

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

IN THE MATTER OF:)
)
Evergreen Development, Inc.) COMPLAINT AND NOTICE OF
) OPPORTUNITY FOR HEARING
and)
) Docket No. CWA-07-2022-0134
)
Mark Schmidt,)
)
)
Respondents)
)
)
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, 40 C.F.R. Part 22 (Consolidated Rules).

2. This Complaint serves as notice that the United States Environmental Protection Agency (EPA) has reason to believe that Respondents have violated Sections 301, 402, and 404 of the CWA, 33 U.S.C. §§ 1311, 1342, and 1344, and regulations promulgated thereunder.

3. 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 U.S. Environmental Protection Agency (“EPA”). The Administrator has delegated this authority to the Regional Administrator, EPA Region 7, who in turn has delegated it to the Director of the Enforcement and Compliance Assurance Division of EPA Region 7 (Complainant).

4. The Respondents in this case are Evergreen Development, Inc., a corporation incorporated under the laws of the state of Nebraska, and Mark Schmidt, the operator of the Site.

Statutory and Regulatory Framework

5. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants except in compliance with, *inter alia*, Sections 402 and 404 of the CWA, 33 U.S.C. §§ 1342, 1344.

6. 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.

7. Section 404 of the CWA, 33 U.S.C. § 1344, specifically requires a person to obtain a permit from the Secretary of the Army acting through the Chief of Engineers, commonly referred to as the U.S. Army Corps of Engineers (hereinafter “Corps”), for any discharge of “dredged or fill material” into the “navigable waters” of the United States.

8. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines “navigable waters,” in part, as the “waters of the United States.”

9. 40 C.F.R. § 232.2 defines “discharge of fill material” as “the addition of fill material into waters of the United States.”

10. 40 C.F.R. § 232.2 defines “fill material” as any material that has the effect of “replacing any portion of a water of the United States with dry land or changing the bottom elevation of any portion of a water of the United States.”

11. 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.

12. 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.

13. Pursuant to Section 402(p) of the CWA, 33 U.S.C. § 1342(p), EPA promulgated regulations at 40 C.F.R. § 122.26 that set forth the NPDES permit requirements for stormwater discharges.

14. 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.

15. 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.

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. EPA maintains concurrent enforcement authority with authorized states for violations of the CWA.

Factual Background

17. Respondents are each a “person” within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

18. At all times relevant to this action, Respondents owned, operated, or otherwise controlled property and a residential construction site located in the Northwest Quarter of Section 11, Township 8 South, Range 8 East, in Lancaster County, Nebraska (hereinafter “the Site”).

19. The Site is a 16.5 acre residential development in the Village of Bennet, Nebraska.

20. A tributary to the Little Nemaha River enters the Site from the north through a large box culvert underneath Bennet Road, flows through the Site, and exits the Site on the eastern boundary underneath Hackberry Street.

21. Upon exiting the Site at Hackberry Street as described above, the tributary flows approximately 0.27 miles into the Little Nemaha River.

22. Starting on or about April 2019, Respondents conducted clearing and grading activities in the Site.

23. Since on or about April 2019, and continuing to the present, Respondents have disturbed approximately 12.1 acres within the Site.

24. Stormwater, snow melt, surface drainage, and runoff water leave Respondents’ Site and discharge into the tributary to the Little Nemaha River.

25. 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).

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

27. The tributary has perennial flow and a hydrological connection to the Little Nemaha River. The tributary and abutting wetlands are “navigable waters” within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7).

28. 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).

29. 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.

30. NDEE issued authorization to Respondents on March 22, 2019, for construction stormwater discharges under NPDES general permit NER160000, with permit tracking number CSW-201903475 ("Respondent's NPDES Permit"). The construction stormwater general permit was signed by the Nebraska Department of Environmental Quality on September 30, 2016, and was effective between November 1, 2016, and October 31, 2021. It was administratively extended until, among other things, permittees submit a new Notice of Intent for coverage under NPDES general permit NER210000, with effective dates of December 1, 2021, through November 20, 2026. On June 14, 2022, NDEE administratively terminated Respondents' NPDES coverage for failure to submit a Notice of Intent application for coverage under the new general permit, NER210000.

31. The principal requirement of Respondents' NPDES Permit was for the permittee 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 industrial activity for construction activities at the construction site, and to assure compliance with the terms and conditions of the Permit.

32. NDEE conducted stormwater inspections on September 8, 2020, November 5, 2020, and April 20, 2021, and documented violations of Respondents' NPDES Permit, including lack of BMPs and failure to maintain BMPs.

33. NDEE sent Respondents a Notice of Noncompliance on September 18, 2020, requesting Respondents take corrective action to address the violations identified by the NDEE inspections.

34. After receiving no response to the Notice of Noncompliance, NDEE filed a Compliance Order on June 30, 2021, requiring Respondents to take specific actions to address the violations. The Compliance Order was personally served on Respondents by the Lancaster County Sheriff's Office on July 6, 2021.

35. To date, Respondents have failed to respond to or comply with NDEE's Compliance Order. NDEE has requested that the EPA pursue the NPDES permit violations pursuant to the EPA's concurrent enforcement authority.

36. In or around September through October 2020, Respondents directed, caused, or conducted earthmoving work using a trackhoe, backhoe, bulldozer, and/or other heavy

equipment that widened and deepened the channel and placed fill material in the tributary to the Little Nemaha River and abutting wetlands.

37. On September 20, 2020, and November 5, 2020, Corps personnel conducted road-side investigations and observed fill material in the unnamed tributary to the Little Nemaha River within the Site and determined a violation of the CWA had occurred.

38. The Corps attempted to contact Respondent Mr. Schmidt by phone and sent Respondents letters containing notices of violation on October 2, 2020, and January 21, 2021.

39. On February 18, 2021, after receiving no response from Respondents to its attempts to contact or correspondence regarding the violations, the Corps Omaha District referred the results of the investigation to EPA Region 7 for potential enforcement.

40. On May 17, 2021, in the presence of Respondent Mr. Schmidt as the representative for Evergreen Development, Inc., EPA and Corps representatives conducted a site inspection and observed impacts in the tributary to the Little Nemaha River immediately downstream of the box culvert under Bennet Road and continuing along approximately 230 linear feet and to approximately 0.13 acres of abutting wetlands.

41. The fill material discharged by Respondents into the tributary to the Little Nemaha River is a “pollutant” within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

42. The heavy equipment used to place the fill material into the unnamed tributary to the Little Nemaha River constitutes a “point source” within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

43. The discharge of the fill material into the tributary to the Little Nemaha River constitutes the “discharge of a pollutant” within the meaning of Section 502(12) of the CWA, 33 U.S.C. § 1362(12).

44. On May 17, 2022, a representative of EPA conducted a road-side investigation and observed that the fill material remains in the unnamed tributary and observed rough grading, earth-moving equipment, and ongoing construction activities at the Site.

Findings of Violation

Count 1

Failure to Install BMPs / Failure to Implement the SWPPP

45. The facts stated above are herein incorporated by reference.

46. Part III of Respondents’ NPDES Permit required that a SWPPP be prepared that describes BMPs to be implemented on the Site to control pollutants in storm water. Part III.A.4 of Respondents’ NPDES Permit required that “the Permittee must implement the SWPPP and

modifications to the SWPPP from commencement of construction activity until final stabilization is complete.”

47. Part III.C of Respondents’ NPDES Permit required that the SWPPP describe, among other things, the interim and permanent stabilization practices and a schedule for their implementation, all temporary construction stormwater management practices that retain/detain flows or otherwise limit runoff and the discharge of pollutants from exposed areas of the construction site, measures to minimize vehicle tracking of sediments offsite include stabilization techniques at points of exit, controls for construction materials, products, and waste materials stored at the site and for equipment and vehicles maintained at the site, such as spill kits, drip pans, and absorbents.

48. Part III.E.2 of Respondents’ NPDES Permit required that Respondents control stormwater to minimize erosion, disturbance of steep slopes, and discharge of sediment from the Site, and provide and maintain natural buffers around Waters of the United States.

49. Parts III.E.3, III.F.1, and III.F.2 of Respondents’ NPDES Permit required Respondents to stabilize disturbed areas immediately unless infeasible, and requires stabilization when clearing, grading, excavating, or other earth disturbing activities have permanently ceased or temporarily ceased and will not resume for a period exceeding 14 calendar days.

50. Part III.L.2 of Respondents’ NPDES Permit required a sign or other notice posted conspicuously near the entrance of the construction site, unless infeasible, containing a copy of the SWPPP.

51. Section 1.5 of Respondents’ SWPPP provides the sequence of construction activity and BMP implementation, including that during site grading in weeks 2-6, Respondents will install silt fences around stockpiles and temporarily stabilize the stockpiles and areas where construction will cease for more than 14 days and in weeks 7-14, Respondents will construct a combined staging and materials storage area and install dumpsters for the Site.

52. Section 2.2 of Respondents’ SWPPP describes the temporary erosion and sediment control BMPs to be installed at the Site, including erosion checks and silt fences, silt fence or biologs on the downhill side of all construction areas, temporary mulch cover or hydro-mulching where construction ceases for more than 14 days, and crushed rock or stone at construction entrances and exits.

53. Section 2.3 of Respondents’ SWPPP describes the good housekeeping BMPs to be implemented at the Site, including collecting all waste materials in trash receptacles in the material storage area, making absorbent and spill cleanup material kits available and placing drip pans under all equipment parked overnight or not in use for a period of time.

54. During the NDEE Inspection on September 8, 2020, the inspector observed and documented several areas of the Site that were missing BMPs, including disturbed areas missing temporary erosion control BMPs, missing buffers for streams and wetlands, and missing BMPs for stockpiles. The inspector also observed that the construction entrances were not rocked.

55. During the NDEE Inspection on November 5, 2020, the inspector observed and documented the continued failure to install BMPs, including at construction entrances, recently graded areas, and slide slopes.

56. During the NDEE Inspection on April 20, 2021, the inspector observed that the sequence of construction activity and BMP implementation in the SWPPP was not being followed, and documented several areas of the Site that lacked erosion checks or complete silt fencing and showed evidence of erosion rills and gullies, construction equipment and materials not stored in the material storage area, waste material not collected in receptacles and exposed to stormwater, and lack of drip pans, absorbents, and spill kits in areas where heavy equipment was stored overnight.

57. Respondents' failures to properly install BMPs at the Site and failures to fully implement the provisions of the SWPPP are violations of the conditions or limitations of the NPDES permit, and as such, is a violation of Section 402(p) of the CWA, 33 U.S.C. § 1342(p).

Count 2

Failure to Maintain BMPs / Failure to Conduct and Document Periodic Inspections and/or Take Corrective Actions

58. The facts stated above are herein incorporated by reference.

59. Part III.F.8 of Respondents' NPDES Permit required that all temporary control measures be properly selected, installed, and maintained, and if periodic inspections or other information indicates a control is installed incorrectly or is ineffective, corrective actions must be completed within 7 days or before the next storm event, whichever is practicable.

60. Part III. J of Respondents' NPDES Permit required that Respondents conduct and document inspections at least once every 14 days and within 24 hours of the end of a storm event of 0.5 inches or greater in order to record whether any BMPs need to be maintained or have proved inadequate and locations where additional BMPs are needed, and take corrective action. Part III.K of Respondents' NPDES Permit required the SWPPP to be amended when inspections determine the SWPPP is ineffective at eliminating or significantly minimizing pollutants in stormwater discharges from the Site.

61. During the NDEE Inspection on September 8, 2020, the inspector observed and documented that grading had destroyed the integrity of the silt fence along the perimeter.

62. During the NDEE Inspection on April 20, 2021, the inspector observed and documented several areas of unmaintained sediment control fences where they had fallen, were installed incorrectly, or were full of sediment.

63. Given the conditions of the Site during each NDEE Inspection, and continued failure to maintain BMPs, Respondents failed to conduct and document periodic inspections and/or take corrective actions.

64. Respondents' failure to properly maintain BMPs at the Site and failure to conduct and document periodic inspections and/or take corrective actions are violations of the conditions or limitations of the NPDES permit, and as such, is a violation of Section 402(p) of the CWA, 33 U.S.C. § 1342(p).

Count 3
Unauthorized Discharge of Fill Material

65. The facts stated above are herein incorporated by reference.

66. Respondents did not obtain a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, prior to the performance of the fill placement described herein.

67. Respondents' discharge of pollutants from a point source into waters of the United States occurred without a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, and, therefore, these discharges violated Section 301 of the CWA, 33 U.S.C. § 1311.

Relief

68. For violations of CWA Sections 301, 402, and 404, 33 U.S.C. §§ 1311, 1342, and 1344, Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), authorizes the administrative assessment of civil penalties in an amount not to exceed \$10,000 per day for each day during which the violation continues, up to a maximum total penalty of \$125,000. Pursuant to the Civil Monetary Penalty Inflation Adjustment Rule of 2022, as mandated by the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended through the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, and the EPA's implementing regulations at 40 C.F.R. Section 19.4, civil administrative penalties of up to \$23,989 per day for each day during which a violation continues, up to a maximum of \$299,857, may be assessed for violations of CWA Sections 301, 402, and 404, 33 U.S.C. §§ 1311, 1342, and 1344, that occur after November 2, 2015.

69. Based on the foregoing Finding of Violations, and pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), EPA Region 7 hereby proposes to issue a Final Order Assessing an Administrative Penalty against the Respondents for the violations cited above, in the amount of **One Hundred and Thirty-Eight Thousand Four-Hundred and Fifty-Eight Dollars (\$138,458)**.

70. The proposed penalty is based upon the facts stated in this Complaint, the nature, circumstances, extent, and gravity of the violation, and with respect to the violator, ability to pay, any prior history of such violation, the degree of culpability, economic benefit or savings resulting from the violation, and such other matters as justice may require.

71. The penalty proposed in this Complaint is based upon the best information available to EPA at the time that this Complaint was issued. The penalty may be adjusted if the Respondents establishes bona fide issues of ability to pay, or other defenses relevant to the appropriate amount of the proposed penalty.

NOTICE OF OPPORTUNITY TO REQUEST A HEARING

Answer and Request for Hearing

72. As required by Section 309(g)(4) of the CWA, 33 U.S.C. § 1319(g)(4), prior to the assessment of a civil penalty, EPA will provide public notice of the proposed penalty, and reasonable opportunity for the public to comment on the matter, and present evidence in the event a hearing is held.

73. EPA has notified the state of Nebraska regarding this proposed action by mailing a copy of this document to the NDEE.

74. Respondents may request a hearing to contest any material fact contained in this Complaint above or to contest the appropriateness of the proposed penalty set forth therein. Such a hearing will be held and conducted in accordance with the Consolidated Rules, a copy of which is enclosed herein.

75. To avoid being found in default, which constitutes an admission of all facts alleged in this Complaint and a waiver of the right to hearing, Respondents must file a written answer and request for hearing within thirty (30) days of service of this Complaint and Notice of Opportunity for Hearing. The answer shall clearly and directly admit, deny, or explain each of the factual allegations contained in this Complaint with regard to which Respondents have any knowledge, or shall clearly state that Respondents have no knowledge as to particular factual allegations in this Complaint. The answer shall also state (a) the circumstances or arguments which are alleged to constitute the grounds of defense; (b) the facts that Respondents dispute; (c) the basis for opposing any proposed relief; and (d) whether a hearing is requested. Said answer shall be filed with the following:

Regional Hearing Clerk
U. S. Environmental Protection Agency Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219.

76. Failure to admit, deny or explain any material factual allegation in this Complaint constitutes an admission of the allegation.

77. A hearing upon the issues raised by this Complaint and the answer may be held if requested by Respondents in the answer. If Respondents do not request a hearing, the Presiding Officer may hold a hearing if issues appropriate for adjudication are raised in the answer.

78. In any hearing on the proposed penalty for this Complaint, members of the public to whom EPA is obligated to give notice of this proposed penalty action, will have the right, under Section 309(g) (4) (B) of CWA, 33 U.S.C. § 1319(g) (4) (B), to be heard and present evidence on the merits of the proposed CWA penalty assessment. If no hearing is held, EPA will issue a Final Order Assessing Administrative Penalties pursuant to the CWA, and only members of the public who submitted timely comments on the proposed penalty assessment will have an additional thirty (30) days to petition to set aside the said Order and to hold a hearing thereon.

EPA will grant the petition and will hold a hearing only if the petitioners' evidence is material and was not considered by EPA in the issuance of the Final Order.

79. If Respondents fail to file a written answer within thirty (30) days of service of this Complaint and Notice of Opportunity for Hearing, Respondents may be found in default. Such default by Respondents constitutes an admission of all facts alleged in this Complaint and a waiver of Respondent's right to contest such factual allegations. A Default Order may thereafter be issued by the Presiding Officer and the civil penalties proposed herein shall become due and payable unless the record clearly demonstrates that the requested relief is inconsistent with the CWA.

80. Whether or not Respondents request a hearing, an informal conference may be requested in order to discuss the facts of this case, the proposed penalty, and the possibility of settlement. To request a settlement conference, please contact:

Shane McCoin
Assistant Regional Counsel
United States Environmental Protection Agency Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219
Telephone: (913) 551-7955
Email: mccoin.shane@epa.gov

81. Please note that a request for an informal settlement conference does not extend the thirty (30) day period during which a written answer and request for a hearing must be submitted.

82. EPA encourages all parties against whom a civil penalty is proposed to pursue the possibilities of settlement as a result of an informal conference. Any settlement which may be reached as a result of such a conference shall be embodied in a written Consent Agreement and Final Order (CAFO) issued by the Regional Judicial Officer, EPA Region 7. The issuance of such a CAFO shall constitute a waiver of Respondent's right to request a hearing on any matter stipulated therein.

DAVID COZAD
Director
Enforcement and Compliance Assurance Division

SHANE MCCOIN
Assistant Regional Counsel
Office of Regional Counsel

CERTIFICATE OF SERVICE

I certify that on the date noted below I delivered this Complaint and Notice of Opportunity for Hearing to the Regional Hearing Clerk, U.S. Environmental Protection Agency, by electronic mail to: R7_Hearing_Clerk_Filings@epa.gov.

I further certify that on the dated noted below I sent by electronic mail a copy of the signed Complaint and Notice of Opportunity for Hearing to:

Reuel Andersen
Unit Chief, NPDES Permits and Compliance Unit
Nebraska Department of Environment and Energy
reuel.anderson@nebraska.gov

I have requested that a representative of the Lancaster County Sheriff's Office provide, by personal service, a copy of the signed Complaint and Notice of Opportunity for Hearing; a copy of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits, 40 C.F.R. Part 22; and a copy of the U.S. EPA Small Business Resources Information Sheet to the following:

Mark Schmidt
Respondent and Registered Agent
Evergreen Development, Inc.
8500 Lincoln Street
Lincoln, Nebraska 68526

Signature