

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

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:)	
)	
Majestic C Team, LLC)	Docket No. CWA-07-2016-0055
)	
Respondent)	CONSENT AGREEMENT/ FINAL ORDER
)	
Proceedings under Section 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g))	
_____)	

The U.S. Environmental Protection Agency, Region 7 (“EPA”) and Majestic C Team, LLC (“Respondent”) have agreed to a settlement of the alleged violations set forth in this Consent Agreement and Final Order (“CA/FO”). Thus this action is simultaneously commenced and concluded pursuant to Rules 22.13(b) and 22.18(b)(2) 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 (“Consolidated Rules”).

COMPLAINT

Jurisdiction

1. This is an administrative action for the assessment of civil penalties instituted pursuant to Section 309(g)(2)(B) of the Clean Water Act (“CWA”), 33 U.S.C. § 1319(g)(2)(B), and in accordance with the Consolidated Rules.

2. This CA/FO alleges that the Respondent discharged pollutants into waters of the United States in violation of Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342.

Parties

3. Complainant, by delegation from the Administrator of EPA to the Regional Administrator, EPA, Region 7, and re-delegation is the Director of Region 7's Water, Wetlands and Pesticides Division.

4. Respondent owns and operates a residential construction site located at the intersection of 168th Street and State Street in Omaha, Nebraska.

Statutory and Regulatory Framework

5. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants, unless such discharge is in compliance with, *inter alia*, Section 402 of the CWA, 33 U.S.C. § 1342, which provides that pollutants may be discharged only in accordance with the terms of a National Pollutant Discharge Elimination System permit.

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 502(7) of the CWA, 33 U.S.C. § 1362(7), defines "navigable waters," in part, as the "waters of the United States," which are defined at 40 C.F.R. § 232.2, and which include tributaries to waters of the United States.

8. 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.

9. 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.

10. 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.

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

12. The Nebraska Department of Environmental Quality ("NDEQ") 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.

13. On August 20, 2014, NDEQ issued Respondent a General Permit for construction storm water discharges ("General Permit"), NER114623. The General Permit governs stormwater discharges associated with industrial activity, including clearing, grading and excavation. The principal requirement of the General Permit is for the owner to develop and implement a Stormwater Pollution Prevention Plan ("SWPPP").

FACTUAL BACKGROUND

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 operator of a residential construction site ("Site"), comprised of approximately 75 acres, and located at the intersection of 168th Street and State Street in Omaha, Nebraska. At the time of the EPA inspection, described below, Respondent had cleared and graded approximately 18 acres of Phase I of the construction project.

16. The Site has "stormwater discharges associated with industrial activity" as defined by 40 C.F.R. § 122.26(b)(14), is a "point source" as defined by Section 502(14) of the CWA, 33 U.S.C. § 1362(14), and discharges into an unnamed tributary to Big Papillion Creek, both "waters of the United States," as defined by 40 C.F.R. § 232.2.

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

18. 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.

19. NDEQ issued NPDES Permit No. NER114623 to Respondent on August 20, 2014. This NPDES general permit governs Respondent's stormwater discharges that are associated with industrial activity at the Site.

20. On November 16-20, 2015, 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 its NPDES permit and the CWA. During the inspection, EPA issued Respondent a Notice of Potential Violation citing, *inter alia*, Respondent's failure to properly maintain best management practices, failure to establish effective ground cover to stabilize the Site and Respondent's contribution to an excursion above water quality standards.

21. On February 23, 2016, EPA issued Respondent a Findings of Violation and Order for Compliance, which included a 30 day opportunity for Respondent to confer with EPA concerning

the terms of, and basis for, the Order. The parties conferred on March 8, 2016 and the results of that conference are included in this Amended Findings of Violation and Order for Compliance.

FINDINGS OF VIOLATION

Count 1

Failure to Properly Operate and Maintain Best Management Practices

22. Part III, Section E.1 of Respondent's NPDES permit states that all erosion and sediment control measures and other protective measures identified in the SWPPP must be maintained in effective operating condition. Further, Respondent is required to perform maintenance on any BMPs that are not operating effectively within seven days of identifying such ineffective BMPs. Part III, Section L.4 of Respondent's NPDES permit requires Respondent to initiate stabilization measures where construction activities have temporarily or permanently ceased, but in no case more than 14 days after the construction activity has ceased.

23. During the EPA inspection referenced above, the inspector observed that: (1) silt fences were both undercut and over-topped; (2) sediment basins were full beyond recommended design capacity and in need of repair; (3) stormwater inlet protection devices had been removed at the site; (4) the washout of concrete chutes was not properly contained, and; (5) sparse vegetative ground cover estimated to be less than 25 percent of the Site's non-impervious surface, resulting in significant erosion near Site streets and significant amounts of soil in Site streets. A review of Respondent's Site inspection records indicate Respondent's awareness that silt fences were in need of maintenance between June and October 2015. Further, Respondent's written response to the NOPV issued during EPA's inspection indicates Respondent's awareness that the Site was not properly stabilized since at least September 2015.

24. Respondent's alleged failure to properly operate and maintain BMPs at the Site is a violation of the NPDES permit, and as such, is a violation of Sections 301(a) and 402(p) of the CWA, 33 U.S.C. §§ 1311(a), 1342(p).

Count 2

Failure to Ensure that Discharges do not Contribute to an Excursion of Water Quality Standards

25. Part IV, Section C.1 of Respondent's NPDES permit requires that Respondent install, implement and maintain BMPs that are as stringent as necessary to ensure that discharges do not cause or contribute to an excursion above any applicable water quality standard. Nebraska water quality standards require that surface waters be free of "objectionable films, colors, turbidity, or deposits" (Neb. Rev. Stat. Title 117, Chapter 4, § 005).

26. During the EPA inspection referenced above, the inspector observed discharges of storm water from the Site into the unnamed tributary to Big Papillion Creek, resulting in

observed increases of turbidity in the receiving stream, and which demonstrates a violation of state water quality standards.

27. Respondent's alleged failure to ensure that discharges from the Site do not contribute to an excursion of water quality standards is a violation of the NPDES permit, and as such, is a violation of Sections 301(a) and 402(p) of the CWA, 33 U.S.C. §§ 1311(a), 1342(p).

CONSENT AGREEMENT

28. Respondent admits the jurisdictional allegations of this CA/FO and agrees not to contest EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of the Final Order.

29. Respondent neither admits nor denies the factual allegations contained in this CA/FO.

30. Respondent waives any right to contest the allegations and its right to appeal the proposed Final Order accompanying this Consent Agreement.

31. Respondent and Complainant each agree to bear their own costs and attorney's fees.

32. Nothing contained in the Final Order shall alter or otherwise affect Respondent's obligations to comply with all applicable federal, state, and local environmental statutes and regulations and applicable permits.

33. Respondent certifies that it is fully authorized to enter the terms and conditions of this CA/FO and to execute and legally bind Respondent to it.

34. Respondent certifies by the signing of this CA/FO that, to the best of its knowledge, Respondent is in compliance with all requirements of Sections 301 and 402 of the CWA.

35. The effect of settlement is conditional upon the accuracy of the Respondent's representations to EPA, as memorialized in paragraph 34 above, of this CA/FO.

Supplemental Environmental Project

36. Respondent agrees to undertake the Supplemental Environmental Project ("SEP"), identified in Appendix A, which is enclosed to and incorporated into this Consent Agreement and Final Order. The parties agree that performance of the SEP, set forth in Appendix A, is intended to secure significant environmental restoration and protection.

37. Respondent agrees that within 30 days of the effective date of this Final Order, Respondent shall submit a Work Plan to EPA that describes the details and implementation of the SEP identified in Appendix A. The Work Plan shall include, but not be limited to: (a) the scope of work for the SEP; (b) the estimated start date and completion date for the SEP; and (c)

the names of persons implementing the SEP and the qualifications of each such person. EPA will review the Work Plan and approve it or provide Respondent written comments within thirty (30) days of receipt. If requested by Respondent, EPA will provide Respondent an opportunity to discuss the written comments. Respondent shall resubmit the Work Plan in a form that responds to EPA's comments within thirty (30) days after receipt of EPA's written comments. The Work Plan shall become a Final Work Plan upon approval by EPA. Respondent shall complete the SEP consistent with the approved schedule included in the Final Work Plan, but in no event later than twenty-four (24) months from the effective date of this Final Order.

38. Respondent shall notify EPA in writing within two weeks after the completion of the SEP. Within sixty (60) days after the completion of the SEP, Respondent shall submit to EPA a SEP Completion Report that shall include, but not be limited to, the following:

- a. A description of the activities that Respondent completed in its implementation of the SEP Work Plan.
- b. A signed and notarized certification that none of the cost incurred in implementation of the SEP was funded in any part by a federal grant or other form of federal financial assistance.
- c. An itemized accounting of the costs incurred per project in performance of the SEP.

39. Respondent shall pay stipulated penalties in the following circumstances:

- a. Except as provided in subparagraphs (b) and (c) below, for a SEP, which has not been completed satisfactorily pursuant to the approved SEP Work Plan as described above and as determined by EPA, Respondent shall pay a stipulated penalty to the United States in the amount of Forty Two Thousand, Five Hundred Dollars (\$42,500), along with interest accrued at the statutory rate.
- b. If the SEP is not completed satisfactorily, but Respondent made good faith and timely efforts to complete the project and certifies, with supporting documentation, that at least 80% of the amount of money required to be spent for the project was expended on the SEP, Respondent shall not pay any stipulated penalty.
- c. If the SEP is satisfactorily completed, but the Respondent spent less than 80% of the amount of money required to be spent for the project, Respondent shall pay a stipulated penalty equal to the difference between the amount of the estimated SEP cost set forth in Appendix A and the amount expended in implementing the SEP.
- d. If no SEP is implemented and a penalty of Forty Five Thousand Five

Hundred and Twenty Five Dollars (\$45,525) is not paid within thirty (30) days of the effective date of this Consent Agreement and Final Order, Respondent shall pay a stipulated penalty of Five Thousand Dollars (\$5,000) in addition to that which is due, along with interest accrued at the statutory rate.

40. Payment of the stipulated penalties shall be immediately due and payable upon notice by EPA. Respondent's failure to pay any portion of the penalty assessed herein in accordance with the provisions of this Final Order may result in commencement of a civil action in Federal District Court to recover the total penalty required by the terms of the Final Order, together with interest thereon at the applicable statutory rate. Payment of the stipulated penalties shall be by check, cashier's, or certified check made payable to the "United States Treasury" and shall be remitted to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, Missouri 63197-9000.

The check shall note the case title and the docket number. A copy of the check shall be sent to Chris Muehlberger, Assistant Regional Counsel, U.S. Environmental Protection Agency, Region 7, 11201 Renner Boulevard, Lenexa, Kansas 66219.

41. Respondent hereby certifies that, as of the date of this Consent Agreement and Final Order, Respondent is not required to perform or develop the SEP by any federal, state or local law or regulation; nor is Respondent required to perform or develop the SEP by agreement, grant, or as injunctive relief in any other enforcement action or in compliance with state or local requirements. Respondent further certifies that Respondent has not received, and is not presently negotiating to receive, credit in any other enforcement action for the SEP.

42. EPA and its authorized representatives shall have access to the property Respondent owns that is the location of the SEP at all reasonable times to monitor Respondent's implementation of the SEP. Respondent shall use its best efforts to obtain for EPA access to property not owned by Respondent that is the location of a SEP at all reasonable times to monitor Respondent's implementation of the SEP. Best efforts shall include payment of reasonable costs to obtain access. Nothing herein shall be construed to limit EPA's access authority under the CWA or any other law.

43. Respondent consents to the issuance of the Final Order hereinafter recited and consents to the payment of a civil penalty of Ten Thousand Seven Hundred and Fifty dollars (\$10,750). Payment of this civil penalty and performance of the injunctive relief outlined in EPA's Amended Findings of Violation and Administrative Compliance Order, Docket number CWA-07-2016-0026, shall resolve all civil and administrative claims for all violations of CWA alleged in this document.

44. This Consent Agreement and Final Order addresses all civil and administrative claims for the CWA violations identified above, existing through the effective date of this Consent Agreement and Final Order. EPA reserves the right to take enforcement action with respect to any other violations of the CWA or other applicable law.

45. Respondent shall pay the penalty within thirty (30) days of the Effective Date of this Consent Agreement and Final Order. Payment shall be by check, cashier's, or certified check made payable to the "Environmental Protection Agency – OSLTF-311" and remitted to:

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

46. Respondent shall reference the Docket Number CWA-07-2016-0055 and In the Matter of the Majestic C Team, LLC on the check. A copy of each check shall also be mailed to:

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

and

Chris Muehlberger
Office of Regional Counsel
U.S. Environmental Protection Agency - Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219.

Reservation of Rights

47. EPA reserves the right to enforce the terms of this CA/FO by initiating a judicial or administrative action pursuant to Section 309 of the CWA, 33 U.S.C. § 1319.

48. With respect to matters not addressed in this CA/FO or the Administrative Compliance Order on Consent described above, EPA reserves the right to take any enforcement action pursuant to the CWA, or any other available legal authority, including without limitation, the right to seek injunctive relief, monetary penalties and punitive damages.

PENALTY

IT IS HEREBY AGREED BY THE PARTIES, and pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), it is ORDERED that:

49. Respondent shall pay a civil penalty of Ten Thousand Seven Hundred and Fifty dollars (\$10,750). The penalty shall be paid in full within thirty (30) days following receipt by Respondent of a fully executed copy of this CA/FO. Respondent shall pay the penalty by certified or cashier's check payable to "Treasurer, United States of America" and shall deliver it, with a transmittal that identifies the case name and docket number to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
PO Box 979077
St. Louis, Missouri 63197-9000.

The check must also be annotated with the docket number and with the name of the case. Copies of the transmittal letter and the check shall be simultaneously sent to:

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

and

Chris Muehlberger
Office of Regional Counsel
U.S. Environmental Protection Agency - Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219.

Should the civil penalty not be paid as provided above, interest will be assessed at the annual rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717. The interest will be assessed on the overdue amount from the due date through the date of payment.

50. No portion of the civil penalty or interest paid by Respondent pursuant to the requirements of this CA/FO shall be claimed by Respondent as a deduction for federal, state, or local income tax purposes.

Parties Bound

51. This Final Order shall apply to and be binding upon the Respondent, its agents, successors, and assigns. Respondent shall ensure that any directors, officers, employees, contractors, consultants, firms or other persons or entities acting under or for it with respect to matters included herein comply with the terms of this CA/FO.

Effective Date

52. This Final Order shall become effective upon filing pursuant to 40 C.F.R. § 22.31(b). All time periods herein shall be calculated therefrom unless otherwise provided in this

Final Order.

COMPLAINANT:
U.S. ENVIRONMENTAL PROTECTION AGENCY

Karen A. Flournoy
Director
Water, Wetlands and Pesticides Division

Date

Chris Muehlberger
Assistant Regional Counsel

Date

RESPONDENT:

For Majestic C Team, LLC:

Scott Semrad Manager
Name/Title


Signature

5/21/2016
Date

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