5 Description of all post-construction stormwater management activities.
- C.6 Description of measures to prevent discharge of solid materials to waters of the state.
- C.8 Description of construction and waste materials stored on site, controls to minimize exposure of materials to stormwater, and spill prevention control and countermeasure practices.
- C.9 Description of pollutant sources from areas other than construction and controls and measures that will be implemented to minimize discharges.
- D Identify all allowable sources of non-stormwater discharges and ensure the implementation of appropriate pollution prevention measures for the non-stormwater component(s) of the discharge.

47. The EPA inspection, referenced in paragraph 20 above, revealed that Respondent's SWPPP failed to include the requirements contained in Part III of Respondent's permit.

48. Part III, Section K.1, of Respondent's permit requires that Respondent keep a copy of the SWPPP at the construction site or other location easily accessible during normal business hours.

49. The EPA inspection, referenced in paragraph 20 above, revealed that Respondent failed to keep a copy of the SWPPP at the construction site or other easily accessible location.

50. Part III, Section K.2, of Respondent's permit requires that Respondent post a sign or other notice conspicuously near the main entrance of the construction site or at a local public building.

51. The EPA inspection, referenced in paragraph 20 above, revealed that Respondent failed to post a sign or other notice conspicuously near the main entrance of the construction site.

52. Respondent's failure to develop and maintain an adequate SWPPP is a violation of Respondent's 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 Comply with Narrative Water Quality Standards

53. The facts stated in paragraphs 11 through 20 above are herein incorporated

54. Part VI, Section A.1.b, of Respondent's permit requires that discharges authorized under the permit shall not contain pollutants at concentrations or levels that produce objectionable films, colors, turbidity, deposits, or noxious odor in the receiving stream or waterway.

55. The EPA inspection, referenced in paragraph 20 above, revealed that discharges from the site contained pollutants at levels that produced sediment deposits in the receiving streams adjacent to the site.

56. Respondent's failure to comply with narrative water quality standards is a violation of Respondent's 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), and implementing regulations.

Order For Compliance

57. 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 58 through 60.

58. 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

59. 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.

60. 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, 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

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

Ms. Kimberly Willis
Water, Wetlands and Pesticides Division/Water Enforcement Branch
U.S. Environmental Protection Agency - Region 7
901 North Fifth Street
Kansas City, Kansas 66101.

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

Mr. Pat Rice
Assistant Director
Water Quality Division
Nebraska Department of Environmental Quality
1200 "N" Street, Suite 400
P.O. Box 98922
Lincoln, Nebraska 68509

General Provisions

Effect of Compliance with the Terms of this Order for Compliance

63. 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.

64. 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 CWA, 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 CWA for any violation whatsoever.

Access and Requests for Information

65. 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

66. 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.

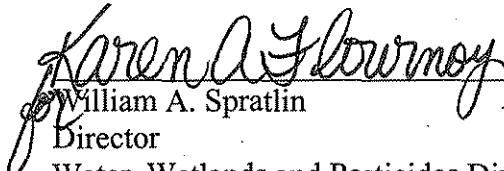
Effective Date

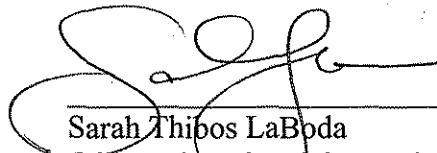
67. The terms of this Order shall be effective and enforceable against Respondent upon the date of its receipt of an executed copy of the Order.

Termination

68. 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 30th day of January, 2009.


William A. Spratlin
Director
Water, Wetlands and Pesticides Division
U.S. Environmental Protection Agency
Region 7
901 North Fifth Street
Kansas City, Kansas 66101


Sarah Thibos LaBoda
Office of Regional Counsel
U.S. Environmental Protection Agency
Region 7
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 Findings of Violation and Administrative Order for Compliance by first class certified mail, return receipt requested, to:

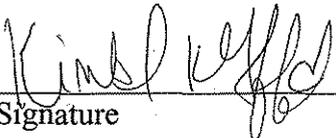
Mr. Patrick Day
Dial Ridgewood, L.L.C.
11506 Nicholas Street, Suite 200
Omaha, Nebraska 68154

Sent via first class mail to:

Mr. Pat Rice
Assistant Director
Water Quality Division
Nebraska Department of Environmental Quality
1200 "N" Street, Suite 400
P.O. Box 98922
Lincoln, Nebraska 68509

FEB 02 2009

Date



Signature