BEFORE THE NEBRASKA DEPARTMENT OF ENVIRONMENTAL QUALITY

IN THE MATTER OF TERRY L. JESSEN d/b/a COMFORT SUITES, Respondent.	Case No. 3024 COMPLAINT, COMPLIANCE ORDER, AND NOTICE OF OPPORTUNITY FOR HEARING

1. This Complaint, Compliance Order, and Notice of Opportunity for Hearing is issued pursuant to Neb. Rev. Stat. § 81-1507(1) of the Nebraska Environmental Protection Act § 81-1501 et seq (Reissue 2008). The Complainant is Michael J. Linder, Director of the Nebraska Department of Environmental Quality (referred to herein as NDEQ). The Respondent is Terry L. Jessen, doing business as Comfort Suites, in Dawson County, Nebraska.

2. The Complainant, NDEQ, is the agency of the state of Nebraska charged with the duty pursuant to Neb. Rev. Stat. § 81-1504 (1) and (4) (Reissue 2008) of exercising exclusive general supervision, administration, and enforcement of the Nebraska Environmental Protection Act, Neb. Rev. Stat. § 81-1501 et seq., and all rules, regulations and permits promulgated thereunder.

3. The Respondent on or about March 9, 2010, and May 25, 2010, engaged in construction involving disturbance of land surface in excess of one (1) acre in Dawson County, Nebraska, from which stormwater containing sediments discharged to waters of the State of Nebraska.

4. Neb. Rev. Stat. § 81-1506 (Reissue 2008) provides in part: "(1) It shall be unlawful for any person to: …(a) To cause pollution of any air, waters, or land of the state or 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;…(2) It shall be unlawful for any person to: (a) Discharge any pollutant into waters of the state without obtaining a permit as required by the National Pollutant Discharge Elimination System as created by the Clean Water Act… (3) It shall be unlawful for any person to: …(d) Violate any rule or regulation adopted and promulgated by the council [Nebraska Environmental Quality Council] pursuant to the Environmental Protection Act or the Livestock Waste Management Act. …"

5. Pursuant to Neb. Rev. Stat. § 81-1505 (1) and (2) (Reissue 2008) the Nebraska Environmental Quality Council adopted and promulgated Title 119, Rules and Regulations Pertaining to the Issuance of Permits Under the National Pollutant Discharge Elimination System, which is in effect at all times material herein and Chapter 10 of which provides in pertinent part as follows: "002 Permit Requirement …002.01 No person shall discharge storm water containing any pollutant except as authorized by a NPDES permit or this Chapter. …"

6. IT IS THEREFORE ORDERED that the Respondent shall perform the following actions on before the dates and times specified below:

A. Immediately upon receipt of this Order cease discharge of stormwater until authorized by NPDES permit or some provision of Title 119, Chapter 10.

B. Within 30 days following receipt of this Order submit to NDEQ a Storm Water Pollution Prevention Plan as described in Appendix A to this Order.

NOTICE OF OPPORTUNITY TO REQUEST A HEARING

7. Pursuant to Neb. Rev. Stat. § 81-1507 (Reissue 2008) the Respondent has the right to apply for a hearing to contest a Complaint and Compliance Order by making a request for such hearing to the Director no later than 30 days after service hereof. Nebraska Department of Environmental Quality, Rules of Practice and Procedure, Title 115, Chapter 7, provides sets forth the procedure of such hearings.

ADVISEMENT OF POSSIBLE PENALTIES

8. The NDEQ 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 NDEQ from pursuing such enforcement. Failure to obey the Order may

result in fines of up to $10,000 per day as set out in Neb. Rev. Stat. § 81-1508.02 (Reissue 2008) for violations of the Environmental Protection Act.

Dated: July 27, 2010

By: /s/ Michael J. Linder
Michael J. Linder, Director
Nebraska Department of
Environmental Quality

APPENDIX A

F. Storm Water Pollution Prevention Plans

1. Storm Water Pollution Prevention Plan Framework

The SWPPP focuses on two major requirements: (1) Providing a site description that identifies sources of pollution to storm water discharges associated with construction activity on site; and (2) identifying and implementing appropriate measures to reduce pollutants in storm water discharges to ensure compliance with the terms and conditions of this permit. A SWPPP must be developed in accordance with sound engineering practices and must be developed specific to the site. For coverage under this permit, the SWPPP must be prepared before commencement of construction and then updated as appropriate. The permit also clarifies that once a definable area of the site has been finally stabilized, no further SWPPP requirements apply to that portion of the site as long as the SWPPP has been updated accordingly to identify that portion of the site as complete. You are required to implement the SWPPP during construction activity from commencement until final stabilization. Construction Activity and final stabilization are defined in the CSW general permit Part VII.

2. Pollution Prevention Plan Contents: Site and Activity Description

The SWPPP must be based on an accurate assessment of the potential for generating and discharging pollutants from the site. Hence, the permit requires a description of the site and intended construction activities in the SWPPP (to provide a better understanding of site runoff characteristics). Details of the site and activity SWPPP requirements are described in the CSW general permit Part III.B.

3. Pollution Prevention Plan Contents: Controls to Reduce Pollutants

a. The SWPPP must describe the practices that will be used to reduce the pollutants in storm water discharges from the site and assure compliance with the terms and conditions of the permit. The SWPPP must describe the intended sequence of major storm water control activities and when, in relation to the construction process, they will be implemented. NDEQ recognizes that many factors can impact the actual construction schedule, so the permittee need not include specific dates (e.g. plan could say install silt fence for area “A” before rough grading, rather than put up silt fences on August 15). Good site planning and preservation of mature vegetation are imperative for controlling pollution in storm water discharges both during and after construction activities. Properly staging major earth disturbing activities can also dramatically decrease the costs of sediment and erosion controls.

b. Stabilization practices are critical to preventing erosion. The SWPPP must include a description of interim and permanent stabilization practices, including a schedule of their implementation. The permittee should ensure that existing vegetation is preserved wherever possible and that disturbed portions of the site are stabilized as quickly as practicable. Stabilization practices include seeding of temporary vegetation, seeding of permanent vegetation, mulching, geotextiles, sod stabilization, vegetative buffer strips, preservation of trees and mature vegetative buffer strips, and other appropriate measures. Temporary stabilization can be the single most important factor in reducing erosion at construction sites. Stabilization also involves preserving and protecting selected trees on the site prior to development. Mature trees have extensive canopy and root systems, which help to hold soil in place. Shade trees also keep soil from drying rapidly and becoming susceptible to erosion. Measures taken to protect trees can vary significantly, from simple ones such as installing tree armoring and fencing around the drip line, to more complex measures such as building retaining walls and tree wells.
c. The SWPPP requires that specific construction dates be documented and maintained as a way for the construction operator as well as NDEQ to determine applicability and implementation status of SWPPP requirements. Important dates include when major grading activities occur, when construction activities temporarily or permanently cease on a portion of the site, and when stabilization measures are initiated.
d. The SWPPP must include a description of structures built to divert flows from exposed soils, and store or otherwise limit runoff and the discharge of pollutants from exposed areas of the site. Structural controls may be necessary because vegetative controls cannot be employed where soil is continually disturbed and because of the lag time before vegetation becomes effective. Options for such controls include silt fences, earth dikes, drainage swales, check dams, subsurface drains, pipe slope drains, level spreaders, storm drain inlet protection, rock outlet protection, sediment traps, reinforced soil retaining systems, gabions and temporary or permanent sediment basins. Placement of structural controls in flood plains should be avoided.
e. The SWPPP must include a description of any post-construction storm water management measures. This permit, however, addresses only the installation of these measures; not the ongoing operation and maintenance of them after cessation of construction activities and final stabilization. Permittees are responsible only for the installation and maintenance of storm water management measures until final stabilization of the site. When selecting storm water management measures, the operator should consider the amount of required maintenance and whether there will be adequate resources for maintaining them over the longer term. Maintenance plans of permanent management measures must be included in the SWPPP. Some discharges of pollutants from post-construction storm water management structures may need to be authorized under an NPDES permit (e.g., the construction project was an industrial facility in a sector covered by the NPDES multi-sector general permit). The owner/operator of such discharges may ask NDEQ if this requirement applies to them. Storm water management measures installed during the construction process can control the volume and velocity of runoff, as well as reduce the quantity of pollutants discharged post-construction. Reductions in peak discharge velocity and volume can reduce pollutant loads as well as diminish physical impacts such as stream bank erosion and stream bed scour. Storm water management measures that mitigate changes to predevelopment runoff

characteristics assist in protecting and maintaining the physical and biological characteristics of receiving streams and wetlands. Structural measures should be installed on upland areas to the extent feasible. The installation of such measures may be subject to section 404 of the CWA if they will be located in wetlands or other waters of the United States.

f. Other controls to be addressed in SWPPPs for construction activities are for compliance with the requirement that solid materials, including building material wastes, not be discharged at the site except as authorized by a section 404 permit.

g. The SWPPP must describe measures to minimize vehicular tracking of soil off-site to paved surfaces and the generation of dust. Dust and dirt-tracking can be minimized by measures such as providing gravel or paving at entrance/ exit drive paths, parking areas and unpaved transit ways on the site carrying significant amounts of traffic (for example, more than 25 vehicles per day); providing entrance wash racks or stations for trucks; and performing street sweeping.

h. The SWPPP must also contain a description of practices to reduce pollutants from construction-related materials which are stored on site, including a description of said construction materials (with updates as appropriate). The plan should include a description of pollutant sources from areas untouched by construction and a description of controls and measures which will be implemented in those areas.

i. The SWPPP must also contain a description of pollutant sources from areas other than construction (including storm water discharges from dedicated asphalt plants and dedicated concrete plants), and a description of controls and measures that will be implemented at those sites to minimize pollutant discharges.

4. Non-Storm Water Discharge Management

The SWPPP must identify and ensure implementation of appropriate pollution prevention measures for each of the eligible non-storm water components of the discharge covered by this permit when combined with storm water discharges associated with construction activity as listed in Title 119 Chapter 10 002.

5. Maintenance of Controls

Erosion and sediment controls can become ineffective if they are damaged or not properly maintained. The SWPPP requires all erosion and sediment control measures to be maintained in effective operating condition. If site inspections identify BMPs that are not operating effectively, maintenance must be performed within seven days and before the next storm event whenever practicable to maintain the continued effectiveness of storm water controls. The permit also requires that the permittee remove sediment from sediment traps or sedimentation ponds or basins when design capacity of that device has been reduced by 50 percent or more.

6. Documentation of Permit Eligibility Related to Endangered Species

An operator's SWPPP must contain documentation of permit eligibility regarding the protection of endangered and threatened species and critical habitat as described in Part III.F of the permit.

7. Copy of Permit Requirements

Copies of the CSW general permit, the signed and certified NOI submitted to NDEQ, and a copy of the letter from NDEQ indicating that a complete NOI has been received must be included in the SWPPP (The CSW-NOI with the original signature must be submitted

to NDEQ.) This condition in the permit is intended to stress the importance of these documents for operators to understanding permit responsibilities.

8. Applicable Local Requirements

Many municipalities and counties have developed sediment and erosion control requirements for construction activities. A significant number have also developed storm water management requirements. The CSW general permit requires that SWPPPs for sites that discharge storm water associated with construction activities be consistent with procedures and requirements of local sediment and erosion control plans and storm water management plans. The construction site's SWPPP may incorporate portions of local program's pollution prevention plan if these requirements are at least as strict as the CSW general permit.

9. Inspections

a. Permittees must inspect designated areas at least once every 14 calendar days and within 24 hours after any storm event of 0.5 inches or greater. NDEQ also recommends that permittees perform a "walk through" inspection of the construction site before anticipated storm events (or series of events such as intermittent showers over a period of days) that could potentially yield a significant amount of runoff.

b. Inspections must be performed by qualified personnel with either the operator's own personnel or consultants hired to perform the inspections. The inspectors must be knowledgeable and possess the skills to assess conditions at the construction site that could impact storm water quality and assess the effectiveness of sedimentation and erosion control measure chosen to control the quality of the sites storm water discharges.

c. Site inspections must be performed as in Part IV of the permit.

d. Where discharge points are accessible, they must be inspected to ascertain whether erosion control measures are effective in preventing impacts to waters of the State. This can be done by inspecting the waters for evidence of erosion or sediment introduction. If discharge points are inaccessible, the permit requires that nearby downstream locations be inspected, if practicable.

e. Inspectors must determine whether erosion control measures are effective in preventing impacts to the receiving water and look for evidence of or the potential for pollutants entering the drainage system.

f. For linear construction activities (e.g., utility line installation, pipeline construction), representative inspections are acceptable and allow for inspection of the project 0.25 miles above and below each access point where a roadway, undisturbed right-of-way, or other similar feature intersects the construction site and allows access to the construction site. This is to limit additional disturbance to soils that may increase the erosion potential resulting from vehicles compromising stabilized areas.

g. Once an inspection has been performed, a report must be retained with the SWPPP for up to three years after the permit expires or is terminated. The report should include all items as per Part IV I.6 of the CSW general permit. The report must also identify any actions taken in accordance with SWPPP requirements and must identify any incidents of non-compliance with permit conditions. If no incidents of non-compliance were found, the report must contain a certification that the site is in compliance with the SWPPP and this permit. Finally, the report must be signed in accordance with the signatory requirements in Part VI D.6 of the CSW general permit.

10. Maintaining an Updated Plan

Storm water pollution prevention plans must be revised whenever a change in design, construction method, operation, maintenance procedure, etc., may cause a significant effect on the discharge of pollutants to surface waters, municipal separate storm sewer systems or a combined sewer overflow system. The plan must also be amended if inspections or investigations by site staff, or by local, state, or federal officials determine that the discharges are ineffective in eliminating or significantly minimizing pollutants in storm water discharges from the construction site. Also, if an inspection reveals inadequacies, the site description and pollution prevention measures identified in the SWPPP must be revised. All necessary modifications to the SWPPP must be made within seven calendar days following the inspection. If existing BMPs need to be modified or if additional BMPs are necessary, implementation must be completed consistent with Part III.E of the CSW general permit. Specifically, these changes must be completed before the next storm event whenever practicable. If implementation before the next storm event is impracticable, this situation should be documented in the SWPPP and the changes must be implemented as soon as practicable.

11. Signature, Plan Review, and Making Plans Available

a. A copy of the SWPPP must be kept at the construction site from the date of project initiation to the date of final stabilization. Permittees with day-to-day operational control over the plan's implementation must keep a copy of the plan readily available whenever they are on site (a central location accessible by all on-site operators is sufficient). If an on-site location is unavailable to store the SWPPP when no personnel are present, notice of the plan's location must be posted near the main entrance at the construction site. A copy of the SWPPP must be readily available to authorized inspectors during normal business hours.

b. A sign or notice about the permit and SWPPP must be posted conspicuously near the main entrance of the site.

If display near the main entrance is infeasible, the notice can be posted in a local public building such as the town hall or public library. For linear projects, the notice must be posted at a publicly accessible location near the active part of the construction project (e.g., where a pipeline project crosses a public road). The permit notice must include the following information: (1) A copy of the completed Notice of Intent as submitted to NDEQ; (2) The current location of the SWPPP (if different than the that submitted to NDEQ in the CSW-NOI) (3) The current contact person and telephone number for scheduling times to view the SWPPP (if different than that submitted to NDEQ in the NOI). The permit does not require that the general public have access to the construction site nor does it require that copies of the plan be available or mailed to members of the public. However, NDEQ strongly encourages permittees to provide public access to SWPPPs at reasonable hours.

c. Permittees must make SWPPPs available, upon request, to federal, state, or local agencies approving sediment and erosion plans, grading plans or storm water management plans; local government officials; the operator of a MS4 receiving discharges from the site. Also, the operator must make SWPPPs available to NDEQ or its authorized representative for review and copying during any on-site inspection.

d. The SWPPP must be signed and certified in accordance with the signatory requirements in the Standard Permit Conditions section of the permit Part VI.D.6

12. Management Practices

a. Control measures must be properly selected and installed in accordance with sound engineering practices and relevant manufacturer's specifications.

b. Off-site accumulations of sediment must be regularly removed to minimize impacts.

c. Litter, construction debris, and construction chemicals must be prevented from entering receiving waters.

d. It is imperative that stabilization be employed as soon as practicable in critical areas. The CSW general permit requires that, except in three situations, stabilization measures must be instituted on disturbed areas as soon as practicable, but no more than 14 days after construction activity has temporarily or permanently ceased on any portion of the site. The three exceptions to this requirement are the following:

(1) When construction activities will resume on a portion of the site within 14 days from suspension of previous construction activities;

(2) When the initiation of stabilization measures is precluded by snow cover or frozen ground, in which case they must be initiated as soon as practicable; and

(3) In arid areas (areas with an average annual rainfall of 0 to 10 inches), semi-arid areas (10 to 20 inches) and areas experiencing droughts; where the initiation of perennial vegetative stabilization measures is precluded by seasonal arid conditions. In this instance, stabilization measures must be initiated as soon as practicable.

e. Increased discharge velocities can greatly accelerate erosion near the outlet of structural measures. To mitigate these effects, velocity dissipation devices should be placed at discharge points and along the length of a runoff conveyance, as necessary, to provide a non-erosive flow. Velocity dissipation devices help protect a water body's natural, pre-construction physical and biological uses and characteristics (e.g., hydrologic conditions such as the hydro period and hydrodynamics).

13. Final Stabilization

Stabilization of exposed soil is one of the foremost means to minimize pollutant discharge during construction activities. Stabilization reduces erosion potential by intercepting water so that it infiltrates into the ground instead of running off the surface, slowing the velocity of runoff, thereby promoting deposition of sediment already being carried. Stabilization provides large reductions in the levels of suspended sediment in discharges and receiving waters. Stabilization refers to covering or maintaining an existing cover over soil. Vegetative cover includes grass, trees, vines, shrubs, etc. Stabilization measures can also include non-vegetative controls such as geotextiles, riprap or gabions (wire mesh boxes filled with rock). Mulches such as straw or bark can be somewhat effective at stabilization in stand-alone fashion but are most effective when used in conjunction with vegetation. When a construction project or an area within a construction project is completed, steps must be taken to permanently and finally stabilize it. For individual lots in residential construction, final stabilization means that either:

a. The homebuilder has completed final stabilization, or

b. The homebuilder has established temporary stabilization including perimeter controls for an individual lot prior to occupation of the home by the homeowner and informing the

homeowner of the need for, and benefits of final stabilization. Part III.M of the CSW general permit gives details of final stabilization.

G. Special Conditions, Management Practices and Other Non-numeric

1. Requiring an Individual Permit or an Alternative General Permit

Based upon a number of different situations (e.g., applicable numeric effluent limitations resulting from a TMDL, or a determination that the operator has the potential to cause or contribute to a water quality standard excursion), may determine that coverage under an individual permit is necessary. If a permittee is currently discharging under this CSW general permit and NDEQ determines that individual coverage is required, written notification of this required change in permit coverage, including reasoning for this decision, an application form, and a deadline for filing the application, will be provided to the permittee by NDEQ. Additionally, any permittee may apply for an individual permit rather than apply for coverage under this general permit. An individual application must be submitted for coverage under such a permit with reasoning supporting the request. If such reasoning is considered adequate by NDEQ, the request will be granted and an individual permit issued. If an individual permit or alternative NPDES permit is issued to the permittee currently covered under this general permit, coverage under the general permit is terminated on the effective date of the new permit. Alternatively, if a permittee, currently covered under the general permit, seeks coverage under an individual or alternative NPDES permit and is denied, coverage under the general permit is terminated on the date of such denial, unless otherwise specified by NDEQ.

2. Oil and Hazardous Substances / Spill Notification

The construction general permit requires the operator to prevent the discharge of hazardous substances or oil from a site in accordance with the SWPPP. Furthermore, if a permitted discharge contains a hazardous substance or oil in an amount equal to or in excess of a reportable quantity established under Title 126 *Rules and Regulations Pertaining to the Management of Waste* and federal reporting requirements of 40 CFR 110, 40 CFR 117, or 40 CFR 302. Details can be found in Part IV.B of the CSW general permit.