

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

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)	
)	Docket No. CWA-07-2020-0121
Towne & Country Manor)	
Development Corp.)	
)	
and)	
)	
Needham Excavating Inc.,)	
)	COMPLAINT AND
Respondents)	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, Towne & Country Manor Development Corp. and Needham Excavating Inc. (“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. Respondents are and were at all relevant times corporations under the laws of the state of Iowa.

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, 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 Iowa Department of Natural Resources (“IDNR”) is the state agency with the authority to administer the federal NPDES program in Iowa 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 a residential construction site known as the Townhomes at Northwest Pointe Place, comprised of approximately 2.7 acres, and located at the intersection of 53rd and Villa Drive in Davenport, Iowa (“Site”).

16. At the time of the EPA inspection, described below, Respondents had cleared and graded the 2.7 acres that form the construction project and was conducting construction activities.

17. Stormwater, snow melt, surface drainage, and runoff water leave Respondents’ Site via multiple stormwater inlets, travel through the city of Davenport’s municipal separate storm sewer system, and discharge into Candlelight Creek, approximately one-third of a mile from the Site.

18. 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).

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

20. Candlelight Creek is an intermittent stream and a tributary to Duck Creek, which is a tributary to the Mississippi River, which is a traditionally navigable water. Candlelight Creek is a “water 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. IDNR issued to Respondent Towne and Country Manor Development Corp. NPDES general permit 35118 – 34781 (“Respondent’s NPDES Permit”) on April 22, 2019, which is effective until April 22, 2020. This NPDES general permit governs 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. On October 17, 2019, 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 permit and the CWA (the “EPA Inspection”). During the EPA Inspection, or shortly thereafter, the inspector reviewed and obtained copies of documents related to the Permit, including without limitation, the Site’s SWPPP 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

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

27. Part III.C.5 of the NPDES Permit requires Respondents to “design, install, implement and maintain effective pollution prevention measures to minimize the discharge of pollutants. At a minimum, such measures must be designed, installed, implemented and maintained to ... (m)inimize the exposure of building materials, building products, construction wastes, trash ... and other materials present on the site to precipitation and storm water.”

28. Part IV of the NPDES Permit requires that a SWPPP be prepared and implemented in accordance with permit requirements. According to the permit, the SWPPP must, *inter alia*, “describe and ensure the implementation of practices which will be used to reduce the pollutants in storm water discharge associated with industrial activity for construction activities at the construction site and to assure compliance with the terms and conditions of this permit.”

29. Respondents’ SWPPP contains the following provisions requiring the design, installation, implementation, and/or maintenance of pollution prevention measures:

- a. Section 2.2 of Respondents’ SWPPP requires that “appropriate soil erosion and sediment controls should be implemented on-site and should be modified to reflect the current phase of construction. All temporary sediment and erosion control measures should be repaired or replaced as soon as deficiencies are noticed to maintain NPDES compliance.”
- b. Section 3.1 of Respondents’ SWPPP requires that “(a)ll waste materials should be

- collected and stored in approved receptacles. No waste should be placed in any location other than in the approved containers.”
- c. Section 3.2 of Respondents’ SWPPP requires the placement of concrete washout areas and that “containment facilities should be of sufficient volume to completely contain all liquid and concrete waste materials including enough capacity for anticipated levels of rainwater.”
 - d. Section 3.9 of Respondents’ SWPPP requires that “(s)tabilized construction entrance(s) should be installed to help reduce vehicle tracking of sediments off-site.”
 - e. Section 5.2 of Respondents’ SWPPP requires that “maintenance of controls [including silt fences and inlet protections] incorporated into this project should be performed as needed to assure their continued effectiveness.”

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. Vehicle tracking was observed off-site;
- b. Respondents had not established a stabilized entry and exit point for vehicle and equipment tracking along Villa Drive;
- c. Vehicles entering/exiting in multiple unstabilized entry/exit points;
- d. Respondents failed to install inlet protection on four storm drain inlets that received runoff from the Site resulting in accumulated sediment, debris, and construction materials adjacent to and inside the inlets;
- e. Respondents failed to properly install and maintain silt fences at multiple areas within Site;
- f. Respondents failed to place concrete washout stations within the Site;
- g. Recent concrete pouring and concrete waste was observed on the ground in multiple locations with no BMPs in place to contain the waste water; and
- h. Trash, building materials, and construction waste was observed throughout the Site outside of approved trash receptacles.

31. A review of Respondents’ self-inspection reports between May 24, 2019, and October 16, 2019, documented the above-referenced violations of the NPDES permit and SWPPP. Further, the reports demonstrate that Respondents failed to address at least ten BMP or SWPPP deficiencies over multiple months despite Respondents’ contractor-inspector’s repeated warnings about the deficiencies.

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

Count 2

Inadequate SWPPP

33. The paragraphs above are re-alleged and incorporated herein by reference.
34. Part IV.C of the NPDES Permit requires Respondents to amend the SWPPP “whenever there is a change in design, construction, operation, or maintenance, which has a significant effect on the potential for the discharge of pollutants ...”
35. Part IV.D.1.D of the NPDES Permit requires, *inter alia*, a site map “indicating drainage patterns ...” in Respondents’ SWPPP.
36. Based on a review of the facility’s self-inspection reports and SWPPP, EPA observed that Respondents failed to update the SWPPP after an October 16, 2019 self-inspection, including failure to show on its SWPPP a construction entry/exit point observed by EPA, failure to install a concrete wash out indicated on the SWPPP’s site map, and failure to install inlet protection devices that were designated on the SWPPP.
37. Based on a review of the facility’s SWPPP, EPA observed that Respondents failed to include drainage patterns on its SWPPP site map.
38. Respondents’ alleged failure to include required elements in its SWPPP is a violation of the conditions of limitations of the NPDES Permit, 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 \$21,933 per day for each day during which the violation continues, up to a maximum of \$274,159.

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 permit 35118-34781 and 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 Four Thousand Dollars (\$4,000) 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. The penalty amount is mitigated based on EPA's evaluation of Respondent's ability to pay

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-07-2020-0121 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:

Lisa Haugen
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 Iowa 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, Towne & Country Manor Development Corp:

 President July 28, 2020
Signature Date

Daniel P. Dolan
Name

President.
Title

For the Respondent, Needham Excavating Inc.:



07/29/20

Signature

Date

Nicholas Needham
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:

Kevin Dolan
Towne and Country Manor Development Corp.
kevin@dandolanhomes.com

and

Nick Needham
Needham Excavating, Inc.
nneedham@needhamex.com;

Copy emailed to Attorney for Complainant:

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

Copy by First Class Mail to the Iowa Department of Natural Resources:

Ted Petersen
Iowa Department of Natural Resources
502 E. 9th Street
Des Moines, Iowa 50319-0034

Date