

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

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)	
)	Docket No. CWA-07-2022-0062
Northpoint Development, LLC,)	
)	
and)	
)	
Beutler, Inc. d/b/a)	
George J. Shaw Construction Co.)	
)	
Respondents)	COMPLAINT AND
)	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 Respondents, Northpoint Development, LLC and Beutler, Inc. d/b/a George J. Shaw Construction Co. (“Respondents”), 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 Respondents have violated Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311, 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 Northpoint Development, LLC is and was at all relevant times a limited liability company under the laws of the state of Missouri. Respondent Beutler, Inc. is and was at all relevant times a corporation under the laws of the state of Missouri.

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. 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.

10. Pursuant to Section 402(p) of the CWA, the EPA promulgated regulations setting forth the NPDES permit requirements for stormwater discharges at 40 C.F.R. § 122.26.

11. 40 C.F.R. §§ 122.26(a)(1)(ii) and 122.26(c) require dischargers of stormwater associated with industrial activity to apply for an individual permit or to seek coverage under a promulgated stormwater general permit.

12. 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 ...”

13. The Kansas Department of Health & Environment (“KDHE”) is the state agency with the authority to administer the federal NPDES program in Kansas pursuant to Section 402 of the CWA. EPA maintains concurrent enforcement authority with authorized states for violations of the CWA.

EPA’s General Allegations

14. Respondents are “persons” as defined by Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

15. At all times relevant to this action, Respondents were the owner and/or operator of an approximately 160-acre industrial construction site known as the Turner Logistics Center Building 5 and Apex CDL Institute Parking Lot Addition site located at 824 North 69th Street, Kansas City, Kansas and the Turner Logistics Center, located at 824 North 69th Street, Kansas City, Kansas (hereinafter, these locations will be combined and referred to as “the Site”). Respondent Beutler, Inc. was responsible for day-to-day construction activities at the Site, including compliance with Respondents’ National Pollutant Discharge Elimination System (“NPDES”) permit.

16. At the time of the EPA inspection, described below, Respondent Beutler, Inc. had cleared and graded approximately 59 acres and was conducting construction activities.

17. Stormwater, snow melt, surface drainage, and runoff water leave Respondents’ Site via multiple drainageway paths to Mill Creek and Muncie Creek and into stormwater inlets to the city of Kansas City, Kansas’ municipal separate storm sewer system.

18. 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).

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

20. Mill Creek and Muncie Creek are tributaries to the Kansas River, which is a traditionally navigable water. Mill Creek and Muncie Creek are “waters of the United States.”

21. 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).

22. 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.

23. KDHE issued to Respondent Northpoint Development, LLC NPDES general permit KSR116609 ("Respondent's NPDES Permit") for the Turner Logistics Center Building 5 and Apex CDL Institute Parking Lot Addition site on June 23, 2021, which is effective until June 24, 2026. KDHE issued to Respondent Northpoint Development, LLC NPDES general permit KSR115365 ("Respondent's NPDES Permit") for the Turner Logistics Center on March 13, 2020, which is effective until March 14, 2025. These NPDES general permits govern Respondents' stormwater discharges that are associated with industrial activity at the Site, including clearing, grading, excavation, and paving.

24. The principal requirement of the NPDES Permit is for the owner and operator 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 construction activities at the construction Site, and to assure compliance with the terms and conditions of the Permit.

25. Two SWPPPs were developed: one for the Turner Logistics Center Building 5 and Apex CDL Institute Parking Lot Addition, and one for the Turner Logistics Center.

26. On September 27, 2021, EPA personnel, under the authority of Section 308(a) of the CWA, 33 U.S.C. § 1318(a), inspected the Site to determine Respondents' compliance with its NPDES permits and the CWA (the "EPA Inspection"). During the EPA Inspection, or shortly thereafter, the inspector reviewed and obtained copies of documents related to the Permits, including without limitation, the Site's SWPPPs and self-inspection reports, toured the Site, and photographed various stormwater-related areas.

EPA's Allegations

Count 1

Failure to Properly Design, Install, Implement and/or Maintain Pollution Prevention Measures and Failure to Fully Implement the Provisions of the SWPPP

27. Part 7 of the NPDES Permits requires Respondents to "select, install, utilize, operate, and maintain effective BMPs in accordance with best professional judgment, generally accepted and scientifically defensible guidance."

28. Part 7 of the NPDES Permits requires that a SWPPP be developed and implemented in accordance with permit requirements. According to the permit, the SWPPP must, *inter alia*, "ensure the design, management, and maintenance of BMPs in order to

eliminate or minimize erosion, sediment, and other pollutants in stormwater runoff from construction activities ... and ensure compliance with the terms and conditions of this NPDES general permit.”

29. The SWPPPs contain the following provisions requiring the design, installation, implementation, and/or maintenance of pollution prevention measures:

- a. Controls:
 - i. “Around the perimeter of the disturbed area, a combination of structural controls including: silt fence, diversion dikes and check dams will be installed to reduce runoff velocities and allow sediment to filter out and settle out.”
 - ii. “Offsite vehicle tracking of sediment will be controlled by stabilized the existing gravel roadway or construction entrances should it become necessary and maintenance of adjoining streets by sweeping.”
- b. Erosion and Sediment Control Inspection and Maintenance Practices:
 - i. “All measures will be maintained in good working order. If a repair is necessary, it will be initiated within 24 hours of report.”
 - ii. “Built-up sediment will be removed from silt fence diversion berms when it has reached one-third the height of the fence or berm.”

30. During the EPA Inspection, the inspector observed and documented multiple areas of the Site where pollution prevention measures were not installed, implemented, and/or maintained and where provisions of the SWPPP requiring the installation, implementation, and/or maintenance of pollution prevention measures were not followed, including:

- a. Silt fence was either full or overwhelmed with sediment located along the northern boundary of the site;
- b. North 69th Street needed sweeping leading to and from the construction site entrance;
- c. The northern ditch directing stormwater runoff north and into the drainageway to Muncie Creek has resulted in the check dams and silt fence to be overwhelmed with sediment and in need of replacement;
- d. The stormwater runoff from the southeast corner along the eastern hillside, and finally terminating in the drainageway to the Muncie Creek did not contain effective stormwater BMPs;
- e. The stormwater inlets along the North 69th Street leading to the entrance of the construction site did not contain any stormwater BMPs; and
- f. The sediment pond on the northeast corner of the site did not contain any stormwater BMPs to reduce stormwater discharges from the unfinished pond.

31. Respondents’ alleged failure to properly design, install, implement, and/or maintain pollution prevention measures and failure to fully implement the provisions of the SWPPPs are violations of the conditions or limitations of the NPDES permits, and as such, are violations of Section 402(p) of the CWA, 33 U.S.C. § 1342(p).

Count 2

Inadequate SWPPP

32. Part 7.22 of the NPDES Permits requires Respondents' SWPPPs to provide "the site and physical conditions which must be met for effective use of the BMP and/or pollution control" and "where, in relation to other site features, the BMP and/or pollution control is to be installed."

33. During EPA's inspection, the inspector observed that soil stockpiles were being moved from the northeast corner of the site to another section that was close to a stormwater basin and drainage channels to Muncie Creek. The inspector's review of the SWPPPs indicated that the SWPPPs did not specify the stormwater controls to be used at these sites.

34. Respondents' alleged failure to include required elements in its SWPPPs is a violation of the conditions of limitations of the NPDES Permits, and as such, is a violation of Section 402(p) of the CWA, 33 U.S.C. § 1342(p).

Count 3

Failure to Comply with Inspection Requirements

35. Part 7.2.10 of the NPDES Permits requires Respondents to "ensure the entire construction site including but not limited to disturbed areas, BMPs, waste and construction storage areas, drainage areas, locations where stormwater can flow from the construction site, and temporarily stabilized areas is inspected on a regular schedule and ... by the end of the next day following a rain event which results in a rainfall total of 0.5 inches or greater." Inspection reports are required to contain "observations relative to the effectiveness of the BMPs (and) actions taken or necessary to correct deficiencies ..."

36. A review of the inspection reports by the EPA inspector showed that Respondents did not conduct ten inspections within 24 hours following at least 0.5 inches of rainfall or the next business day if the rainfall occurred on a Friday, Saturday or Sunday as follows:

Rainfall Date	Precipitation > 0.5 inches
July 16, 2021	0.78
August 13, 2021	1.76
August 18, 2021	0.8
August 21, 2021	1.86
September 4, 2021	0.94
September 5, 2021	0.77

37. A review of the inspection reports by the EPA inspector showed that Respondents' inspections did not identify the stormwater failures along the eastern boundary of the site, including BMPs that were in obvious states of disrepair, maintenance, or replacement.

38. Respondents' alleged failure to comply with their NPDES Permits inspection requirements are violations of the conditions or limitations of the NPDES Permits, and as such, is a violation of Section 402(p) of the CWA, 33 U.S.C. § 1342(p).

Penalty

39. As alleged in the preceding Counts, 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, Respondents are liable for civil penalties of up to \$23,989 per day for each day during which the violation continues, up to a maximum of \$299,857.

CONSENT AGREEMENT

40. Respondents and the EPA agree to the terms of this Consent Agreement/Final Order.

41. Respondents admit the jurisdictional allegations of this Complaint and Consent Agreement/Final Order and agree not to contest the EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of this Consent Agreement/Final Order.

42. Respondents neither admit nor deny the factual allegations and legal conclusions asserted by the EPA in this Complaint and Consent Agreement/Final Order.

43. Respondents waive their rights to contest any issue of fact or law set forth above, and their rights to appeal this Consent Agreement/Final Order.

44. Respondents 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.

45. The undersigned representatives of Respondents certify that they are fully authorized to enter the terms and conditions of this Consent Agreement/Final Order and to execute and legally bind Respondents to it.

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

47. Respondents certify by the signing of this Consent Agreement/Final Order that Respondents' Site is in current compliance with NPDES general permits KSR116609 and KSR115365 as well as Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342, and applicable regulations.

Penalty Payment

48. Respondents agree that, in settlement of the claims alleged in this Consent Agreement/Final Order, Respondents shall pay a civil penalty of Fifty Five Thousand, Three Hundred and Thirty Seven Dollars (\$55,337) 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.

49. Respondents 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-07-2022-0062 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>.

50. Respondents shall simultaneously send copies of the transmittal letter and the check, as directed above, to the following:

Regional Hearing Clerk
U.S. Environmental Protection Agency
11201 Renner Boulevard
Lenexa, Kansas 66219

and

Chris Muehlberger
Office of Regional Counsel
U.S. Environmental Protection Agency
11201 Renner Boulevard
Lenexa, Kansas 66219.

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

52. 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

53. Respondents' 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.

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

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

56. 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 Respondents or to seek any other remedy allowed by law.

57. 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

58. 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.

59. 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.

60. The state of Kansas 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).

61. 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.

62. Respondents consent to service of this Consent Agreement/Final Order via electronic mail.

63. Respondents 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:

Date

David Cozad
Director
Enforcement and Compliance Assurance Division

Date

Chris Muehlberger
Office of Regional Counsel

For the Respondent, Northpoint Development, LLC:



Signature

Date

Nathaniel Hagedorn
Name

Manager
Title

For the Respondent, Beutler, Inc. d/b/a George J. Shaw Construction Co.:



Signature

Date

8/4/2022

Mark R. Teahan

Name

Vice President

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.

Respondents are 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 Respondents:

Brody Sherar
Northpoint Development, LLC
bsherar@northpointkc.com
4825 Northwest 41st Street, #500
Riverside, Missouri 64150

Andy Nimz
Beutler, Inc. d/b/a George J. Shaw Construction Co.
animz@gjshaw.com
1601 Bellefontaine Avenue
Kansas City, Missouri 64127

Copy emailed to Attorney for Complainant:

Chris Muehlberger
U.S. Environmental Protection Agency Region 7
muehlberger.christopher@epa.gov

Copy emailed to the Kansas Department of Health & Environment:

Tom Stiles
Kansas Department of Health & Environment
Bureau of Water
1000 SW Jackson, Suite 420
Topeka, Kansas 66612
tom.stiles@ks.gov

Date