

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VII  
901 NORTH FIFTH STREET  
KANSAS CITY, KANSAS 66101

07 FEB -7 AM 10:29  
ENVIRONMENTAL PROTECTION  
AGENCY-REGION VII  
REGIONAL HEARING CLERK

BEFORE THE ADMINISTRATOR

IN THE MATTER OF )  
)  
)  
D.R.A. Properties, L.C. )  
1525 NE 36<sup>th</sup> Street )  
Ankeny, Iowa 50021 )  
)  
and )  
)  
MJ Properties, L.L.C. )  
5525 NE 22<sup>nd</sup> Street )  
Des Moines, Iowa 50313 )  
)  
Respondents )  
)  
Proceedings under Section 309(g) of the )  
Clean Water Act, 33 U.S.C. § 1319(g) )  
)  
\_\_\_\_\_ )

Docket No. CWA-07-2006-0177  
CONSENT AGREEMENT  
AND FINAL ORDER

The United States Environmental Protection Agency (EPA), Region VII (Complainant) and D.R.A. Properties, L.C. and MJ Properties L.L.C., (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) 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 (Consolidated Rules), 40 C.F.R. §§ 22.13(b) and 22.18(b)(2).

ALLEGATIONS

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.

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

#### Parties

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 EPA. The Administrator has delegated this authority to the Regional Administrator, EPA, Region VII, who in turn has delegated it to the Director of the Water, Wetlands and Pesticides Division of EPA, Region VII (Complainant).

4. Respondents are D.R.A. Properties L.C. (DRA) and MJ Properties L.L.C. (MJ), companies registered under the laws of Iowa and authorized to conduct business in the State of Iowa.

#### 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, Section 402 of the CWA, 33 U.S.C. § 1342. Section 402 of the CWA, 33 U.S.C. § 1342, provides that pollutants may be discharged only in accordance with the terms of a National Pollutant Discharge Elimination System (NPDES) permit issued pursuant to that Section.

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 402(p) of the CWA, 33 U.S.C. § 1342(p), sets forth requirements for the issuance of NPDES permits for the discharge of storm water. Section 402(p) of the CWA, 33 U.S.C. § 1342(p), requires, in part, that a discharge of storm water associated with an industrial activity must conform with the requirements of an NPDES permit issued pursuant to Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342.

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

9. 40 C.F.R. § 122.26(a)(1)(ii) and 122.26(c) requires dischargers of storm water associated with industrial activity to apply for an individual permit or to seek coverage under a promulgated storm water general permit.

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 (5) acres of total land area which are not part of a larger common plan of development or sale.

11. 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, 33 U.S.C. § 1342. EPA maintains concurrent enforcement authority with delegated states for violations of the CWA.

12. IDNR issued an NPDES General Permit for the discharge of storm water associated with construction activities, General Permit No. 2 (General Permit). The General Permit became effective on October 1, 2002, and expires on October 1, 2007. The General Permit governs storm water discharges associated with industrial activity for construction activity.

#### Factual Background

13. Each Respondent is a “person” as defined by Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

14. At all times relevant to this action, DRA was the owner and/or operator of a construction site known as the Albaugh Golf Course, located at NE 36<sup>th</sup> Street & I-35, Ankeny, Iowa (Golf Course). Construction activities occurred at the Golf Course site including clearing, grading, and excavation which disturbed five (5) or more acres of total land area or which disturbed less than five (5) acres of total land area that was part of a larger common plan of development or sale.

15. At all times relevant to this action, DRA was the owner and/or operator of a construction site known as Briar Creek, which consists of both the Briar Creek and Renaissance Villas developments (Briar Creek), located at NE Delaware Avenue & NE 36<sup>th</sup> Street, Ankeny, Iowa. Construction activities occurred at Briar Creek including clearing, grading, and excavation which disturbed five (5) or more acres of total land area or which disturbed less than five (5) acres of total land area that was part of a larger common plan of development or sale.

16. Prior to October 30, 2002, DRA was the owner and/or operator of a construction site known as Briar Creek South, located at NE Delaware Avenue & NE 29<sup>th</sup> Street, Ankeny, Iowa. On October 30, 2002, ownership of Briar Creek South was transferred to MJ Properties, L.L.C. At the time of the inspection referenced in paragraph 24 below, DRA was the operator of the Briar Creek South site. According to Part II(F) of the General Permit, the permittee (DRA) and the new owner (MJ) are responsible for compliance with the permit unless IDNR has been

notified that the new owner has agreed in writing to be solely responsible for compliance with the permit. As of the time of inspection, notification to IDNR had not occurred; therefore MJ, as owner and/or operator of Briar Creek South, was responsible for compliance with DRA's General Permit for Briar Creek South along with DRA. Construction activities occurred at Briar Creek South including clearing, grading and excavation which disturbed five (5) or more acres of total land area or which disturbed less than five (5) acres of total land area that was part of a larger common plan of development or sale.

17. Storm water, snow melt, surface drainage, and runoff water leaves Respondents' facilities and discharges directly into Otter Creek and the Ankeny Storm Water System which drains to Four Mile Creek. The runoff and drainage from Respondents' facilities is "storm water" as defined by 40 C.F.R. § 122.26(b)(14)(x), and is a "point source" as defined by 502(14) of the CWA, 33 U.S.C. § 1362(14).

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

19. Otter Creek is a tributary of Four Mile Creek. Four Mile Creek is a tributary of the Des Moines River.

20. Storm water runoff from Respondents' construction sites 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).

21. Respondents' discharge of pollutants associated with an industrial activity, as defined by 40 C.F.R. § 122.26(b)(14)(x), requires a permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

22. DRA applied for and was issued NPDES permit coverage under the General Permit described in paragraph 12 above. IDNR assigned DRA permit number IA-6576-6379, which was issued on August 1, 2003, for the Albaugh Golf Course; permit number IA-5601-5422, which was issued on November 13, 2002, for Briar Creek South; and permit number IA-4727-4560, which was issued on April 24, 2001, for Briar Creek.

23. On April 12 and 13, 2004, IDNR performed an inspection of the Albaugh Golf Course to determine compliance with the facility's Iowa NPDES General Permit.

24. On April 14, 2004, EPA performed an inspection of the Albaugh Golf Course, Briar Creek and Briar Creek South under the authority of Section 308(a) of the CWA, 33 U.S.C. § 1318(a). The purpose of the inspection was to evaluate the treatment and disposal of storm

water at the site in accordance with the CWA.

Findings of Violation

**Count 1**

**FAILURE TO DEVELOP AN ADEQUATE SWPPP**

25. The facts stated in paragraphs 13 through 24 above are herein incorporated.

26. Part IV of the DRA's General Permit requires in part that the storm water pollution prevention plan (SWPPP) include, *inter alia*, the following items:

- A. The SWPPP shall identify potential sources of pollution which may reasonably be expected to affect the quality of the storm water discharge from construction activities. (Part IV).
- B. The SWPPP must be amended whenever there is a change in design, construction, operation, maintenance, or whenever there is a change in ownership or transference of the General Permit. (Part IV(C)).
- C. The SWPPP site description must include a site map specifying the locations where storm water is discharged to surface water. (Part IV(D)(1)(D)).
- D. The SWPPP must include description of construction or waste materials expected to be stored on site with information regarding controls used to reduce pollutants from these materials. (Part IV (D)(2)(C)(1)).
- E. The SWPPP shall identify and ensure the implementation of appropriate pollution prevention measures for non-storm water discharges. (Part IV(D)(5)).
- F. The SWPPP must include certifications signed by all contractors and subcontractors executing measures described in the SWPPP. (Part (D)(7)(A)).

27. At the time of the EPA inspection referenced in paragraph 24 above, DRA's SWPPP for the Briar Creek and Briar Creek South developments did not address the requirements contained in parts A, B, D, E and F of paragraph 26 above.

28. At the time of the EPA inspection referenced in paragraph 24 above, DRA's SWPPP for the Golf Course did not address the requirement contained in parts A, C, D, E and F of paragraph 26 above.

29. Respondents' failure to develop an adequate SWPPP is a violation of DRA's General Permit, and as such, is a violation of Sections 301(a) and 402(p) of the CWA, 33 U.S.C. § 1311(a) and § 1342(p).

### **Count 2**

#### **FAILURE TO INSTALL APPROPRIATE BEST MANAGEMENT PRACTICES**

30. The facts stated in paragraphs 13 through 24 above are herein incorporated.

31. Part IV of the DRA's General Permit requires that DRA develop and implement a SWPPP that describes and ensures implementation of Best Management Practices (BMPs) in order to reduce the amount of sediment and other pollutants in storm water discharges associated with DRA's construction activities. As owner and/or operator of Briar Creek South, MJ is responsible for compliance with DRA's General Permit along with DRA.

#### **A. Lack of Sediment Control Structures**

32. Part IV(D)(2)(A)(2)(b) of the DRA's General Permit requires, for drainage areas serving ten (10) or more acres, the installation of a sediment basin, sediment traps, silt fences, or equivalent sediment controls for all sideslope and downslope boundaries of the construction area.

33. At the time of the IDNR inspection referenced in paragraph 23 above, DRA had an improperly designed sedimentation basin and had not installed silt fencing along Otter Creek and in the area that drains the northern 25 acres of the Albaugh Golf Course.

34. At the time of the EPA inspection referenced in paragraph 24 above, DRA had not installed silt fencing around two storm water inlets located near 36<sup>th</sup> St. in the Renaissance Villas portion of the Briar Creek site as required by the SWPPP.

35. At the time of the EPA inspection referenced in paragraph 24 above, DRA and MJ had not installed any silt fencing along the southern boundary of the Briar Creek South development as required by the SWPPP.

36. At the time of the EPA inspection referenced in paragraph 24 above, DRA had not installed portions of silt fencing along segments of the eastern boundary of the Briar Creek development as required by the SWPPP. DRA and MJ had not installed portions of silt fencing

along the eastern boundary and Briar Creek South development as required by the SWPPP.

37. At the time of the EPA inspection referenced in paragraph 24 above, DRA had not installed mechanisms to protect the storm drain inlets at the Renaissance Villas and Briar Creek developments. DRA and MJ had not installed storm drain inlet protection at the Briar Creek South development.

### **B. Lack of Vehicle Track-out Controls**

38. Part IV(D)(2)(C)(2) of the DRA's General Permit requires that off-site vehicle tracking of sediments be minimized.

39. At the time of the EPA inspection referenced in paragraph 24 above, track-out of sediment was observed at the Briar Creek and Briar Creek South developments. DRA failed to install appropriate controls to minimize off-site tracking of sediments at the Briar Creek site. DRA and MJ failed to install appropriate controls to minimize off-site tracking of sediments at the Briar Creek South site.

40. Respondents' failure to install the appropriate best management practices is a violation of DRA's General Permit, and as such, is a violation of Sections 301(a) and 402(p) of the CWA, 33 U.S.C. § 1311(a) and § 1342(p).

### **Count 3**

#### **FAILURE TO MAINTAIN POLLUTION CONTROL MEASURES**

41. The facts stated in paragraphs 13 through 24 above are herein incorporated.

42. Part VI(M) of DRA's General Permit requires that DRA shall at all times properly operate and maintain all facilities and systems of treatment and control which are used to achieve compliance with the terms of the General Permit and the SWPPP. As owner and/or operator of Briar Creek South, MJ is responsible for compliance with DRA's General Permit along with DRA.

43. At the time of the EPA inspection referenced in paragraph 24 above, DRA had not adequately maintained silt fences at the Albaugh Golf Course and Briar Creek developments. DRA and MJ had not adequately maintained silt fences at the Briar Creek South development.

44. Part IV(D)(2)(C)(2) of the DRA's General Permit requires that off-site vehicle tracking of sediments be minimized.

45. At the time of the EPA inspection referenced in paragraph 24 above, DRA had not adequately maintained the gravel egress area at the Albaugh Golf Course. As a result, sediment track-out was observed on NE 36<sup>th</sup> Street.

46. Respondents' failure to properly maintain pollution control measures is a violation of DRA's General Permit, and as such, is a violation of Sections 301(a) and 402(p) of the CWA, 33 U.S.C. § 1311(a) and § 1342(p).

#### **Count 4**

#### **FAILURE TO PERFORM AND DOCUMENT SITE INSPECTIONS**

47. The facts stated in paragraphs 13 through 24 above are herein incorporated.

48. Part IV(D)(4) of DRA's General Permit requires that regular inspections be performed at a minimum of once every seven calendar days and within twenty-four (24) hours of the end of a storm that is 0.5 inches or greater on disturbed areas of the construction site. In addition, it requires that necessary modifications revealed by the inspection be noted in a report and implemented within seven calendar days of the inspection. The report is to be retained as part of the SWPPP for at least three years or until final stabilization is achieved. As owner of Briar Creek South, MJ is responsible for compliance with DRA's General Permit along with DRA.

49. The EPA inspection referenced in paragraph 24 above found that DRA did not perform and document weekly site inspections during construction which occurred after seeding on the Briar Creek site. Both DRA and MJ Properties failed to perform and document weekly site inspections during construction which occurred after seeding on the Briar Creek South site.

50. The EPA inspection referenced in paragraph 24 above found that DRA did not perform and document weekly site inspections on the Albaugh Golf Course site.

51. Respondents' failure to perform and document site inspections is a violation of the DRA's General Permit, and as such, is a violation of Sections 301(a) and 402(p) of the CWA, 33 U.S.C. § 1311(a) and § 1342(p).

#### **Relief**

52. Based on the foregoing Findings of Violation, and pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), EPA, Region VII hereby proposes to issue a Final Order assessing an administrative penalty against the D.R.A. Properties L.C. and MJ Properties L.L.C. for the violations cited above, in the amount of \$67,500.



### **CONSENT AGREEMENT**

1. Respondents and EPA agree to the terms of this Consent Agreement and Final Order and Respondents agree to comply with the terms of this Consent Agreement and Final Order.

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

3. Respondents neither admit nor deny the factual allegations and legal conclusions set forth in this Consent Agreement and Final Order.

4. Respondents waive their right to a judicial or administrative hearing on any issue of fact or law set forth above, and their right to appeal this Consent Agreement and Final Order.

5. Respondents and Complainant agree to conciliate the matters set forth in this Consent Agreement and 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.

6. This Consent Agreement and Final Order addresses all civil and administrative claims for the CWA violations identified above. Complainant reserves the right to take any enforcement action with respect to any other violations of the CWA or any other applicable law.

7. Nothing contained in this Consent Agreement and 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.

8. The undersigned representative of each Respondent certifies that he or she is fully authorized to enter the terms and conditions of this Consent Agreement and Final Order and to execute and legally bind the representative's respective Respondent to it.

9. DRA certifies, that as of the date that it executes this Consent Agreement and Final Order, it is in compliance at the Briar Creek, Briar Creek South and Albaugh Golf Course sites with the requirements of Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342. MJ certifies, that as of the date that it executes this Consent Agreement and Final Order, it is in compliance at the Briar Creek site with the requirements of Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342.

10. The effect of settlement described in paragraph 6 above is conditional upon the accuracy of the Respondents' representations to EPA, as memorialized in paragraph 9 above, of this Consent Agreement and Final Order.

11. Respondents agree that, in settlement of the claims alleged in this Consent Agreement and Final Order, Respondents shall pay a penalty of \$67,500 as set forth in paragraph 1 of the Final Order.

12. Respondents understand that failure to pay any portion of the civil penalty on the date the same is due may result in the commencement of a civil action in Federal District Court to collect said penalty, along with interest thereon at the applicable statutory rate.

## **FINAL ORDER**

### **Payment Procedures**

Pursuant to the authority of Section 309(g) of the CWA, 33 U.S.C. § 1319(g), and according to terms of this Consent Agreement and Final Order, IT IS HEREBY ORDERED THAT:

1. Respondents shall pay a mitigated civil penalty of Sixty-Seven Thousand Five Hundred Dollars (\$67,500) within thirty days of the effective date of this Final Order.

2. Payment of the penalty shall be by cashier or certified check made payable to the "United States Treasury" and remitted to:

U.S. Environmental Protection Agency Region VII  
P.O. Box 371099M  
Pittsburgh, Pennsylvania 15251.

The payment shall identify the Respondents by name and docket number (CWA-07-2006-0177). Copies of the check shall be mailed to:

Jonathan W. Meyer  
Assistant Regional Counsel  
U.S. Environmental Protection Agency - Region VII  
901 North 5th Street  
Kansas City, Kansas 66101

and

Kathy Robinson  
Regional Hearing Clerk  
U.S. Environmental Protection Agency - Region VII

901 North 5th Street  
Kansas City, Kansas 66101.

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

#### **Parties Bound**

4. This Consent Agreement and 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 and Final Order.

#### **General Provisions**

5. Notwithstanding any other provision of this Consent Agreement and Final Order, EPA reserves the right to enforce the terms of this Consent Agreement and 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.

6. Complainant reserves the right to take enforcement action against Respondents for any past or future violations of the CWA and its implementing regulations and to enforce the terms and conditions of this Consent Agreement and Final Order.

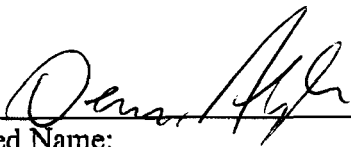
7. This Order shall be entered and become effective only after the conclusion of the period of public notice and comment required pursuant to Section 309(g)(4) of the CWA, 33 U.S.C. § 1319(g)(4), and 40 C.F.R. § 22.45. Unless otherwise stated, all time periods stated herein shall be calculated in calendar days from such date.

8. Respondents and Complainant shall bear their respective costs and attorney's fees.

9. The headings in this Consent Agreement and Final Order are for convenience of reference only and shall not affect interpretation of this Consent Agreement and Final Order.

*In the matter of  
D.R.A. Properties, L.C. and  
MJ Properties L.L.C.  
Consent Agreement and Final Order  
Page 12 of 15*

**For the Respondent D.R.A. Properties L.C.:**

  
\_\_\_\_\_  
Printed Name:  
Title: *Manager*

*12/18/06*  
\_\_\_\_\_  
Date

*In the matter of  
D.R.A. Properties, L.C. and  
MJ Properties L.L.C.  
Consent Agreement and Final Order  
Page 13 of 15*

**For the Respondent MJ Properties L.L.C.:**

*Matt Meredith*

Printed Name:

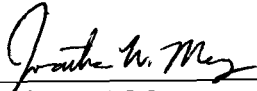
Title: *Member*

*12/18/06*

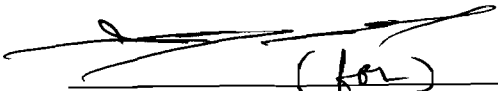
Date

*In the matter of  
D.R.A. Properties, L.C. and  
MJ Properties L.L.C.  
Consent Agreement and Final Order  
Page 14 of 15*

**For the Complainant:**  
The United States Environmental Protection Agency

  
\_\_\_\_\_  
Jonathan W. Meyer  
Assistant Regional Counsel

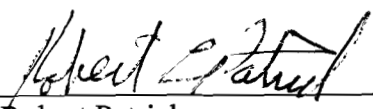
12-22-06  
Date

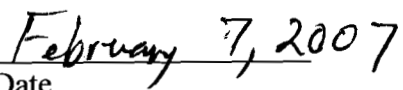
  
\_\_\_\_\_  
(for)  
Art Spratlin  
Division Director  
Water, Wetlands and Pesticides Division

12/26/06  
Date

*In the matter of  
D.R.A. Properties, L.C. and  
MJ Properties L.L.C.  
Consent Agreement and Final Order  
Page 15 of 15*

IT IS SO ORDERED. This Final Order shall become effective immediately.

  
\_\_\_\_\_  
Robert Patrick  
Regional Judicial Officer

  
\_\_\_\_\_  
Date

IN THE MATTER OF D.R.A. Properties, L.C. and MJ Properties, L.L.C., Respondents  
Docket No. CWA-07-2006-0177

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Consent Agreement and Final Order was sent this day in the following manner to the addressees:

Copy hand delivered to  
Attorney for Complainant:


Jonathan W. Meyer  
Assistant Regional Counsel  
Region VII  
United States Environmental Protection Agency  
901 N. 5<sup>th</sup> Street  
Kansas City, Kansas 66101

Copy by Certified Mail Return Receipt to:

Melissa Ince, Esq.  
Polsinelli, Shalton, Flanigan, Suelthaus PC  
700 West 47<sup>th</sup> Street, Suite 1000  
Kansas City, Missouri 64112

Scott Young, Esq.  
Polsinelli, Shalton, Flanigan, Suelthaus PC  
700 West 47<sup>th</sup> Street, Suite 1000  
Kansas City, Missouri 64112

Dated: 2/7/07

  
Kathy Robinson  
Hearing Clerk, Region 7