



John R. Kasich, Governor
Mary Taylor, Lt. Governor
Scott J. Nally, Director

May 10, 2013

RE: LORAIN COUNTY
PITTSFIELD TWP
CONSTRUCTION STORM WATER
QUARRY ROAD STORAGE LAGOON
3GC06270*AG

Dennis O'Toole
Stumphauzer O'Toole
5455 Detroit Rd
Sheffield Village, OH 44054

Dear Mr. O'Toole:

I am in receipt of your letters dated April 25, 2013, and April 30, 2013, regarding the above referenced site located on Quarry Road north of Hughes Road. Further, I spoke with Donald Ortner, your client, via telephone on May 2, 2013, and hopefully, many of the questions in your letter dated April 25, 2013, and expectations for corrective action were answered during that conversation. Ohio EPA does not withdraw a Notice of Violation; however, this letter will respond to your letter dated April 25, 2013, and provide clarity to the situation:

Definition of "Facility"

In terms of NPDES permits for storm water associated with construction, the facility is the permitted construction activity as depicted in the site map submitted with the Notice of Intent (NOI), i.e., permit application, and associated storm water pollution prevention plan (SWP3). The NOI indicates the acreage to be disturbed by the proposed construction activity and the boundary of that area is to shown on a site map that accompanies the NOI. Disturbance means any clearing, grading, excavating, filling or other alteration of land surface where natural or man-made cover is destroyed in a manner that exposes the underlying soils.

Definition of "Operator"

Although not asked that way, your second question is really a question about the definition of "operator" which determines who must obtain NPDES permit coverage. Part I.F.1.a of the Ohio EPA General Storm Water NPDES Permit for Construction Activities #OHC000004 indicates that all parties that meet the definition of "operator" must obtain NPDES permit coverage. An operator is anyone with (a) operational control over the construction plans and specifications for the construction activity, including the ability to make modifications to those plans and specifications, or (b) day-to-day operational control of those activities at a project which are necessary to ensure compliance with an SWP3 for the site or other permit condition, e.g., they direct workers at a site to carry out activities required by the SWP3 or comply with permit conditions. In the case of the Quarry Road Storage Lagoon, French Creek Bioenergy LLC meets the definition of operator, and thus, submitted an NOI to obtain NPDES permit coverage.

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However, it is quite typical that the general contractor hired to do the site work or a construction management company overseeing the project also meets the definition of operator because they are directing the day-to-day operations at the site. Your response clarified that the contractor performing construction activities at the site was D & D Associated Contractors Inc., i.e., Mr. Ortner's business, and not Mr. Ortner personally. Your response further indicates that the work performed by D & D Associated Contractors was directed by Quasar Energy Group and not D & D Associated Contractors. Ohio EPA notes your position on this issue; however, it appears to be in conflict with the information provided by French Creek Bioenergy LLC. D & D Associated Contractors Inc. must submit a co-permittee NOI if they meet the definition of operator. Please note that Ohio EPA records still do not indicate that any party has become a co-permittee of French Creek Bioenergy LLC for this construction activity.

The requirement to submit a co-permittee NOI was discussed with Mr. Ortner during our telephone conversation on May 2, 2013. D & D Associated Contractors should be submitting a co-permittee NOI as a matter of routine on any NPDES-regulated construction site where they are involved and meet the definition of "operator." There is no fee to submit a co-permittee NOI, but it is to be submitted at least 21 days prior to the commencement of construction activity. In instances where the co-permittee is not known at least 21 days prior to the start of construction activities, Ohio EPA expects the co-permittee NOI to be submitted before the proposed co-permittee engages in construction activity at the facility.

Citations of ORC 6111 and OAC 3745-38

Failing to submit an NOI or co-permittee NOI to obtain NPDES permit coverage creates the violation of ORC 6111.04, i.e., discharging storm water associated with construction activities without NPDES permit coverage.

The reference to OAC 3745-38-06 was incorrect and should have been OAC 3745-38-02. OAC 3745-38 was amended in July 2010 and section 3745-38-06 was replaced with section 3745-38-02; however, OAC 3745-38-02(A)(1) and OAC 3745-38-02(A)(2) state the following:

(A)(1) No person may discharge any pollutant or cause, permit, or allow a discharge of any pollutant from a point source without applying for and obtaining an individual NPDES permit in accordance with Chapter 3745-33 of the Administrative Code or obtaining authorization to discharge under a general NPDES permit in accordance with this chapter. As a minimum, this chapter shall be administered consistent with the federal water pollution control act and regulations adopted by the administrator, including 40 CFR 122 (effective July 1, 2009).

(A)(2) Each point source shall be regulated by an individual or general NPDES permit, as determined by the director.

In concert, the citation of ORC 6111.04 and OAC 3745-38-02 is an indication that the operator is discharging storm water associated with construction activity without authorization under an NPDES permit.

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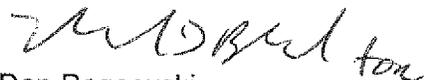
Expectations for Corrective Action

On or about May 2, 2013, French Creek Bioenergy LLC notified Ohio EPA that they will not be moving forward with the Quarry Road Storage Lagoon project. Their intent is to fill in the pond and restore the site to its pre-construction condition. In the interim, appropriate sediment controls must be implemented to minimize off-site sedimentation and areas disturbed by construction that will remain idle for 14 or more days must be stabilized. Once site restoration activities are completed, the site must be permanently stabilized. Permanent stabilization means the establishment of permanent vegetation, decorative landscape mulching, matting, sod, rip rap and landscaping techniques to provide permanent erosion control on areas where construction operations are complete or where no further disturbance is expected for at least one year. Because unauthorized impacts to wetlands occurred as a result of construction activities at this facility, the Army Corps of Engineers is requiring French Creek Bioenergy to submit a wetland restoration plan. Stabilization within delineated wetlands is to occur per the wetland restoration plan approved by the Corps.

In my telephone conversation with Mr. Ortner, he indicated that D & D Associated Contractors has bid to perform the restoration work, but does not know if it will be awarded to them. Please note that Ohio EPA expects D & D Associated Contractors to submit a co-permittee NOI before engaging in these activities if they are awarded the job. French Creek Bioenergy LLC has indicated to Ohio EPA that they expect site restoration to be completed by May 31, 2013.

I trust this letter provides the response you requested and clarifies your understanding of the NPDES permit program for storm water associated with construction activities. If you have further questions, please contact me at (330) 963-1145.

Sincerely,



Dan Bogoevski
District Engineer
Division of Surface Water

DB:bo

pc: Bruce Bailey, French Creek Bioenergy LLC
Donald Ortner
Gerry Innes, Lorain County Prosecutor's Office
John Niedzialek, Lorain SWCD
Dan Shinsky, Pittsfield Twp
Trustees, Pittsfield Twp

ec: Mike Settles, PIC, CO