Message

From: Livingston, Peggy [Livingston.Peggy@epa.gov]
Sent: 5/17/2018 9:29:12 PM
To: Dygowski, Laurel [Dygowski.Laurel@epa.gov]
CC: DeJong, Stephanie [DeJong.Stephanie@epa.gov]
Subject: FW: Inspection Reports

Peggy Livingston
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From: DeVoe, Michelle [mailto:Michelle.DeVoe@dgslaw.com]
Sent: Thursday, May 17, 2018 2:51 PM
To: Livingston, Peggy <Livingston.Peggy@epa.gov>
Subject: Inspection Reports

Hi Peggy,

I wanted to follow up on your email below. We are missing Laurel's annotated inspection reports for 11/19/13 and 6/10/14. Could you please provide us with copies of those?

Thanks, Michelle

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A **LexMundi** Member

From: Livingston, Peggy [mailto:Livingston.Peggy@epa.gov]
Sent: Wednesday, May 16, 2018 12:00 PM
To: Temkin, Betsy <Elizabeth.Temkin@dgslaw.com>
Cc: Dygowski, Laurel <Dygowski.Laurel@epa.gov>; DeJong, Stephanie <DeJong.Stephanie@epa.gov>
Subject: Kiewit: I-25 storm water matter

Settlement Communication
Subject to Rule 408 of the Rules of Evidence

Betsy:

We would like to thank you, Connie Determan, and Jenn Bradtmueller for coming to the EPA's conference center on May 10th to meet with Stephanie DeJong, Laurel Dygowski, and me concerning Kiewit's storm water permit compliance at the I-25 highway project near Colorado Springs. Region 8 would also like to follow up on some issues discussed during our meeting.

Corrective Actions

In alleging failures to take timely corrective action following an inspection, we considered the following permit provisions, and in particular the language in bold:

From Part I.D.8 of the State Permit:

Where BMPs have failed, resulting in noncompliance with Part I.D.2, they must be addressed as soon as possible, **immediately in most cases,** to minimize the discharge of pollutants.

From Part 2.1.1.4.b of the Federal Permit:

You [the permittee] must inspect all erosion and sediment controls in accordance with the applicable requirements in Part 4.1, and document your findings in accordance with Part 4.1.7. If you find a problem, (*e.g., erosion and sediment controls need to be replaced, repaired, or maintained*), you must make the necessary repairs or modifications in accordance with the following schedule:

i. initiate work to fix the problem immediately after discovering the problem, and complete such work **by the close of the next work day**, if the problem does not require significant repair or replacement, or if the problem can be corrected through routine maintenance.

ii. When installation of a new erosion or sediment control or a significant repair is needed, you must install the new or modified control and make it operational, or complete the repair, by no later than **7 calendar days from the time of discovery** where feasible. If it is infeasible to complete the installation or repair within 7 calendar days, you must document in your records why it is infeasible to complete the installation or repair within the 7-day timeframe and document your schedule for installing the stormwater control(s) and making it operational as soon as practicable after the 7-day timeframe.

From Part 5.2 of the Federal Permit:

In all circumstances, you must immediately take all reasonable steps to minimize or prevent the discharge of pollutants until a permanent solution is installed and made operational, including cleaning up any contaminated surfaces so that the material will not discharge in subsequent storm events.

Note: In this context, the term "immediately" requires construction operators to, on the same day a condition requiring corrective action is found, take all reasonable steps to minimize or prevent the discharge of pollutants until a permanent solution is installed and made operational. However, if the problem is identified at a time in the work day when it is too late to [initiate] corrective action, the initiation of corrective action must begin on the following work day.

From Part 5.2.1 of the Federal Permit:

For any of the following conditions on your site, you must install a new or new or modified control and make it operational, or complete the repair, by no later than **7 calendar days** from the time of discovery. If it is infeasible to complete the installation or repair within 7 calendar days, you must document in your records why it is infeasible to complete the installation or repair within the 7 calendar day timeframe and document your schedule for installing the stormwater control(s) and making it operational as soon as practicable after the 7-day timeframe.

5.2.1.1 A required stormwater control was never installed, was installed incorrectly, or not in accordance with the requirements in Parts 2 and/or 3; or

5.2.1.2 You become aware that the stormwater controls you have installed and are maintaining are not effective enough for the discharge to meet applicable water quality standards or

applicable requirements in Part 3.1. In this case, you must notify your EPA Regional Office by the end of the next day.

For purposes of alleging violations for a settlement with Kiewit, we considered the more lenient federal permit provisions.

"**Close of next work day.**" For problems not requiring significant repair or replacement, or problems correctable through routine maintenance, we considered failure to take corrective action within two days as a violation.

"7 calendar days." For problems requiring a new erosion or sediment control, such as where a BMP was incorrectly installed and a new one was needed, or where a significant repair was needed to an existing BMP, we considered failure to take corrective action within seven days as a violation, in the absence of documentation indicating that more than seven days would be needed.

The two pdf attachments entitled "Corrective Actions 1 of 2" and "Corrective Actions 2 of 2" highlight instances in which we considered the failure to take timely corrective action as a violation, based on the approach set forth above. In addition, the third pdf attachment, entitled "Corrective Actions Not Logged" indicates where we did not see evidence of any corrective action having been taken.

Inspection Reports Provided During May 10th Meeting

During our meeting, Laurel provided Kiewit with paper copies of various inspection reports demonstrating missing or inadequate BMPs. The reports should cover inspections on the following dates:

6/5/2013, 8/22/2013, 8/23/2013, 8/28/2013, 8/30/2013, 9/30/2013, 10/30/2013, 11/19/2013, 12/16/2013, 2/26/2014, 4/2/2014, 4/8/2014, 5/22/2014, 3/12/2014, 4/28/20145/2/2014, 5/2/2014, 5/29/2014, 6/2/2014, 6/10/2014, 7/8/2014, 7/14/2018, 7/17/2014, 7/21/2014, 7/30/2014, 7/31/2014, 8/1/2014, 8/9/2014, 8/15/2014, 8/19/2014, 10/10/2014

If anything is missing from the paper copies you received during our meeting, please let me know. In light of your comments during our meeting, we are reviewing the examples of BMPs we have alleged were insufficient or inadequately maintained.

CDOT Spreadsheet

A copy of the CDOT spreadsheet referenced during the meeting is also attached.

Upset Defense

We understand your position to be that rainstorms preceding the August 23, 2013, August 30, 2013, and September 30, 2013 site inspections constituted upset events. We expect to address this in more detail in the near future.

Next Meeting

For a follow-up meeting, would any of the following suggested dates work for you?

Tuesday, May 29th
Wednesday, June 13th
Thursday, June 14th

We reserve the right to advocate a more stringent interpretation of the relevant permits should this case be litigated. However, recognizing Kiewit's cooperation, we are providing this explanation for purposes of settlement.

Thank you.

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