

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL

STATE OF WYOMING

IN THE MATTER OF THE APPEAL OF)
NOTICE OF VIOLATION AND)
ORDER NO. 4331-08)
ISSUED TO KDA CONSTRUCTION, INC.)

Docket No. 08-3807

FILED

APR 23 2009

*Jim Ruby, Executive Secretary
Environmental Quality Council*

ORDER GRANTING SUMMARY JUDGMENT

THIS MATTER has come before the Environmental Quality Council on March 25, 2009, in Cheyenne, Wyoming upon Respondent’s Motion for Summary Judgment.

The Council members present at the hearing were Dennis M. Boal, Chairman, Thomas Coverdale, Presiding Officer, Tim Flitner, Catherine Guschewsky, John N. Morris, F. David Searle, and Dr. Fred Ogden. Also present for the Council were Jim Ruby, Executive Secretary of the Environmental Quality Council (EQC) and Marion Yoder, Senior Assistant Attorney General. The Respondent, the Wyoming Department of Environmental Quality, Water Quality Division (WQD) was represented by Luke J. Esch, Assistant Attorney General of the Attorney General’s Office. The Petitioner, KDA Construction, Inc., (KDA) were not present or represented at the hearing.

In Petitioner’s September 3, 2008 petition for review, Petitioner stated that the project had been abandoned and there were no plans to continue the project. Respondent, DEQ filed a Motion for Summary Judgment on the Petitioner’s appeal accompanied by affidavits and responses regarding Petitioner’s grounds for appeal. The Council considered DEQ’s motion and responses and finds as follows:

I. STATEMENT OF CASE

Pursuant to the Wyoming Environmental Quality Act and DEQ regulations, DEQ is responsible for regulating and permitting discharges to surface waters within the State of Wyoming. In June of 2007, KDA requested discharge authorization from DEQ for storm water to be created by construction activities at the Bluffs Senior Estates project in Sweetwater County under the Large Construction General Permit.

On August 14, 2008, DEQ issued Notice of Violation and Order (NOV) No. 4331-08 to KDA for failing to abide by Wyoming Pollution Discharge Elimination System (WYPDES) Authorization WYR103444. On September 3, 2008, KDA filed a petition for appeal of NOV No. 4331-08, stating that the project had been cancelled due to lack of financing and stating that there were no plans to continue the project. DEQ answered KDA’s appeal, submitted discovery requests, and filed a motion for summary judgment with the EQC. KDA did not respond to DEQ’s discovery requests or the motion for summary judgment.

II. FINDINGS OF FACT

1. On June 18, 2007, DEQ received from KDA Construction, Inc., a Notice of Intent to Request Discharge Authorization for Storm Water from Large Construction Activities (NOI). *See* affidavit from Matt Buchholz, Environmental Scientist 3 at DEQ, hereinafter “Buchholz Aff.,” ¶ 7; Buchholz Aff., Ex. A.
2. KDA’s NOI was dated “6-15-07,” signed by Douglas Sproul as CEO of KDA, and requested discharge authorization from DEQ for storm water from construction activities at the Bluffs Senior Estates project in Sweetwater County under Large Construction General Permit WYR 10-0000. *See* Buchholz Aff. ¶ 8; Buchholz Aff., Ex. A at 1.
3. KDA’s NOI listed the “Name of project operator” who was “responsible for permit compliance” as “KDA Const. Inc.” and the mailing address as 3723 Fairview Industrial Dr. SE, Suite 196, Salem, OR 97302. *See* Buchholz Aff. ¶ 9; Buchholz Aff., Ex. A at 1.
4. KDA’s NOI described the Bluffs Senior Estates project as a project for the construction of a new residential site approximately 14.47 acres in size. *See* Buchholz Aff. ¶ 10; Buchholz Aff., Ex. A at 2.
5. KDA’s NOI stated that a storm pipe would be used to convey most storm water runoff from the Bluffs Senior Estates construction project approximately one-half mile northeast to Killpecker Creek, and that the remainder would flow into Killpecker Creek down an existing borrow ditch within the WYDOT right of way. *See* Buchholz Aff. ¶ 11; Buchholz Aff., Ex. A at 2.
6. KDA’s NOI noted: “See Part 5 of the general permit for information regarding when and how to terminate coverage.” *See* Buchholz Aff., Ex. A at 1.
7. Mr. Sproul certified in the NOI that he was “aware of the terms and conditions of the large construction general permit” and that he agreed to comply with those requirements. *See* Buchholz Aff., Ex. A at 3.
8. Part 3.5 of Large Construction General Permit WYR 10-0000 (the General Permit) stated that “[s]ubmission of the NOI to the Department constitutes full agreement by the operator to meet and comply with all requirements of this general permit.” *See* Attachment D to DEQ’s Motion for Summary Judgment (DEQ’s Motion), at 5.
9. Part 2.13 of the general permit defined “Operator” as the company that has day-to-day supervision and control of activities occurring at the construction site, which can be the owner, developer or general contractor, and is responsible for ensuring compliance with all conditions of the permit. *See* Attachment D to DEQ’s Motion, at 3.
10. Part 2.9 of the general permit defined “Large Construction Activity” to mean “any clearing, grading or excavation project which will disturb five or more (not necessarily contiguous) surface acres.” *See* Attachment D to DEQ’s Motion, at 3.

11. Part 4.1 of the general permit (Change of Operator) stated that when responsibility for storm water discharges for a large construction activity changes from one operator to another, the current and future permittee shall submit a completed Notice of Transfer and Acceptance (NOTA), certified and signed by both parties within 14 days of the change. *See* Attachment D to DEQ's Motion, at 6.
12. DEQ Authorization to Discharge WYR103444 issued to KDA stated: "See Part 5 of the general permit for information regarding termination of coverage." *See* Buchholz Aff., Ex. B.
13. Part 5.1 of the general permit (Notice of Termination) stated that a permittee wishing to terminate coverage under the general permit must submit a signed Notice of Termination (NOT) identifying the facility and the reason permit coverage is no longer required. *See* Attachment D to DEQ's Motion, at 7.
14. Part 5.2 of the general permit (Notice of Termination) stated that compliance with the conditions of the general permit was required until an NOT had been submitted and accepted by the Department. *See* Attachment D to DEQ's Motion, at 7.
15. Part 5.3.1 of the general permit (Notice of Termination) stated that an NOT may only be submitted when final stabilization has been achieved for all parts of the site for which the permittee is responsible. *See* Attachment D to DEQ's Motion, at 7.
16. Part 2.8 of the general permit defined "Finally Stabilized" to mean "that all soil disturbing activities at the site have been completed, and a uniform perennial vegetative cover with a density of 70% of the native background vegetative cover for the area has been established on all disturbed unpaved areas and areas not covered by permanent structures." *See* Attachment D to DEQ's Motion, at 3.
17. Following the issuance of Authorization to Discharge WYR103444, KDA engaged in construction activities associated with the Bluffs Senior Estates project in Sweetwater County which involved excavation and disturbance of the land surface. *See* Buchholz Aff. ¶ 13; Buchholz Aff., Ex. C; *See also* Attachment A to DEQ's Motion at ¶ 17.
18. On May 20, 2008, Matt Buchholz, Environmental Scientist 3 with DEQ and WYPDES staff member, conducted a site inspection of the Bluffs Senior Estates project site in Rock Springs, Wyoming. During this site visit, Mr. Buchholz took several pictures of the project site and drafted a Construction Storm Water Inspection Report. *See* Buchholz Aff. ¶ 14; Buchholz Aff., Ex. C & D.
19. Mr. Buchholz also called KDA on May 20, 2008, and spoke to a Mr. Michael Neely about the site inspection. Mr. Neely told Mr. Buchholz that KDA had not been onsite for 6 months, and Mr. Buchholz informed him of the permit requirements that were not being met. *See* Buchholz Aff. ¶ 15.

20. On June 17, 2008, Mr. Buchholz wrote a letter to KDA using KDA's contact information that KDA had listed on the NOI and informed KDA of the observed violations. Mr. Buchholz ordered KDA to cure the observed violations within 30 days. *See* Buchholz Aff. ¶ 16; Buchholz Aff., Ex. E.
21. Mr. Buchholz returned to the project site for a follow-up inspection on July 24, 2008, and the conditions on the site had not improved from the previous inspection. *See* Buchholz Aff. ¶ 17.
22. On August 14, 2008, DEQ issued NOV No. 4331-08 to KDA for failing to abide by WYPDES Authorization WYR103444 as required by the WYPDES Storm Water Permit. *See* Buchholz Aff. ¶ 19; Buchholz Aff., Ex. F.
23. DEQ sent the NOV to KDA by addressing and mailing NOV No. 4331-08 to the same address KDA listed in the NOI it signed on June 15, 2006. *See* Buchholz Aff. ¶ 20; Buchholz Aff., Ex. A.
24. On September 3, 2008, KDA sent DEQ and EQC a letter requesting an appeal of NOV No. 4331-08, stated that the project had been cancelled, and stated that no work had been conducted on the project since January 31, 2008. KDA also stated that the NOV had been mailed to the wrong address and included the corrected address in the NOV appeal. *See* Buchholz Aff. ¶ 21; Buchholz Aff., Ex. G.
25. In KDA's September 3, 2008 request for appeal, KDA gave the name and address of a third party and stated that all further communications regarding the project should be directed to the third party. KDA did not allege that the site had reached final stabilization or that KDA and the third party had entered a properly executed NOTA. *See* Buchholz Aff. ¶ 21; Buchholz Aff., Ex. G.
26. Prior to filing its September 3, 2008, letter appealing NOV No. 4331-08, KDA did not notify DEQ of a change in mailing address. Attachment A to DEQ's Motion, at ¶ 19.
27. KDA did not submit a NOTA as required for a change of operator under Part 4.1 of the general permit. Attachment A to DEQ's Motion, at ¶ 20.
28. KDA's September 3, 2008, letter appealing NOV No. 4331-08 was KDA's first request to DEQ for "termination" of the permit for the Bluffs Senior Estates construction project. Attachment A to DEQ's Motion, at ¶ 23.
29. KDA did not submit a NOT for termination of coverage as required under Part 5.1 of the general permit. Attachment A to DEQ's Motion, at ¶ 24.
30. KDA did not complete final stabilization of surface areas disturbed by KDA's construction activities at the Bluffs Senior Estates project site as required for termination of coverage under Part 5.3 of the general permit. *See* Attachment A to DEQ's Motion, at ¶ 25; *See also* affidavit of Kathleen Mulkey, DEQ WYPDES Permit Inspector, hereinafter "Mulkey Aff."

III. CONCLUSIONS OF LAW

1. Chapter II, Section 14 of the DEQ Rules of Practice & Procedure applies the Wyoming Rules of Civil Procedure to matters before the EQC.
2. Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Wyo. R. Civ. P. 56(b), (c).
3. Under Wyoming law, DEQ is charged with the responsibility to permit and regulate discharges into surface waters within the state of Wyoming. DEQ issues permits in accordance with the requirements of Art. 3 of the Wyoming Environmental Quality Act (WEQA), Wyo. Stat. Ann. §§35-11-301, 302, and Ch. 2 Sec. 6 of the Wyoming Water Quality Rules and Regulations (WWQRR).
4. Authorizations issued for large construction activities are required to abide by the terms and conditions contained in the "General Permit to Discharge Storm Water Associated with Large Construction Activity under the Wyoming Pollution Discharge Elimination System." (General Permit)
5. Pursuant to Section 3.5 of the General Permit, submission of the NOI to the DEQ constitutes full agreement by the operator to meet and comply with all requirements of the General Permit. *See* Attachment D to DEQ's Motion, at 5.
6. As shown in the photographs taken during the site investigation on May 20, 2008, and confirmed by Mr. Buchholz and Ms. Mulkey's affidavits, KDA has failed to establish 70% of any vegetative cover on disturbed areas. *See* Buchholz Aff., Ex. C, *See also* Mulkey Aff.
7. Mr. Sproul, KDA's CEO, acknowledged and agreed that KDA would meet and comply with all requirements of the permit.
8. KDA, as the permittee, is required to comply with the terms of the General Permit until it has properly terminated or transferred its responsibilities under the permit.
9. There are no genuine issues of material fact as to KDA's violations of the General Permit; therefore, DEQ is entitled to summary judgment against KDA as a matter of law.

ORDER

IT IS THEREFORE ORDERED that:

The Department of Environmental Quality, Water Quality Division's Motion for Summary Judgment in regard to KDA's appeal of NOV & Order No. 4331-08 is GRANTED. NOV & Order No. 4331-08 is therefore affirmed and is considered a final order pursuant to Wyo. Stat. Ann. §§35-11-701(c).

SO ORDERED this 22nd day of April, 2009.

A handwritten signature in cursive script, appearing to read "T. Coverdale", written in black ink. The signature is positioned above a horizontal line.

Thomas Coverdale,
Secretary/Presiding Officer
Environmental Quality Council
122 West 25th Street
Herschler Bldg., Rm. 1714
Cheyenne, Wyoming 82002

CERTIFICATE OF SERVICE

I, Kim Waring, certify that at Cheyenne, Wyoming, on the 23rd day of April, 2009, I served a copy of the foregoing ORDER GRANTING SUMMARY JUDGMENT by depositing copies of the same in the United States mail, postage prepaid, duly enveloped and addressed to;

Rock Springs Senior Living, LLC
Contact: Scott Ramey
P.O. Box 3006
Salem, OR 97302

Brad Hankins
KDA Construction, Inc.
3950 Fairview Industrial Dr., SE
Ste. 210
Salem, OR 97302

by electronic mail to the following:

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