

ARKANSAS DEPARTMENT OF ENERGY AND ENVIRONMENT
DIVISION OF ENVIRONMENTAL QUALITY

IN THE MATTER OF:

Down by the Falls, LLC
3135 South Lakeside
Springfield, MO 65804

LIS No. ~~20~~- 21-008
Permit Tracking No. ARR156739
AFIN 51-00172

CONSENT ADMINISTRATIVE ORDER

This Consent Administrative Order (“Order”) is issued pursuant to the authority of the Arkansas Water and Air Pollution Control Act (“Act”), Ark. Code Ann. § 8-4-101 *et seq.*, the Federal Water Pollution Control Act, 33 U.S.C. § 1311 *et seq.*, and the rules issued thereunder by Arkansas Pollution Control and Ecology Commission (APC&EC).

The issues herein having been settled by the agreement of Down by the Falls, LLC (Respondent) and the Division of Environmental Quality¹ (DEQ), it is hereby agreed and stipulated that the following FINDINGS OF FACT and ORDER AND AGREEMENT be entered.

FINDINGS OF FACT

1. Respondent operates the former Dog Patch, USA large construction site (Facility) located off Highway 7 in Marble Falls, Newton County, Arkansas.
2. Respondent is regulated pursuant to the National Pollutant Discharge Elimination System (NPDES).

¹ Pursuant to Act 910 of 2019, the Arkansas Transformation and Efficiencies Act, the former Arkansas Department of Environmental Quality is now the Division of Environmental Quality in the newly created Department of Energy and Environment.

3. Pursuant to the federal Clean Water Act, 33 U.S.C. § 1311(a) *et seq.*, the NPDES program prohibits the discharge of pollutants except as in compliance with a permit issued under the NPDES program in accordance with 33 U.S.C. § 1342(a).

4. DEQ is authorized under the Act to issue NPDES permits in the state of Arkansas and to initiate an enforcement action for any violation of an NPDES permit.

5. Ark. Code Ann. § 8-4-217(a)(3) provides:

(a) It shall be unlawful for any person to:

...

(3) Violate any provisions of this chapter or of any rule or order adopted by the [APC&EC] under this chapter or of a permit issued under this chapter by the [DEQ].

6. Ark. Code Ann. § 8-4-217(b)(1)(C) provides:

(b)(1) It shall be unlawful for any person to engage in any of the following acts without having first obtained a written permit from the division:

...

(C) To construct, install, or operate any building, plant, works, establishment, or facility, or any extension or modification thereof, or addition thereto, the operation of which would result in discharge of any wastes into the waters of this state or would otherwise alter the physical, chemical, or biological properties of any waters of this state in any manner not already lawfully authorized.

7. Ark. Code Ann. § 8-4-103(c)(1)(A) authorizes DEQ to assess an administrative civil penalty not to exceed ten thousand dollars (\$10,000) per violation for any violation of any provision of the Act and any rule or permit issued pursuant to the Act.

8. Pursuant to Ark. Code Ann. § 8-4-103(c)(1)(B), “[e]ach day of a continuing violation may be deemed a separate violation for purposes of penalty assessment.”

9. DEQ issued the NPDES Stormwater Construction General Permit (SCGP), Permit Number ARR150000, on May 4, 2016 with an effective date of November 1, 2016, and an expiration date of October 31, 2021.

10. The operator of a construction site who fails to notify DEQ of their intent to be covered under the NPDES SCGP and who discharges pollutants (sediment, debris, etc.) to waters of the state without an NPDES permit is in violation of the Act.

11. On August 5, 2020, DEQ conducted a construction stormwater inspection of the Facility, and noted the following violations:

a. The Facility had neither applied for nor been issued coverage under the SCGP. Failure to obtain coverage under and comply with the SCGP is a violation of the Act and the Clean Water Act.

b. Construction activities were occurring with over five (5) acres of disturbed soil. Respondent’s construction activities at the site fall within the definition of a “Large Construction Site” as set forth in APC&EC Rule 6.103 and Part I, Section A of the SCGP. Respondent is operating a large construction site without a permit for the discharge of stormwater associated with construction activity. This unpermitted discharge is a violation of Ark. Code Ann. § 8-4-217(b)(1)(C) and is therefore a violation of Ark. Code Ann. § 8-4-217(a)(3).

- c. Respondent was performing in-stream activities in Mill Creek without having been issued a Short Term Activity Authorization (STAA) from DEQ. Respondent was actively dredging Mill Creek in violation of APC&EC Rule 2.305 and therefore in violation of Ark. Code Ann. § 8-4-217(a)(3).
 - d. Respondent's unauthorized dredging activities were causing a visible increase in turbidity in Mill Creek. A visible increase in turbidity of receiving waters from in-stream activities is a violation of APC&EC Rule 2.503 and is therefore a violation of Ark. Code Ann. § 8-4-217(a)(3).
12. On August 17, 2020, DEQ sent Respondent a letter notifying Respondent that the conditions at the Facility constituted violations of the Federal Clean Water Act. The letter also advised Respondent to cease immediately the sediment discharges from the Facility, comply with the terms of the NPDES SCGP No. ARR150000, and obtain the required STAA. Additionally, DEQ required Respondent to initiate corrective action to eliminate discharges of silt and sediment to waters of the state and requested a written response with five (5) calendar days of receipt of the letter.
13. On August 17, 2020, Respondent submitted a STAA Request to DEQ.
14. On August 18, 2020, DEQ sent Respondent a copy of the inspection report.
15. On September 2, 2020, DEQ approved Respondent's request for a STAA by issuing STAA ID #20200327.
16. On September 15, 2020, Respondent submitted a Stormwater Pollution Prevention Plan (SWPPP) and Notice of Intent (NOI) for coverage under the NPDES SCGP.
17. On September 17, 2020, DEQ approved the SWPPP and NOI and issued coverage under the NPDES SCGP with Permit Tracking Number ARR156739.

ORDER AND AGREEMENT

WHEREFORE, the parties stipulate and agree as follows:

1. Respondent shall immediately cease all discharges of turbid water, silt, and sediment to waters of the state from the disturbed areas of Respondent's construction sites and right-of-ways.
2. Respondent shall comply with the terms and conditions of the Notice of Coverage (NOC) and the associated NPDES Stormwater Construction General Permit, including but not limited to the following:
 - a. Divert concentrated or channelized flows of Stormwater away from and around areas of disturbance on steep slopes;
 - b. Use specialized erosion and sediment controls for steep slopes, such as temporary and permanent seeding with soil binders, erosion control blankets, surface roughening, reducing the continuous slope length with terracing or diversions, gradient terraces, interceptor dikes and swales, grass-lined channels, pipe slope drains, subsurface drains, level spreaders, check dams, seep berms, and triangular silt dikes;
 - c. Establish uniform perennial vegetation that provides 80% or more of the cover that is provided by vegetation native to local undisturbed areas;
 - d. Maintain or reestablish twenty-five (25) feet of natural buffer zone, as measured horizontally from the top of the bank to the disturbed area, from any waters of the state; and
 - e. Maintain or reestablish fifty (50) feet of natural buffer zone, as measured horizontally from the top of the bank to the disturbed area, from established TMDL waterbodies, streams listed on the 303(d) list, Extraordinary Resource Waters, Ecologically Sensitive Waterbodies, or Natural and Scenic Waterways.

3. On or before the fifteenth (15th) day of the month following the effective date of this Order, and thereafter each month for a period of six (6) months then each quarter thereafter for a period of eighteen (18) months or until the permit is terminated, Respondent shall submit progress reports detailing the state of stabilization throughout all areas disturbed by the project. The progress reports shall include a copy of all site inspections, photographs depicting the state of stabilization or corrective actions, and an update of any additional corrective actions taken to ensure that turbid water, silt, and sediment are not leaving the construction sites or right-of-ways throughout all areas disturbed by the project. In the event that any progress report is inadequate, DEQ will provide Respondent a written Notice of Deficiency identifying concerns to be addressed in the next progress report.

4. In compromise and full settlement of the violations specified in the Findings of Fact, Respondent agrees to pay a civil penalty of Three Thousand Dollars (\$3000.00) or one-half of the full civil penalty of One Thousand Five Hundred Dollars (\$1500.00) if this Order is signed and returned to the Office of Water Quality Enforcement Branch, DEQ, 5301 Northshore Drive, North Little Rock, Arkansas, 72118-5317, within twenty (20) calendar days of receipt of this Order. Payment is due within thirty (30) calendar days of the effective date of this Order. Such payment of the penalty shall be made payable to the Division of Environmental Quality, and mailed to the attention of:

DEQ, Fiscal Division
5301 Northshore Drive
North Little Rock, AR 72118

In the event that Respondent fails to pay the civil penalty within the prescribed time, DEQ shall be entitled to attorneys' fees and costs of collection.

5. Failure to meet any requirement or deadline of this Order constitutes a violation of this Order. If Respondent should fail to meet any such requirements or deadlines, Respondent consents and agrees to pay on demand to DEQ stipulated penalties according to the following schedule:

- a. First day through fourteenth day: \$100.00 per day
- b. Fifteenth day through the thirtieth day: \$500.00 per day
- c. Each day beyond the thirtieth day: \$1000.00 per day

These stipulated penalties for delay in performance shall be in addition to any other remedies or sanctions that may be available to DEQ by reason of failure by Respondent to comply with the requirements of this Order.

6. If any event, including but not limited to an act of nature, occurs that causes or may cause a delay in the achievement of compliance by Respondent with the requirements or deadlines of this Order, Respondent shall so notify DEQ, in writing, as soon as reasonably possible after it is apparent that a delay will result, but in no case after the due dates specified in this Order. The notification shall describe in detail the anticipated length of the delay, the precise cause of the delay, the measures being taken and to be taken to minimize the delay, and the timetable by which those measures will be implemented.

7. DEQ may grant an extension of any provision of this Order, provided that Respondent requests such an extension in writing and provided that the delay or anticipated delay has or will be caused by circumstances beyond the control of and without the fault of Respondent. The time for performance may be extended for a reasonable period but in no event longer than the period of delay resulting from such circumstances. The burden of proving that any delay is caused by circumstances beyond the control of and without the fault of Respondent and the length of the

delay attributable to such circumstances shall rest with Respondent. Failure to notify the DEQ promptly, as provided in the preceding paragraph of this Section, shall be grounds for a denial of an extension.

8. All requirements by the Order and Agreement are subject to approval by DEQ. Unless otherwise specified herein, in the event of any deficiencies, Respondent shall, within the timeframe specified by DEQ, submit any additional information or changes requested, or take additional actions specified by DEQ to correct any such deficiencies. Failure to respond adequately to such Notice of Deficiency within the timeframe specified in writing by DEQ constitutes a failure to meet the requirements established by this Order.

9. This Order is subject to public review and comment in accordance with Ark. Code Ann. § 8-4-103(d) and APC&EC Rule 8 and shall not be effective until thirty (30) calendar days after public notice is given. DEQ retains the right to rescind this Order based upon the comments received within the thirty (30) day public comment period. Notwithstanding the public notice requirements, the corrective actions necessary to achieve compliance shall be taken immediately. The publication of this Order shall occur on or about the 10th or 25th day of the month following the date this Order is executed. As provided by APC&EC Rule 8, this matter is subject to being reopened upon Commission initiative or in the event a petition to set aside this Order is granted by the Commission.

10. Nothing in this Order shall be construed as a waiver by DEQ of its enforcement authority over alleged violations not specifically addressed herein. Also, this Order does not exonerate Respondent from any past, present, or future conduct that is not expressly addressed herein, nor does it relieve Respondent of its responsibilities for obtaining any necessary permits.

11. By virtue of the signature appearing below, the individual represents that he or she is a Managing Member of Respondent, being duly authorized to execute and bind Respondent to the terms contained herein as attested by the secretary of said entity. Execution of this Order by an individual other than a Managing Member of Respondent shall be accompanied by a resolution granting signature authority to said individual as duly ratified by the governing body of the entity.

SO ORDERED THIS 27 DAY OF January, 2020.

Becky W Keogh
BECKY W. KEOGH, DIRECTOR

APPROVED AS TO FORM AND CONTENT:

Down by the Falls, LLC

BY: Shana Parrott
(Signature)

Shana Parrott
(Typed or printed name)

TITLE: Manager

DATE: 1-21-2021