

BEFORE THE NEBRASKA DEPARTMENT OF ENVIRONMENT AND ENERGY

|                             |   |                             |
|-----------------------------|---|-----------------------------|
| IN THE MATTER OF            | ) |                             |
|                             | ) | Case No. 3544               |
| MARK T. SCHMIDT             | ) |                             |
|                             | ) | COMPLAINT, COMPLIANCE ORDER |
| FID # 107073, CSW-201903475 | ) | AND NOTICE OF               |
|                             | ) | OPPORTUNITY FOR HEARING     |
| Respondent.                 | ) |                             |

**I. INTRODUCTION**

1. This Complaint, Compliance Order, and Notice of Opportunity for Hearing is issued pursuant to Neb. Rev. Stat. § 81-1507. The Complainant is the Director of the Nebraska Department of Environment and Energy (NDEE or Department). The Respondent is Mark T. Schmidt, owner and operator of a residential subdivision development business operating in Lancaster County, Nebraska.
2. Complainant has determined the Respondent is in violation of the Environmental Protection Act, Neb. Rev. Stat. § 81-1501 *et seq.*, and Neb. Admin. Code, Title 119, *Rules and Regulations Pertaining to the Issuance of Permits under the National Pollutant Discharge Elimination System* (Title 119).

**II. JURISDICTION**

3. NDEE is the agency of the State of Nebraska charged with the duty, pursuant to Neb. Rev. Stat. § 81-1504(1), of exercising exclusive general supervision, administration, and enforcement of the Nebraska Environmental Protection Act (NEPA), Neb. Rev. Stat. § 81-1501 *et seq.*, and Title 119.
4. NDEE is further charged, pursuant to Neb. Rev. Stat. §81-1504(4), with the duties to act as the state water pollution control agency for all purposes of the Clean Water Act ("CWA"), as amended, 33 U.S.C. 1251 *et seq.*



5. The Nebraska Environmental Quality Council (EQC), pursuant to its authority in Neb. Rev. Stat. §81-1505, has promulgated Title 119 to regulate the discharge of pollutants to waters of the State through the issuance of National Pollutant Discharge Elimination System (NPDES) permits for purposes of CWA.

### **III. COMPLAINT**

6. Respondent, at all times material herein, has been engaged in various stages of site preparation and initial construction activities in the development of approximately forty-eight (48) residential lots and one (1) associated outlot located in the N 1/2, NW 1/4 of Section 11, Township 08 North, Range 08 East, in Lancaster County, NE.
7. Respondent's lots include residential lots with unbuilt home sites, residential lots in early stages of home construction; and an outlot containing a drainage way for the purpose of storm water management and conveyance.
8. Respondent's residential lots and outlot are referenced in various submittals by Respondent, NDEE records, and correspondence as located in the "Evergreen Place" or "Evergreen Place, 1<sup>st</sup> Addition" residential subdivision development in Bennet, NE.
9. On March 21, 2019, NDEE received a Construction Storm Water Notice of Intent (CSW-NOI) from Respondent, in his individual capacity, seeking coverage for Respondent's development project under the National Pollutant Discharge Elimination System (NPDES) Construction Storm Water General Permit (CSW-GP) Number NER160000.
10. As part of the CSW-NOI submittal received on March 21, 2019, Respondent identified a total project size of 16.5 acres and 12.1 acres of the project that would be disturbed by construction activity, making Respondent's development subject to the requirement that

NPDES permit coverage be obtained pursuant to Title 119 Ch. 2, 002.06; Ch. 10, 002.01; and that all discharges of storm water be compliant with CSW-GP NER160000.

11. As part of the CSW-NOI submittal received on March 21, 2019, Respondent identified a tributary to the Little Nemaha River as the receiving water body for discharges from Respondent's construction activity. The tributary to the Little Nemaha River is a "[w]ater of the state" under Neb. Rev. Stat. § 81-1502(21).

12. As part of the CSW-NOI submittal received on March 21, 2019, Respondent certified, under penalty of law, that a Storm Water Pollution Prevention Plan (SWPPP) had been developed for the project by a qualified individual and that the SWPPP contained:

- a. site and activity descriptions (CSW-GP Part III.B);
- b. sediment and pollution control measures and record keeping requirements related to these measures (CSW-GP Part III.C);
- c. erosion prevention measures and record keeping requirements related to these measures (CSW-GP Part III.C);
- d. inspection requirements, maintenance of Best Management Practices (BMPs) and associated record keeping requirements (CSW-GP Part III.E, I-J); and
- e. a plan for final stabilization of the project (CSW-GP Part III.M).

13. On March 22, 2019, NDEE sent Respondent an authorization letter and assigned Respondent CSW-GP permit number CSW-201903475 allowing Respondent to discharge construction storm water for the project described in the CSW-NOI in accordance with the terms and conditions of NPDES Construction Storm Water General Permit Number NER160000.

14. Among the terms and conditions of NPDES General Permit Number NER160000, Respondent must:

- a. implement the SWPPP as written from commencement of construction activity until final stabilization is complete (Part III.A.4);
- b. maintain in effective operating condition all erosion and sediment control measures and other protective measures identified in the SWPPP (Part III.E.1);
- c. perform and document regular site inspections according to the requirements of Part III.I., including, but not limited to: ensuring the proper operation of erosion and sediment control measures; looking for evidence of pollutants entering or

potentially entering the storm water conveyance system, assessing whether control measures are effective in preventing impacts to waters of the state, and looking for evidence of off-site sediment tracking by vehicles (Part III.I.4);

- d.** perform maintenance within seven days on BMPs that have been identified by inspection as not operating effectively (Part III.E.1);
- e.** amend the SWPPP if during inspections or investigations by site staff, or by local, state, or federal officials, it is determined that the SWPPP is ineffective in eliminating or significantly minimizing pollutants in storm water discharges from the construction site (Part III.J.2);
- f.** modify the SWPPP as necessary within seven days of inspection to include additional or modified BMPs to correct problems identified by inspection (Part III.J.3);
- g.** select, install, and maintain all control measures in accordance with any relevant manufacturer specifications and good engineering practices and, if used incorrectly, replace or modify the control measure as soon as practicable (Part III.L.1); and
- h.** remove off-site accumulations of sediment at a frequency sufficient to minimize off-site impacts (Part III.L.2).

15. On September 8, 2020, NDEE conducted an inspection to evaluate Respondent's compliance with the terms and conditions of NPDES CSW-GP NER160000 and the project SWPPP.

The NDEE inspector observed:

- a.** SWPPP best management practices (BMPs) were not installed;
- b.** SWPPP signage was not installed; and
- c.** Sediment controls and BMPs for vehicle track out were not installed.

16. On September 18, 2020, NDEE sent a Letter of Noncompliance (LNC) that cited Respondent for violations of NPDES CSW-GP NER160000 and Title 119, Ch. 14, 001.01, which states:

001.01 Duty to comply. The permittee must comply with all conditions of the permit. Any permit noncompliance constitutes a violation of the Federal and State Act and is grounds for enforcement action; for permit termination, revocation and reissuance, or modification; or denial of a permit renewal application.

17. The September 18, 2020 LNC requested that Respondent voluntarily comply with corrective measures identified in the LNC and submit a report demonstrating compliance within 14 days.

18. To date, Respondent has not complied with or responded to the September 18, 2020 LNC.

19. On November 5, 2020, NDEE conducted a follow-up inspection to evaluate Respondent's compliance with the September 18, 2020 LNC. The NDEE inspector observed that no SWPPP BMPs were installed along recently graded areas and that SWPPP signage was not installed.

20. On April 20, 2021, NDEE conducted a follow-up inspection focused on compliance with specific sections of the project SWPPP. The NDEE inspectors observed:

- a.** multiple buckets of hydraulic oil and batteries on the south end of the property with some buckets uncapped and having the potential to discharge;
- b.** sediment control fences that had fallen, were installed incorrectly, or were full of sediment and thus unable to control discharges;
- c.** uncontained piles of trash and universal waste on the north side of the property which could mix with storm water and discharge pollutants;
- d.** heavy equipment staging areas and areas where heavy equipment was stored overnight did not have drip pans, absorbents, or spill kits onsite creating the potential to discharge oil, fuel, and other pollutants from these equipment;
- e.** Section 1.5 of the SWPPP, which identifies a timeline and sequence of activity the owner will follow for major construction activities and BMP installation, was not being followed, specifically Site Grading, step 4; and Infrastructure, steps 1 and 3;
- f.** Section 2.2 of the SWPPP, which states that erosion checks shall be placed in all areas where sediment control is required and before the start of any construction, was not being followed, and evidence of rill and gully erosion was visible in areas facing south from the roadway and facing east from the southwest side of the property;
- g.** Section 2.2 of the SWPPP, which states that sediment control fencing or bio-logs will be installed along the downhill side of all construction areas, was not being followed;
- h.** Section 2.2 of the SWPPP, which states that sediment control fencing shall be placed at all areas where sediment control is required and before the start of any construction, was not being followed;
- i.** Section 2.2 of the SWPPP, which states that temporary mulch or hydromulch will be placed to protect and stabilize exposed soils where construction ceases for more than 14 calendar days and over the winter months, was not being followed;
- j.** Section 2.3 of the SWPPP, which states that all waste materials will be collected in trash receptacles in the materials storage area and construction materials & equipment will be stored in the staging/materials storage area, was not being followed.

21. The sediment and sediment-contaminated water that have been discharged and continue to be discharged by Respondent is a "pollutant" as defined in Title 119, Chapter 1, 089 and "[w]ater pollution" as defined in Neb. Rev. Stat. § 81-1502(20).
22. Respondent's failure to implement the project SWPPP make all discharges resulting from this non-compliance unauthorized under the terms and condition NPDES CSW-GP NER160000.
23. Respondent's unauthorized discharge of sediment and sediment-contaminated water violates Neb. Rev. Stat. § 81-1506(1)(a) which states that "[i]t shall be unlawful for any person [t]o cause pollution of any air, waters, or land of the state or to place or cause to be placed any wastes in a location where they are likely to cause pollution of any air, waters, or land of the state . . ."
24. Respondent's unauthorized discharge of sediment and sediment-contaminated water violates both the terms and conditions of CSW-GP, authorization #201903475, and Neb. Rev. Stat. § 81-1506(2)(c) which makes it unlawful to "increase in volume or strength any waste in excess of permitted discharges specified under any existing permit."
25. Respondent's discharge of sediment and sediment-contaminated water violates Neb. Rev. Stat. § 81-1506(3)(c) which states that "[i]t shall be unlawful for any person [t]o [v]iolate any rule or regulation adopted and promulgated by the [Nebraska Environmental Quality] council pursuant to the Environmental Protection Act. . ."
26. Respondent's unauthorized discharge of sediment and sediment-contaminated water violates Title 119, Chapter 10, Section 002.01 which states that "[n]o person shall discharge storm water containing any pollutant except as authorized by NPDES permit or this Chapter."

27. Respondent's failure to control construction storm water, implement the project SWPPP, and comply with the terms and conditions of Construction Storm Water General Permit NER160000 violates Respondent's NPDES CSW-GP, authorization # CSW-201903475.
28. The Director has determined that the actions required by this Order are necessary and appropriate to protect the public health, welfare, or the environment.

#### **IV. COMPLIANCE ORDER**

29. Based upon the Complaint set forth above, IT IS HEREBY ORDERED:

30. Within 30 days of receipt of this Order, Respondent shall:

- a.** Install and maintain all SWPPP signage as required by CSW-GP NER160000
- b.** Install and maintain all temporary erosion and sediment control BMPs in accordance with SWPPP Section 2.2;
- c.** Implement all good housekeeping BMPs in accordance with SWPPP Section 2.3;
- d.** Install and maintain all permanent erosion and sediment control BMPs in accordance with SWPPP Section 2.4 for all areas where final grading has been completed; and
- e.** Continue final stabilization activities in accordance with SWPPP Section 2.6 as final grading is completed in various project areas.

31. Within 60 days of receipt of this Order, Respondent shall submit a written description of the actions taken to comply with paragraph 30.

32. Submissions to the Department under this Order shall refer to FID #107073 and shall be sent to:

Reuel Anderson  
NPDES Compliance Section Supervisor  
Nebraska Department of Environment and Energy  
P.O. Box 98922

Lincoln, NE 68509-8922

#### **V. NOTICE OF OPPORTUNITY TO REQUEST A HEARING**

33. This Order shall become final, pursuant to Neb. Rev. Stat. § 81-1507(1), unless Respondent files an answer and request, in writing, for a hearing no later than thirty days after receipt of this Order. Failure to answer within thirty days shall be deemed an admission of the allegations of the Complaint.

34. A written answer to the Complaint, Compliance Order and Notice of Opportunity for Hearing must conform to the requirements of Neb. Admin. Code, Title 115, Rules of Practice and Procedure. The answer and request for hearing may be filed by mail to: Jim Macy, Director, State of Nebraska Department of Environment and Energy, P.O. Box 98922, Lincoln, Nebraska 68509-8922, or may be hand delivered to the Department's Lincoln office located at 245 Fallbrook Blvd, Lincoln, Nebraska.

#### **VI. SETTLEMENT CONFERENCE**

35. Whether or not Respondent requests a hearing, an informal settlement conference may be requested by writing to Brian McMullen, Attorney, Nebraska Department of Environment and Energy, P.O. Box 98922, Lincoln, Nebraska 68509-8922, or have your attorney make such a request.

36. A request for settlement conference does not extend the thirty (30) day period during which a written answer and request for hearing must be submitted or otherwise delay the final effective date of this Order.

#### **VII. INJUNCTIVE RELIEF AND PENALTY PROVISIONS**

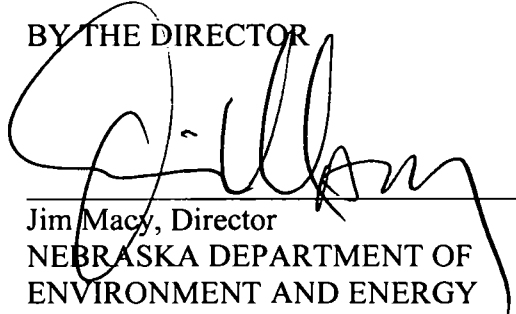
37. The NDEE reserves the right to pursue enforcement in the proper court of law for injunctive relief or to seek civil or criminal penalties for any violations that are the subject of this



Complaint, Compliance Order and Notice of Opportunity for Hearing. Nothing in this Complaint, Compliance Order and Notice of Opportunity for Hearing precludes the NDEE from pursuing such enforcement.

Dated this 30<sup>th</sup> day of June, 2021.

BY THE DIRECTOR

  
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Jim Macy, Director  
NEBRASKA DEPARTMENT OF  
ENVIRONMENT AND ENERGY