

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

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)	
)	Docket No. CWA-07-2022-0032
Fremont, Nebraska)	
)	COMPLAINT AND
Respondent)	CONSENT AGREEMENT/
)	FINAL ORDER
Proceedings under Section 309(g) of the)	
Clean Water Act, 33 U.S.C. § 1319(g))	
_____)	

COMPLAINT

Jurisdiction

1. This is an administrative action for the assessment of civil penalties instituted pursuant to Section 309(g) of the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act (“CWA”), 33 U.S.C. § 1319(g), and in accordance with the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation, Termination or Suspension of Permits (“Consolidated Rules”), 40 C.F.R. Part 22.

2. Complainant, the U.S. Environmental Protection Agency Region 7 (“EPA”) and Respondent, City of Fremont, Nebraska (“Respondent” or “City”), have agreed to a settlement of this action before the filing of a complaint, and thus this action is simultaneously commenced and concluded pursuant to Rules 22.13(b) and 22.18(b)(2) and (3) of the Consolidated Rules, 40 C.F.R. §§ 22.13(b) and 22.18(b)(2) and (3).

3. This Complaint and Consent Agreement/Final Order serves as notice that the EPA has reason to believe that the Respondent has violated Section 402 of the CWA, 33 U.S.C. § 1342, and regulations promulgated thereunder.

Parties

4. The authority to take action under Section 309(g) of the CWA, 33 U.S.C. § 1319(g), is vested in the Administrator of the EPA. The Administrator has delegated this authority to the Regional Administrator, EPA Region 7, who in turn has delegated the authority under Section 309(g) to the Director of the Enforcement and Compliance Assurance Division of EPA Region 7 (collectively referred to as the “Complainant”).

5. Respondent is and was at all relevant times a municipality organized under the laws of the state of Nebraska.

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*, Section 402 of the CWA, 33 U.S.C. § 1342. 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.

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 502(7) of the CWA, 33 U.S.C. § 1362(7), defines “navigable waters” as the “waters of the United States,” which in turn has been defined to include, *inter alia*, all waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, and tributaries to such waters. 40 C.F.R. § 122.2.

9. To implement Section 402 of the CWA, the EPA promulgated regulations codified at 40 C.F.R. Part 122. Under 40 C.F.R. Part 122.1, an NPDES permit is required for the discharge of pollutants from any point source into waters of the United States.

10. Section 402(p) of the CWA, 33 U.S.C. § 1342(p), sets forth requirements for the issuance of NPDES permits for various categories of municipal stormwater discharges, including those by the City which are the subject to this Order.

11. Pursuant to Section 402(p)(6) of the CWA, 33 U.S.C. § 1342(p)(6), EPA promulgated regulations (“Phase II stormwater regulations”) at 40 C.F.R. Part 122 setting forth the additional categories of stormwater discharges to be permitted and the requirements of the Phase II program.

12. 40 C.F.R. § 122.26(a)(9)(i)(A) states that on or after October 1, 1994, for discharges composed entirely of stormwater operators shall be required to obtain an NPDES permit if the discharge is from a small municipal separate storm sewer system required to be regulated pursuant to 40 C.F.R. § 122.32.

13. 40 C.F.R. § 122.26(b)(8) defines “municipal separate storm sewer” (“MS4”) as a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains):

- a. owned or operated by a state, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to state law) having jurisdiction over disposal of sewage, industrial wastes, stormwater, or other wastes, including special districts under state law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved

management agency under section 208 of the CWA that discharges to waters of the United States;

- b. designed or used for collecting or conveying stormwater;
- c. which is not a combined sewer; and
- d. which is not part of a POTW as defined at 40 C.F.R. § 122.2.

14. 40 C.F.R. § 122.26(b)(16) defines “small MS4”, in part, as all separate storm sewers that are:

- a. owned or operated by the United States, a state, city, town, borough, county, parish, district, association, or other public body . . . having jurisdiction over disposal of sewage, industrial wastes, stormwater, or other wastes [. . .];
- b. not defined as “large” or “medium” municipal separate storm sewer systems pursuant to Paragraphs (b)(4) and (b)(7), or designated under Paragraph (a)(1)(v) of this section.

15. 40 C.F.R. § 122.32(a) provides that a small MS4 is regulated if:

- a. the small MS4 is located in an urbanized area as determined by the latest Decennial Census by the Bureau of the Census; or
- b. the MS4 is designated by the NPDES permitting authority, including where the designation is pursuant to §§ 123.35(b)(3) and (b)(4), or is based upon a petition under § 122.26(f).

16. 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, 33 U.S.C. § 1342, the implementing regulations, and a Memorandum of Understanding dated February 7, 2019. EPA maintains concurrent enforcement authority with authorized state programs for violations of the CWA.

EPA’s General Allegations

17. Respondent is a municipality and as such is a “person” for purposes of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

18. Respondent operates a stormwater drainage system consisting of, among other things, drain inlets, storm sewers, and outfalls, and as such is a “municipal separate storm sewer” as that term is defined in 40 C.F.R. § 122.26(b)(8).

19. At all times relevant to this Order, Respondent owned and/or operated a “small municipal separate storm sewer system,” as defined by 40 C.F.R. § 122.26(b)(16).

20. Respondent’s small MS4 is located in the Fremont, Nebraska “urbanized area” as defined by the 2010 Census or use population as determined by 2010 census: 26,397, and therefore, at all times relevant to this Order, Respondent’s small MS4 is subject to regulation pursuant to 40 C.F.R. § 122.32(a)(1).

21. Respondent's small MS4 is a "point source" as defined by Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

22. Respondent's small MS4 discharges pollutants into the Elkhorn River and the Platte River, which are "navigable waters" as defined by Section 502(7) of the CWA, 33 U.S.C § 1362(7).

23. The Elkhorn River is impaired by *E. coli*, for which a Total Maximum Daily Load ("TMDL") for bacteria was placed and approved in 2009.

24. Discharges from Respondent's small MS4 result in the addition of pollutants from a point source to navigable waters, and thus are the "discharges of a pollutant" as defined by Section 502(12) of the CWA, 33 U.S.C. § 1362(12).

25. Respondent's discharges from a small MS4 required a permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342, and 40 C.F.R. §§ 122.26(a)(9)(i)(A), 122.32.

26. NDEE issued a permit for discharges from Respondent's small MS4 under NPDES General Permit No. NE-R310000 with authorization number NE-R310001 ("MS4 Permit"). The General Permit is effective from July 1, 2017, to June 30, 2022.

27. On September 21-25, 2020, representatives of the EPA conducted an audit of the City's MS4 program (hereafter "the MS4 Audit") under the authority of Section 308(a) of the CWA, 33 U.S.C. § 1318(a), to evaluate the City's compliance with its MS4 permit and the CWA.

28. As part of the MS4 Audit, the City provided documentation to EPA to review, including its FY19 MS4 Annual Report, Storm Water Management Plan ("SWMP") submitted to NDEE on December 29, 2017, Illicit Discharge Detection and Elimination ("IDDE") Program Manual, and other written procedures to support the implementation of the SWMP.

29. A copy of the MS4 Audit report was provided to the City by electronic mail on November 23, 2020.

EPA's Findings of Violation

Count 1

Failure to Develop and Implement an Adequate IDDE Program

30. The facts stated above are re-alleged and incorporated herein by reference.

31. Part IV of the MS4 Permit requires that the City develop, implement, and enforce a SWMP that shall reduce the pollutant discharge from the MS4 to the maximum extent practicable, protect water quality, and satisfy the water quality requirements of the Clean Water Act.

32. Part IV.B.2.a.1 of the MS4 Permit requires the City to develop, implement, and enforce an IDDE Program to detect, investigate, and eliminate non-storm water discharges, including illegal dumping, into its system for the MS4.

33. Part IV.B.2.a.1(a) of the MS4 Permit further requires the City to develop as part of the IDDE program an enforcement plan or mechanism. The City adopted a stormwater discharge control ordinance No. 5163 prohibiting non-storm water discharges to the MS4. The City developed an IDDE program manual in 2019, which includes procedures to investigate, document, and conduct enforcement as appropriate.

34. Part IV.B.2.a.1(d)(ii) of the MS4 Permit requires the City to document all investigations, tracking dates of illicit discharge, results of investigations, any follow up from the investigation, and the date the investigation is closed.

35. Part IV.B.2.a.1(e)(ii) of the MS4 Permit requires the City to document all interactions with potentially responsible parties as well as follow-up investigations to confirm illicit discharges have been removed.

36. The City did not document enforcement of the IDDE Program in accordance with the MS4 Permit nor the City's IDDE Manual during 2019 and 2020 in the following ways:

- a. The City did not consistently document investigations, including specific follow-up actions to the investigation and the date the investigation was closed; and
- b. The City did not implement all initial actions set forth in the IDDE Manual, including ensuring inspection reports were signed by the responsible party to acknowledge receipt and obtaining documentation of corrective actions taken.

37. Part IV.B.2.a.1(b) of the MS4 Permit requires a storm sewer system map showing the location of all outfalls and waters of the state that receive discharges from those outfalls, and delineation of connections and interactions to other MS4 systems.

38. The City's MS4 map failed to delineate interconnections with another MS4 owned by the Nebraska Department of Transportation along State Highway 77 within the City in violation of the MS4 Permit.

39. Part IV.B.2.a.1(c) of the MS4 Permit requires the City to develop and implement outfall field screening procedures and priority locations to investigate for detecting illicit discharges and to document written dry weather field screening and analytical monitoring procedures which are to be used at a number of outfall locations specified in the SWMP each year to detect discharges to the MS4.

40. The City's IDDE Manual provides examples of illicit discharges including dry weather flows that contain pollutants or pathogens and references a Standard Operating Procedure for outfall screening but does not identify a procedure to determine the presence of optical brighteners at outfalls nor sampling criteria for dry weather outfall screening.

41. The City failed to develop and implement an adequate dry weather screening program, including failing to conduct additional sampling or follow up investigation when multiple indications of an illicit discharge, including dry weather flow, algae, odors, and optical brighteners, were noted in the outfall screening log and inspection reports, and failing to develop and implement clear, written sampling protocols.

42. The City's failure to develop and implement an adequate IDDE program, as set forth above, are violations of its MS4 Permit and, as such, are violations of Section 402 of the CWA, 33 U.S.C. § 1342.

Count 2

Failure to Conduct and Document Construction Site Inspections

43. The facts stated above are re-alleged and incorporated herein by reference.

44. Part IV.B.3.a. of the MS4 Permit requires the permittee to develop, implement, and enforce a program to control stormwater pollutant discharges from construction activities.

45. Part IV.B.3.d.1. of the MS4 Permit requires the City to inspect public and private construction activity according to local procedures with a strategy documented in the SWMP.

46. Section 4.3.2 of the City's SWMP states that "every private building lot and land development receive[s] municipal oversight inspection for erosion and sediment control an average of quarterly (routine) during the period of active construction."

47. Throughout 2019 and 2020, the City failed to conduct and document inspections of public and private construction activity for erosion and sediment control an average of quarterly during the period of active construction contrary to the procedures and strategy in the SWMP.

48. The City's failure to adequately implement the required elements of the SWMP, as set forth above, is a violation of the MS4 Permit and, as such, is a violation of Section 402 of the CWA, 33 U.S.C. § 1342.

Count 3

Failure to Develop and Implement an Adequate Municipal Pollution Prevention and Good Housekeeping Plan

49. The facts stated above are re-alleged and incorporated herein by reference.

50. Part IV.B.5.a.1 and Part IV.B.5.a.2 of the MS4 Permit require the City to develop and maintain an inventory of municipally-owned or operated facilities and stormwater controls and identify on a map where the municipally-owned or operated facilities are located within the MS4.

51. The City has not developed an inventory or a map of municipally-owned or operated facilities and stormwater controls within the MS4.

52. Part IV.B.5.d.1(a) of the MS4 Permit requires the City to develop a strategy to inspect and clean the storm water inlets as needed in the SWMP, and report implementation of this strategy in the City's annual report.

53. The City has not developed a strategy for storm sewer inlet cleaning and system maintenance, and does not adequately document or maintain a schedule of implementation.

54. The City's failure to develop and maintain and implement the required elements of a SWMP, as set forth above, are violations of the MS4 Permit and, as such, are violations of Section 402 of the CWA, 33 U.S.C. § 1342.

**Count 4
Failure to Timely Submit MS4 Annual Reports**

55. The facts stated above are re-alleged and incorporated herein by reference.

56. Part VI.A of the MS4 Permit requires the City to develop and submit an annual report by April 1 of every year.

57. The MS4 annual report for the fiscal year 2018 was not submitted by April 1, 2019.

58. The City's failure to submit its annual report timely, as set forth above, is a violation of its MS4 Permit and, as such, is a violation of Section 402 of the CWA, 33 U.S.C. § 1342.

Penalty

59. As alleged by the EPA above, and pursuant to Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), as adjusted pursuant to 40 C.F.R. § 19.4, for violations that occurred after November 2, 2015, where penalties are assessed on or after December 23, 2020, Respondent is liable for civil penalties of up to \$22,584 per day for each day during which the violation continues, up to a maximum of \$282,293.

CONSENT AGREEMENT

60. Respondent and the EPA agree to the terms of this Consent Agreement/Final Order.

61. Respondent admits the jurisdictional allegations of this Complaint and Consent Agreement/Final Order and agrees not to contest the EPA's jurisdiction in this proceeding or any

subsequent proceeding to enforce the terms of this Consent Agreement/Final Order.

62. Respondent neither admits nor denies the factual allegations and legal conclusions asserted by the EPA in this Complaint and Consent Agreement/Final Order.

63. Respondent waives its right to contest any issue of fact or law set forth above, and their right to appeal this Consent Agreement/Final Order.

64. Respondent and Complainant agree to conciliate the matters set forth in this Consent Agreement/Final Order without the necessity of a formal hearing and agree to bear their own costs and attorney's fees incurred as a result of this action.

65. Respondent consents to receiving the filed Consent Agreement and Final Order electronically at the following email address: Joey.Spellerberg@fremontne.gov.

66. The undersigned representative(s) of Respondent certifies that he or she is fully authorized to enter the terms and conditions of this Consent Agreement/Final Order and to execute and legally bind Respondent to it.

67. Respondent understands and agrees that this Consent Agreement/Final Order shall apply to and be binding upon Respondent and Respondent's agents, successors and/or assigns. Respondent shall ensure that all contractors, employees, consultants, firms or other persons or entities acting for Respondent with respect to matters included herein comply with the terms of this Consent Agreement/Final Order.

68. Respondent certifies by the signing of this Consent Agreement/Final Order that the Respondent is scheduled to be in compliance with its NPDES Permit and Section 402 of the CWA, 33 U.S.C. § 1342, and applicable regulations, pursuant to the Administrative Order for Compliance on Consent, CWA-07-2022-0031.

Penalty Payment

69. Respondent agrees that, in settlement of the claims alleged in this Consent Agreement/Final Order, Respondent shall pay a civil penalty of **Twenty-Six Thousand and Five Hundred Dollars (\$26,500)** pursuant to the authority of Section 309(g) of the CWA, 33 U.S.C. § 1319(g), to be paid in full no later than 30 days after the effective date of this Consent Agreement/Final Order as set forth below.

70. Respondent shall pay the penalty identified above by certified or cashier's check made payable to "Treasurer, United States of America," with a transmittal that identifies the case name, facility address, and docket number CWA-07-2022-0032 to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center

P.O. Box 979077
St. Louis, Missouri 63197-9000

or by alternate payment method described at <http://www.epa.gov/financial/makepayment>.

71. Respondent shall simultaneously send copies of the transmittal letter and the check, as directed above, or proof of alternate payment method, to the following:

Regional Hearing Clerk at: R7_Hearing_Clerk_Filings@epa.gov

Shane McCoin at: mccoins.shane@epa.gov

72. Respondent agrees that no portion of the civil penalty or interest paid by Respondent pursuant to the requirements of this Consent Agreement/Final Order shall be claimed by Respondent as a deduction for federal, state, or local income tax purposes.

73. Interest on any late payment will be assessed at the annual interest rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717. The interest will be assessed on any overdue amount from the due date through the date of payment. Failure to pay the civil penalty when due may result in the commencement of a civil action in Federal District Court to collect said penalty, together with costs or interest.

Effect of Settlement and Reservation of Rights

74. Respondent's payment of the entire civil penalty pursuant to this Consent Agreement/Final Order resolves all civil and administrative claims pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), for alleged violations identified in this Complaint and Consent Agreement/Final Order. Complainant reserves the right to take any enforcement action with respect to any other violations of the CWA or any other applicable law.

75. The effect of settlement described above is conditional upon the accuracy of the Respondent's representations to the EPA, as memorialized in this Consent Agreement/Final Order.

76. Nothing contained in this Consent Agreement/Final Order shall alter or otherwise affect Respondent's obligation to comply with all applicable federal, state and local environmental statutes and regulations and applicable permits.

77. Notwithstanding any other provision of this Consent Agreement/Final Order, the EPA reserves the right to enforce the terms of this Consent Agreement/Final Order by initiating a judicial or administrative action pursuant to Section 309 of the CWA, 33 U.S.C. § 1319, and to seek penalties against Respondent or to seek any other remedy allowed by law.

78. With respect to matters not addressed in this Consent Agreement/Final Order, the EPA reserves the right to take any enforcement action pursuant to the CWA and its

implementing regulations, or any other available legal authority, including without limitation, the right to seek injunctive relief, penalties and damages.

General Provisions

79. The Parties acknowledge that this Consent Agreement/Final Order is subject to the public notice and comment required pursuant to Section 309(g)(4) of the CWA, 33 U.S.C. § 1319(g)(4), and 40 C.F.R. § 22.45.

80. Pursuant to 40 C.F.R. § 22.31(b), this Consent Agreement/Final Order shall be effective after signature by the authorized regional official and upon filing with the Regional Hearing Clerk, U.S. Environmental Protection Agency, 11201 Renner Boulevard, Lenexa, Kansas 66219. All time periods herein shall be calculated therefrom in calendar days unless otherwise provided in this Consent Agreement/Final Order.

81. The state of Nebraska has been provided an opportunity to consult with Complainant regarding this matter in accordance with the requirements of 40 C.F.R. § 22.38(b) and Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1).

82. The headings in this Consent Agreement/Final Order are for convenience of reference only and shall not affect interpretation of this Consent Agreement/Final Order.

83. Respondent and Complainant agree that this Consent Agreement/Final Order may be signed in part and counterpart.

For the Complainant, United States Environmental Protection Agency Region 7:

Wendy Lubbe
Acting Director
Enforcement and Compliance Assurance Division

Shane E. C. McCain
Office of Regional Counsel

For the Respondent, City of Fremont:


Signature

6/28/2022
Date

Joey Spellerberg
Name

Mayor
Title

FINAL ORDER

Pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation, Termination or Suspension of Permits, 40 C.F.R. Part 22, the foregoing Consent Agreement resolving this matter is hereby ratified and incorporated by reference into this Final Order.

The Respondent is ORDERED to comply with all of the terms of the Consent Agreement. In accordance with 40 C.F.R. § 22.31(b), the effective date of the foregoing Consent Agreement and this Final Order is the date on which this Final Order is filed with the Regional Hearing Clerk.

IT IS SO ORDERED.

Date

Karina Borromeo
Regional Judicial Officer

CERTIFICATE OF SERVICE

I certify a true and correct copy of the Complaint and Consent Agreement/Final Order was sent this day in the following manner to the addressees:

Copy emailed to Respondent:

The Honorable Joey Spellerberg
Mayor of Fremont, Nebraska
Joey.Spellerberg@fremontne.gov

Copy emailed to attorney for Respondent:

Travis Jaycott
Adams & Sullivan, P.C., L.L.O.
jacott@adamsandsullivan.com

Copy emailed to representatives for Complainant:

Shane McCoin
EPA Region 7 Office of Regional Counsel
mccoin.shane@epa.gov

Angela Acord
EPA Region 7 Enforcement and Compliance Assurance Division
acord.angela@epa.gov

Copy emailed to representatives for NDEE:

Kara Valentine
kara.valentine@nebraska.gov

Date

Regional Hearing Clerk