UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7
901 NORTH FIFTH STREET
KANSAS CITY, KANSAS 66101

04 MAY 26 PM 2:09

ENVIRONMENTAL PROTECTION AGENCY-REGION VII
REGIONAL HEARING CLERK

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
	)	Docket No. CWA-07-2004-0213
JMB No. 2, L.L.C.	)	
Enclaves at Cherry Hills	)	
Old Manchester Rd.	)	FINDINGS OF VIOLATION,
Wildwood, MO 63040	)	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 J.M.B. No. 2, L.L.C. (hereinafter "JMB"), a company incorporated 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. MO-R101xxx (the General Permit). The general permit governs storm water discharges associated with construction or land disturbance activity (e.g., clearing, grubbing, excavating, grading, and other activity that results in the destruction of the root zone).

Factual Background

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

12. At all times relevant to this action, Respondent was the owner and/or operator of a construction site known as the Enclaves at Cherry Hills located at Old Manchester Road, in Wildwood, Missouri (the Site). 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. Storm water, snow melt, surface drainage and runoff water leaves a portion of Respondent's Site and goes into Caulks Creek, which is a tributary of Lake Chesterfield, the

Bonhomme Creek and the Missouri River. Storm water, snow melt, surface drainage and runoff water also leaves a portion of Respondent's Site and goes into the Hamilton/Carr Creek, which is a tributary of the Meramec River. The runoff and drainage from Respondent's facility is "storm water" as defined by 40 C.F.R. § 122.26(b)(13).

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

15. Respondent's storm water runoff from the Site is the "discharge of a pollutant" as defined by CWA Section 502(12), 33 U.S.C. § 1362(12).

16. The Site is a "point source" which has caused and continues to cause the "discharge of pollutants" as defined by CWA Section 502, 33 U.S.C. § 1362.

17. Respondent discharged pollutants into both Caulks Creek, a tributary of Lake Chesterfield, the Bonhomme Creek and the Missouri River and the Hamilton/Carr Creek a tributary of the Meramec River. Caulks Creek, the Hamilton/Carr Creek, Lake Chesterfield, Bonhomme Creek, the Meramec River, and the Missouri River are "navigable waters" as defined by CWA Section 502, 33 U.S.C § 1362.

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 described in paragraph 10 above. MDNR issued Respondent Permit No. MO-R103687 (The Permit) on November 10, 1999. The permit was reissued as MO-R105782 on September 5, 2003.

20. On or about March 2-5, 2004, EPA 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. At the time of the inspection approximately 131 acres were disturbed for development of The Enclaves at Cherry Hills.

21. On or about March 17, 2004, MDNR issued a Notice of Violation (NOV) to Respondent for failure to install two siltation basins as required by Respondent's SWPPP, and for discharging sediment into the Hamilton/Carr Creek.

22. On or about March 26, 2004, the City of Wildwood personnel observed continuing silt/sediment runoff from the graded areas impacting the turbidity of Caulks Creek and Lake Chesterfield, and also ineffective silt fences.

Findings of Violation

Failure to Comply with Narrative Water Quality-Based Effluent Limitations or Conditions - Count 1

23. The facts stated in paragraphs 1 through 22 above are herein incorporated.

24. Paragraph 1 of the Requirements and Guidelines section of Respondent's permit states in part that storm water shall not cause a violation of the state water quality standards, including but not limited to the following conditions:

a. Waters shall be free from substances in sufficient amounts to cause the formation of putrescent, unsightly or harmful bottom deposits or prevent full maintenance of beneficial uses;

c. Waters shall be free from substances in sufficient amounts to cause unsightly color or turbidity, offensive odor or prevent full maintenance of beneficial uses;

g. Waters shall be free from physical, chemical or hydrologic changes that would impair the natural biological community.

25. The inspection and observations referenced in paragraphs 20 through 22 above, found that Respondent had discharged storm water laden with silt/sediment into Caulks Creek, the Hamilton/Carr Creek and Lake Chesterfield, causing the occurrence of the conditions contained in Paragraphs 1(a), (c), and (g) of the Requirements and Guidelines section of Respondent's Permit.

26. Respondent's discharge of storm water is a violation of Paragraphs 1(a), (c), and (g) of the Requirements and Guidelines section 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).

Failure to Develop and Implement SWPPP Requirements - Count 2

27. The facts stated in paragraphs 24 through 26 above are herein incorporated.

28. Paragraph 8 of the Requirements and Guidelines section of Respondent's permit states, in part, that the SWPPP shall provide for the following:

b. Drainage areas:

iii. The area impacted by the land disturbance of the drainage course change is to be revegetated or protected from erosion as soon as possible. Areas within 50 feet of defined drainage ways should be recontoured as needed and revegetated, seeded, or otherwise protected within five (5) working days after grading has ceased.

d. Disturbed areas: Where soil disturbing activities cease in an area for more than 14 days, the disturbed areas shall be protected from erosion by stabilizing the area with mulch or other similarly effective erosion control BMPs.

29. The inspections and observations referenced in paragraphs 20 through 22 above, found that Respondent has failed to develop and implement a SWPPP as required to address drainage and disturbed areas on site, including but not limited to the 50 feet surrounding Caulks Creek and the Hamilton/Carr Creek and approximately 131 acres of graded and disturbed land. Inadequacies in the SWPPP include but are not limited to the following; slopes throughout the site remained un-stabilized, sod has not been placed wherever seeding does not establish sufficient ground cover, and silt fences are inconsistent with the SWPPP.

30. Respondent's failure to develop and implement an adequate SWPPP as required is a violation of Paragraphs 8(b) and (d) of the Requirements and Guidelines section 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).

Failure to Install Appropriate Best Management Practices - Count 3

31. The facts stated in paragraphs 28 through 30 above are herein incorporated.

32. Paragraph 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 construction site.

33. The inspections and observations referenced in paragraphs 20 through 22 above, revealed that Respondent did not install appropriate impediments to sediment movement for storm water to pass through prior to leaving the construction site in the areas along the western edge of the site and common area adjacent to Caulks Creek and southwest of the elementary school. Areas of inadequacy include but are not limited to the following: slopes throughout remained un-stabilized, sod has not been placed wherever seeding does not establish sufficient ground cover, and silt fences are inconsistent with the SWPPP.

34. Respondent's failure to install appropriate impediments to sediment movement is a violation of Paragraph 8(e) of the Requirements and Guidelines section 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).

Failure to Perform and Document Site Inspections - Count 4

35. The facts stated in paragraphs 32 through 34 above are herein incorporated.

36. Paragraph 10 of the Requirements and Guidelines section of Respondent's permit requires that regular 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.

37. The inspection referenced in paragraph 20 above, revealed that Respondent did not perform site inspections at a minimum of once per week, note any deficiencies in a report, correct the deficiencies within seven calendar days of the inspection, and keep the report at a site which is readily available from the permitted site. Specifically, the weeks of April 21, May 26, June 16, July 7, July 21 and December 29, 2003 were unavailable.

38. Respondent's failure to perform and document site inspections is a violation of Paragraph 10 of the Requirements and Guidelines section 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).

Failure to Amend/Update the SWPPP - Count 5

39. The facts stated in paragraphs 36 through 38 above are herein incorporated.

40. Paragraph 9 of the Requirements and Guidelines section of Respondent's permit requires in part for Respondent to amend and update the SWPPP as appropriate during the term of the land disturbance activity and at a minimum, whenever the:

c. Permittee's inspections indicate deficiencies in the SWPPP or any BMP;
e. SWPPP is determined to be ineffective in significantly minimizing or controlling erosion and sedimentation (e.g., there is visual evidence, such as excessive site erosion or excessive sediment deposits in streams or lakes).

41. The inspections and observations referenced in paragraphs 20 through 22 above, revealed that Respondent has failed to effectively and adequately amend/update the SWPPP to control erosion and silt/sediment runoff into Caulks Creek and the Hamilton/Carr Creek or their tributaries.

42. Respondent's failure to amend/update the SWPPP is a violation of Paragraph 9 of the Requirements and Guidelines section 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).

Order For Compliance

43. 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 44 through 47.

44. Respondent shall immediately implement all requirements of Respondent's existing SWPPP that have not been implemented thus far.

45. Within five (5) days of the effective date of this Order, Respondent shall submit in writing proposed amendments to the SWPPP, developed by qualified personnel, detailing the specific actions necessary to correct the violations cited herein including detailing what action is required to correct the deficiencies and eliminate and prevent recurrence of the violations cited above, and a schedule for implementation and reporting the results to come into compliance with all of the applicable requirements of the permit.

46. Upon receipt of EPA's approval of the Plan, Respondent shall implement such plan in accordance with the schedule contained therein.

47. The EPA will review each submission of a plan or report by Respondent, and notify Respondent in writing of the EPA's approval or disapproval of the plan or report, or any part thereof. If a submission is disapproved in whole or in part by the EPA, the EPA will provide written comments to Respondent explaining the basis for its decision. Within ten (10) days of receipt of the EPA's disapproval pertaining to any submission, Respondent shall amend/revise the disapproved submission, addressing all of the EPA's comments, and resubmit same to the EPA. If the EPA disapproves the revised submission, the EPA may modify and approve the same in accordance with its previous comments. In the event of such modification and approval, the EPA will notify Respondent of the modification/approval.

Submissions

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

Larry Long, Hydrologist
WENF
Water, Wetlands, and Pesticides Division
U.S. Environmental Protection Agency - Region 7
901 North Fifth Street
Kansas City, KS 66101

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

Tom Siegel
Missouri Dept. of Natural Resources
7545 S. Lindbergh Blvd.
Ste. 210
St. Louis, MO 63125

General Provisions

Effect of Compliance with the Terms of this Order for Compliance

50. Compliance with the terms of this Order shall not relieve Respondent of liability for, or preclude the 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.

51. 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(b), (c), (d) or (g) of the Act, 33 U.S.C. § 1319(b), (c), (d) or (g), for any violation cited in this Order. Issuance of this Order shall not be deemed an election by the 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

52. Nothing in this Order shall limit the 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

53. 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

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

Termination

55. 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 25th day of May, 2004.

Leo J. Alderman, Director
Water, Wetlands and Pesticides Division
U.S. Environmental Protection
Agency
Region 7
901 North Fifth Street
Kansas City, Kansas 66101

Kristina MG Kemp
Assistant 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 Order for Compliance by first class certified mail, return receipt requested, to:

Registered Agent
JMB. No. 2, L.L.C.
Harold Tzinberg
168 N. Meramec, 4th Floor
St. Louis, MO 63105

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

Tom Siegel
Missouri Dept. of Natural Resources
7545 S. Lindbergh Blvd.
Ste. 210
St. Louis, MO 63125

5/20/04
Date

Sarah A. Zaragoza

7002 0860 0006 5961 1641

U.S. Postal Service
CERTIFIED MAIL RECEIPT
(Domestic Mail Only: No Insurance Coverage Provided)

OFFICIAL USE

Postage	$
Certified Fee	
Return Receipt Fee (Endorsement Required)	
Restricted Delivery Fee (Endorsement Required)	
Total	

MAY 26 2004
Postmark Here

Sent To: Registered Agent
JMB. No. 2, L.L.C.
Harold Tzinberg
Street, or PO: 168 N. Meramec, 4th Floor
City, St: St. Louis, MO 63105

PS Form 3800, April 2002 — See Reverse for Instructions

7002 0860 0006 5961 1658

U.S. Postal Service
CERTIFIED MAIL RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)

OFFICIAL USE

Postage	$
Certified Fee	
Return Receipt Fee (Endorsement Required)	
Restricted Delivery Fee (Endorsement Required)	
Total P	

MAY 26 2004
Postmark Here

Sent To: Tom Siegel
MDNR
Street, or PO B: 7545 S. Lindbergh Blvd.
Ste. 210
City, Sta: St. Louis, Missouri 63125

PS Form 3800, April 2002 — See Reverse for Instructions

7002 0860 0006 5961 1672

U.S. Postal Service
CERTIFIED MAIL RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)

OFFICIAL USE

Postage	$
Certified Fee	
Return Receipt Fee (Endorsement Required)	
Restricted Delivery Fee (Endorsement Required)	
Total Pos	

MAY 26 2004
Postmark Here

Sent To: Mr Kevin Mohammad, Chief
Enforcement Section Water Pollution
Control Program – MDNR
Street, Ap or PO Box: PO Box 176
City, State: Jefferson City, Missouri 65102

PS Form 3800, April 2002 — See Reverse for Instructions