

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

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)	
)	Docket No. CWA-07-2023-0128
Gaten Properties, LLC)	
)	
)	
)	
)	
Respondent)	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 Respondent, Gaten Properties, LLC (“Respondent”), 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”) with concurrence of the Regional Counsel.

5. Gaten Properties, LLC (“Gaten”) is and was at all relevant times a limited liability company formed under the laws of the state of Kansas and the operator of the Site.

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.”

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 a 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, except operations that result in the disturbance of less than five acres of total land area which are part of a larger common plan of development or sale.”

13. The Kansas Department of Health and Environment (“KDHE”) is the state agency within the state of Kansas that has been authorized by the EPA to administer the federal NPDES program 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.

EPA's General Allegations

14. Respondent is a “person,” as defined by Section 502(5) of the CWA, 33 U.S.C. § 1362(5).
15. At all times relevant to this action, Respondent was the owner and/or operator of a residential construction site known as Triple Creek Farm, comprised of approximately 49.4 acres, approximately 13 of which was disturbed, and located at the intersection of 175th Street and Antioch Road in Overland Park, Kansas (“Site”).
16. At the time of the EPA inspection, described below, the Site was in the building construction phase, in various phases of construction from clearing and excavating to home building, and had already been cleared, graded, had infrastructure installed, and had well-established vegetation on the lots that were not active. All curb and gutter and stormwater inlets had been installed.
17. Stormwater, snow melt, surface drainage, and runoff water leave Respondent’s Site and discharge into Coffee Creek.
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. Coffee Creek is a perennial stream and a tributary to the Blue River, which is a tributary to the Missouri River, a traditionally navigable water. Coffee Creek is a “water of the United States” and therefore a “navigable water” within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7).
21. Coffee Creek is listed on the State’s CWA Section 303(d) List as impaired for aquatic life use, food procurement, and primary contact recreation uses, and total maximum daily loads have been developed for fecal coliform, biochemical oxygen demand, nitrogen, phosphorous, and total suspended solids.
22. Stormwater runoff from Respondent’s 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).
23. Respondent’s 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.
24. On September 27, 2019, KDHE issued authorization to Clearwater USA, Inc.

under Permit Authorization No. KSR115082, under the Kansas Construction Stormwater General Permit No. KSR100000 (“the NPDES Permit”). Clearwater USA, Inc. then transferred the NPDES Permit to Respondent prior to commencement of industrial activity at the Site. The Construction Stormwater General Permit was effective between August 1, 2017 and July 31, 2022. This NPDES General Permit governs Respondent’s stormwater discharges that are associated with industrial activity at the Site, including clearing, grading and excavation.

25. The principal requirement of the NPDES Permit is for the permittee to develop and implement a Stormwater Pollution Prevention Plan (“SWPPP”). The purpose of the SWPPP is to ensure the design, implementation, management, and maintenance of Best Management Practices (“BMPs”) in order to eliminate or minimize erosion, sediment, and other pollutants in stormwater runoff from construction activities; comply with the Kansas Surface Water Quality Standards; and ensure compliance with the terms and conditions of the NPDES general permit.

26. On September 21, 2021, EPA personnel, under the authority of Section 308(a) of the CWA, 33 U.S.C. § 1318(a), inspected the Site to determine Respondent’s compliance with the NPDES Permit and the CWA (the “EPA Inspection”). During the EPA Inspection, the inspector toured the Site and photographed various stormwater-related areas.

27. During the EPA Inspection, the inspector observed and documented significant failures to select, install, and maintain BMPs.

28. During the EPA Inspection, the inspector requested copies of documents related to the NPDES Permit, including without limitation, the Site’s SWPPP and self-inspection reports, but did not receive any of the requested documents during the EPA Inspection.

29. At the conclusion of the EPA Inspection, the inspector again requested Site records, including the SWPPP, erosion control map, notice of intent, and Site inspection reports. After multiple follow-ups on September 21, 2021, September 28, 2021, and October 9, 2021, on October 9, 2021, Respondents provided EPA with the SWPPP, erosion control map, and notice of intent. To date, EPA has not received any site inspection reports.

EPA’s Allegations

Count 1

Failure to Maintain SWPPP Onsite

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

31. Part 7 of the NPDES Permit requires Respondent, before initiating construction activities at the Site, to develop a SWPPP that is specific to the construction activities that are to be employed at the Site.

32. Part 10.1 of the NPDES Permit requires Respondent to maintain the SWPPP for a period of three years following the date of the notice of termination of the construction project,

and that the SWPPP must be kept on-site or in a readily available location identified in the Site's notice of intent until final stabilization has been completed.

33. During the EPA Inspection, the inspector requested a copy of the SWPPP; however, a copy was not at the Site nor was one provided to EPA until 18 days after the EPA Inspection.

34. Respondent's alleged failure to maintain a SWPPP onsite is a violation of the conditions or limitations of the NPDES Permit.

Count 2

Failure to Properly Select, Install and/or Maintain BMPs and Fully Implement the Provisions of the SWPPP

35. The paragraphs above are re-alleged and incorporated herein by reference.

36. Part 3.8 of the NPDES Permit requires that dewatering activities be controlled in accordance with the NPDES Permit, including employing bag filters or equivalent technology.

37. Part 7 of the NPDES Permit requires that a SWPPP be prepared and fully implemented. Part 7.1 of the NPDES Permit further requires that BMPs and/or pollution controls are properly installed and maintained at the locations and relative timeframes specified in the SWPPP and that any stormwater runoff from disturbed areas leaving the Site must first pass through an appropriate sediment control.

38. Part 7.2.3 of the NPDES Permit requires Respondent to design, install and maintain BMPs to, among other things, minimize sediment discharges from the site, minimize off-site tracking of soils by cleaning any off-site track out by the end of the workday, and provide storm drain inlet protection for inlets down gradient of disturbed project areas that are not fully stabilized.

39. Part 7.2.5 of the NPDES Permit requires that exposed soils where activities have been inactive for 14 days or more need to be stabilized.

40. Part 11.1 of the NPDES Permit requires all stormwater controls to be maintained and effective.

41. During the EPA Inspection, the inspector observed and documented several areas of the Site that lacked BMPs, including:

- a. Vehicle trackout was present on the roadway near Lot 10 of the Site;
- b. Several large unstabilized stockpiles of earthen debris; and
- c. Dewatering was occurring at a large pit that had been dug out for the foundation of a home on Lot 10 and there was no filter device on the end of the dewatering hose prior to the discharge point.

42. During the EPA Inspection, the inspector observed and documented several BMPs on the Site in need of maintenance, including:

- a. At least five (5) of the Site's stormwater drain inlets were in need of maintenance or needed to be replaced, including gutter controls full of sediment; and
- b. At least four (4) instances of silt fence in need of repair or replacement.

43. Respondent's alleged failure to properly design, install and/or maintain BMPs at the Site and failure to fully implement the provisions of the SWPPP is a violation of the conditions or limitations of the NPDES permit.

**Count 3
Failure to Conduct and/or Document Inspections**

44. The paragraphs above are re-alleged and incorporated herein by reference.

45. Part 7.2.10 of the NPDES Permit requires regular Site inspections a minimum of once every 14 days and an inspection by the end of the next day following a rain event which results in a rainfall total of 0.5 inches or greater, with certain exceptions not applicable here. A report of each regularly scheduled inspection and required rain event inspection shall be documented.

46. Part 7.2.10 of the NPDES Permit requires any deficiencies in the operation or maintenance, effectiveness, adequacy or coverage extent of all installed BMPs, temporary stabilization measures and other pollution control measures identified during the inspection to be noted in the inspection report and corrected within seven (7) calendar days of the inspection unless infeasible and, if infeasible, the reason shall be noted in the inspection report with a specific timeframe for completing all needed maintenance and repairs.

47. Part 10.1 of the NPDES Permit requires Respondent to maintain all Site inspection records for a period of three years following the date of the notice of termination of the construction project, and that all records must be kept on-site or in a readily available location identified in the Site's notice of intent until final stabilization has been completed.

48. During the EPA Inspection, the Inspector requested the Site inspection records. To date, Respondent has not provided any Site inspection records.

49. Based on a review of relevant rainfall data, Respondent did not conduct and/or document required inspections every 14 days or by the end of the next day following rain events of 0.5 inches or greater on sixty-eight (68) occasions in 2020 and 2021.

50. Respondent's alleged failure to conduct and/or document required inspections is a violation of the conditions or limitations of the NPDES Permit.

Penalty

51. As alleged in the preceding Counts 1 through 3, 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, Respondent is 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

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

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

54. Respondent neither admits nor denies the factual allegations.

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

56. 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.

57. Respondent consents to receiving the filed Consent Agreement/Final Order electronically at the following email address: dan@quinnkc.com with a copy to danliker@dsdklaw.com.

58. The undersigned representative 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.

59. 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.

60. Respondent certifies by the signing of this Consent Agreement/Final Order that Respondent's Site is in current compliance with NPDES General Permit KSR100000, with Permit Authorization No. KSR115082, and the CWA, and applicable regulations.

Penalty Payment

61. Respondent agrees that, in settlement of the claims alleged in this Consent Agreement/Final Order, Respondent shall pay a civil penalty of **Forty-Four Thousand One-Hundred Fifty-Six Dollars (\$44,156.00)** 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.

62. 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-07-2023-0128 to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979078
St. Louis, Missouri 63197-9000

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

63. Respondent shall simultaneously send copies of the transmittal letter and the check, or proof of other form of payment, as directed above, to the following:

Regional Hearing Clerk at: R7_Hearing_Clerk_Filings@epa.gov

Adam Hilbert at: hilbert.adam@epa.gov

64. 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.

65. 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

66. 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.

67. 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.

68. 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.

69. Notwithstanding any other provision of this Consent Agreement/Final Order, 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.

70. With respect to matters not addressed in this Consent Agreement/Final Order, 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

71. 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.

72. 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. All time periods herein shall be calculated therefrom in calendar days unless otherwise provided in this Consent Agreement/Final Order.

73. 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).

74. 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.

75. 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:

David Cozad
Director
Enforcement and Compliance Assurance Division

Adam Hilbert
Office of Regional Counsel

For the Respondent, Gaten Properties, LLC:



Signature

Date 9/14/23

Name Daniel Quinn

Title Manager

Member

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:

Daniel Quinn
Resident Agent, Gaten Properties, LLC
dan@quinnkc.com

Copy emailed to Respondent's representative:

Deron Anliker
Duggan Shadwick Doerr & Kurlbaum LLC
danliker@dsdklaw.com

Copy emailed to representatives for Complainant:

Adam Hilbert
EPA Region 7 Office of Regional Counsel
hilbert.adam@epa.gov

Dr. Delia Garcia
EPA Region 7 Enforcement and Compliance Assurance Division
garcia.delia@epa.gov

Copy emailed to KDHE:

Tom.stiles@ks.gov
Mr. Tom Stiles, Director
Kansas Department of Health and Environment, Bureau of Water

Date

Regional Hearing Clerk