

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7
11201 RENNER BOULEVARD
LENEXA, KANSAS 66219

IN THE MATTER OF) Docket No. CWA-07-2017-0109
)
Bettis Asphalt and Construction, Inc.)
)
)
)
) COMPLAINT AND CONSENT
) AGREEMENT / FINAL ORDER
)
Proceedings under Section 309(g))
of the Clean Water Act,)
33 U.S.C. § 1319(g))
_____)

COMPLAINT

Jurisdiction

1. This is an administrative action for the assessment of civil penalties instituted pursuant to Section 309(g) of the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act (“CWA”), 33 U.S.C. § 1319(g), and in accordance with the United States Environmental Protection Agency’s (“EPA”) Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. Part 22 (“Consolidated Rules of Practice”).

2. This Complaint and Consent Agreement/Final Order (“CA/FO”) alleges that Bettis Asphalt and Construction, Inc. violated Section 301 of the CWA, 33 U.S.C. § 1311, a permit issued pursuant to Section 402, 33 U.S.C. § 1342, and regulations promulgated thereunder.

Parties

3. The authority to take action under Section 309(g) of the CWA, 33 U.S.C. § 1319(g), is vested in the Administrator of EPA. The Administrator has delegated this authority to the Regional Administrator of EPA, Region 7, who in turn has delegated it to the Director of the Water, Wetlands and Pesticides Division of EPA, Region 7 (“Complainant”).

4. Bettis Asphalt and Construction, Inc. (hereafter “Bettis Asphalt” or “Respondent”) is and was at all relevant times a corporation under the laws of and authorized to conduct business in the state of Kansas.

Statutory and Regulatory Framework

5. The objective of the CWA is to restore and maintain the chemical, physical and biological integrity of the nation's waters. *See* Section 101(a) of the CWA, 33 U.S.C. § 1251(a).
6. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants except in compliance with, *inter alia*, Section 402 of the CWA, 33 U.S.C. § 1342. That Section provides that pollutants may be discharged in accordance with the terms of a National Pollutant Discharge Elimination System ("NPDES") permit issued pursuant to that Section.
7. The CWA prohibits the "discharge" of "pollutants" from a "point source" into "navigable waters" of the United States, as these terms are defined by Section 502 of the CWA, 33 U.S.C. § 1362.
8. Section 502(6) of the CWA, 33 U.S.C. § 1362(6), defines "pollutant" to include, *inter alia*, rock, sand, cellar dirt, garbage, chemical waste, solid waste and industrial waste discharged into water.
9. Section 502(14) of the CWA, 33 U.S.C. § 1362(14), defines "point source" to include "any discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged."
10. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines "navigable waters" as the "waters of the United States," which are defined at 40 C.F.R. § 122.2 and which include tributaries to waters of the United States.
11. Section 402(p) of the CWA, 33 U.S.C. § 1342(p), sets forth requirements for the issuance of NPDES permits for the discharge of stormwater. That Section requires, in part, that a discharge of stormwater associated with an industrial activity must conform with the requirements of a NPDES permit issued pursuant to Sections 301 and 402 of the CWA.
12. Pursuant to Section 402(p) of the CWA, EPA promulgated regulations setting forth the NPDES permit requirements for stormwater discharges at 40 C.F.R. § 122.26.
13. 40 C.F.R. §§ 122.26(a)(1)(ii) and 122.26(c) require dischargers of stormwater associated with industrial activity to apply for an individual permit or to seek coverage under a promulgated stormwater general permit.

14. 40 C.F.R. § 122.26(b)(14)(ii) defines “stormwater discharge associated with industrial activity,” in part, as discharges from facilities under Standard Industrial Classification (“SIC”) 2951 (Asphalt Paving Mixtures and Blocks).

15. Section 309(g) of the CWA provides for the assessment of civil penalties for violations of conditions or limitations in a permit issued pursuant to Section 402 of the CWA.

16. The Kansas Department of Health and Environment (“KDHE”) is the state agency with the authority to administer the federal NPDES program in Kansas pursuant to Section 402 of the CWA, 33 U.S.C. § 1342, and applicable implementing regulations. EPA maintains concurrent enforcement authority with authorized state programs for violations of NPDES permits.

EPA’s General Allegations

17. Respondent is a “person” as that term is defined in as defined by Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

18. Respondent is and was at all times relevant to this action the owner and/or operator of a facility operating under the name Bettis Asphalt and Construction, Inc., located at 2350 Northwest Water Works Drive, Topeka, Kansas 66606 (“Facility”), operating under SIC code 2951.

19. Stormwater, snow melt, surface drainage and runoff water leave the Facility and discharge to the Kansas River. The runoff and drainage from the Facility is “stormwater” as defined by 40 C.F.R. § 122.26(b)(13).

20. Stormwater from the Facility contains “pollutants” as defined by Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

21. The Facility has “stormwater discharges associated with industrial activity” as defined by 40 C.F.R. § 122.26(b)(14)(ii), and is a “point source” as defined by Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

22. The Kansas River is a “water[] of the United States” as defined by Section 502(7) of the CWA, 33 U.S.C. § 1362(7), and its implementing regulation, 40 C.F.R. § 122.2.

23. Stormwater runoff from Respondent’s industrial activity results in the addition of pollutants from a point source to waters of the United States, and thus is the “discharge of a pollutant” as defined by CWA Section 502(12), 33 U.S.C. § 1362(12).

24. Respondent's discharge of pollutants associated with an industrial activity, as defined by 40 C.F.R. § 122.26(b)(14)(ii), requires a permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

25. KDHE issued General Permit Number KSR000184 to Respondent for the discharge of stormwater under the NPDES on February 13, 2007 ("Permit"). The Permit expired on October 31, 2016 and KDHE renewed it on November 1, 2016 with a new expiration date of October 31, 2021. The Permit governs stormwater discharges associated with industrial activities, including activities related to asphalt manufacturing and products.

26. Respondent has operated under the Permit at all times relevant to this Complaint.

27. On March 28, 2016, EPA performed an Industrial Stormwater Compliance Evaluation Inspection (hereafter "EPA Inspection") of Respondent's Facility under the authority of Section 308(a) of the CWA, 33 U.S.C. § 1318(a), to evaluate Respondent's compliance with its NPDES permit and the CWA.

28. During the EPA Inspection, the EPA inspector reviewed Respondent's available records related to the NPDES permit, and observed the Facility site and the receiving waters to which the Facility discharges stormwater.

Allegations of Violation

29. The facts stated above are herein incorporated.

Count 1

Inadequate Stormwater Pollution Prevention Plan and Failure to Periodically Amend the Stormwater Pollution Prevention Plan

30. Section 2.1 of Respondent's Permit requires that the permittee develop a Stormwater Pollution Prevention Plan ("SWPPP") and fully implement, periodically review, and update as necessary, the provisions of the SWPPP.

31. Section 2.4 of Respondent's Permit requires that the SWPPP contain certain minimum requirements. These requirements include a site map that identifies the outline of drainage areas, the approximate acreage of each stormwater outfall and the direction of flow. The site map must also identify the location of loading and unloading areas, stock piles, areas where spills have occurred and residues remain, oils, paint, and storage tanks.

32. The EPA Inspection found material stockpiles and chemical inventory stored outdoors that were not identified on the site map in Respondent's SWPPP. In addition,

Respondent's site map did not indicate the approximate acreage of the Facility's stormwater outfall and did not indicate the locations of loading/unloading areas.

33. Section 2.4.6 of the Permit requires Respondent to update the SWPPP within 90 days whenever Respondent's inspections indicate deficiencies in the SWPPP or there are significant changes in design, construction, operation or maintenance of the Facility.

34. At the time of the EPA Inspection on March 28, 2016, Respondent's SWPPP indicated that it was last updated in July 2010. Respondent's SWPPP site map showed office space and vehicular maintenance and washing areas which were moved off the Facility site in 2013. Respondent's failure to update its SWPPP site map is a violation of its Permit.

35. Respondent's failure to include all required information in its SWPPP, and to timely review and update its SWPPP, is a violation of the terms and conditions of Respondent's Permit, and as such, is a violation of Section 402(p) of the CWA, 33 U.S.C. § 1342(p), and EPA's implementing regulations.

Count 2

Failure to Implement Adequate Control Measures or Take Sufficient Corrective Actions to Improve Control Measures

36. Section 2.2 of Respondent's Permit requires Respondent to review, evaluate, select, install, utilize operate and maintain best management practices ("BMPs") in order to reduce the amount of pollutants in stormwater discharges associated with industrial activity at the Facility.

37. Section 2.4.3 of Respondent's Permit requires Respondent to list and describe BMPs appropriate for the Facility in its SWPPP, including, but not limited to, BMPs for good housekeeping practices, preventative maintenance, spill prevention and response procedures, sediment and erosion controls, inspections and management of runoff.

38. Section 2.3 of Respondent's SWPPP identifies BMPs for good housekeeping, preventative maintenance, spill prevention and response procedures, chemical storage, inspections, internal reporting procedures and management of runoff. That Section also requires Respondent to maintain areas around the Facility in a clean and orderly manner.

39. The EPA Inspection found trash debris scattered around the Facility and in the drainage channel leading to the primary stormwater intake structure, as well as paint and AC oil spilled on the ground. The EPA inspector also found striping paint containers, asphalt release agent and additive outside of secondary containment. In addition, the EPA inspector observed a tanker truck leaking diesel and an oil release from a tank overfill in January 2016 in secondary containment that had still not been recovered at the time of the EPA Inspection more than two

months later. These findings indicate a failure to implement adequate BMPs for good housekeeping, spill prevention and response, preventative maintenance, chemical storage, inspections and internal reporting procedures.

40. Section 2.3 of Respondent's SWPPP states that no BMP for sediment and erosion control is needed because the activities at the Facility should not create an issue with erosion.

41. The EPA Inspection found sand spilling over or outside secondary containment and soil stockpiles with no controls. The EPA inspector observed sand from a stockpile at the Facility site traveling toward and entering a ravine which leads directly to the Kansas River on the northern perimeter of the site. A section of the perimeter concrete barricade had a gap just east of the primary outfall where the EPA inspector observed sand traveling toward the ravine.

42. Respondent's failure to implement adequate control measures or take sufficient corrective actions to improve control measures, is a violation of the terms and conditions of Respondent's Permit, and as such, is a violation of Section 402(p) of the CWA, 33 U.S.C. § 1342(p), and EPA's implementing regulations.

Count 3

Failure to Adequately Document Routine Site Inspections

43. Section 2.4.3(d) of Respondent's Permit requires Respondent to conduct routine site inspections, at least quarterly, and to include follow-up procedures in the SWPPP to ensure that appropriate actions are taken in response to the inspections. The Permit requires Respondent to have trained personnel inspect designated equipment and storage areas for raw material, finished products, chemicals, recycling, paint, fueling and maintenance, loading/unloading and waste management.

44. The EPA Inspection and review of Respondent's records showed that Respondent's quarterly inspection reports did not include the inspection of storage areas for finished products, recycling, paint, and loading/unloading areas. Based on these findings, Respondent failed to adequately document the inspection of the areas listed above during quarterly inspections.

45. Respondent's failure to adequately document routine site inspections is a violation of the terms and condition of Respondent's Permit, and as such, is a violation of Section 402(p) of the CWA, 33 U.S.C. § 1342(p), and EPA's implementing regulations.

CONSENT AGREEMENT

46. Respondent and EPA agree to the terms of this Consent Agreement/Final Order and Respondent agrees to comply with the terms of the Final Order.

47. Respondent admits the jurisdictional allegations of this CA/FO and agrees not to contest EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of the Final Order.

48. Respondent neither admits nor denies the factual allegations contained in this Complaint and CA/FO.

49. Respondent waives any right to contest the allegations set forth in this CA/FO and its right to appeal this Consent Agreement and the accompanying Final Order.

50. Respondent and EPA agree to conciliate this matter without the necessity of a formal hearing and to bear their respective costs and attorney's fees incurred as a result of this action.

51. This CA/FO addresses all civil and administrative claims for the CWA violations identified above existing through the effective date of this CA/FO. EPA reserves the right to take enforcement action with respect to any other violations of the CWA or other applicable law. EPA further reserves the right to take enforcement action against Respondent for any future violations of the CWA and its implementing regulations, and to enforce the terms and conditions of this CA/FO.

52. Respondent certifies by the signing of this CA/FO that, to the best of its knowledge, Respondent is in compliance with all requirements of the CWA, 33 U.S.C. §1251, *et seq.*, and all regulations promulgated there under.

53. The effect of settlement is conditional upon the accuracy of the Respondent's representations to EPA.

54. The headings in this CA/FO are for convenience of reference only and shall not affect interpretation of this CA/FO.

55. Nothing contained in the CA/FO shall alter or otherwise affect Respondent's obligations to comply with all applicable federal, state and local environmental statutes and regulations and applicable permits, nor shall it be construed to be a ruling on, or determination of, any issue related to any federal, state or local permit.

56. Respondent consents to the issuance of the Final Order and consents to the payment of a civil penalty in the amount of Ten Thousand Dollars (\$10,000) within thirty (30) days of the effective date of the Final Order.

57. The undersigned representative(s) of Respondent certifies that he or she is fully authorized to enter the terms and conditions of this Complaint and CA/FO and to execute and

legally bind Respondent to it.

Penalty Payment

58. Respondent shall pay a civil penalty of Ten Thousand Dollars (\$10,000) within thirty (30) days of the effective date of the Final Order. Respondent shall pay the penalty by cashier's or certified check made payable to the "Treasurer, United States of America," and shall deliver the check with a transmittal that identifies the case name and docket number, CWA-07-2017-0109, to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, Missouri 63197-9000.

59. Copies of the transmittal letter and the check shall be simultaneously sent to:

Regional Hearing Clerk
U.S. Environmental Protection Agency - Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219

and to:

Katherine Reitz
Attorney Advisor
U.S. Environmental Protection Agency - Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219.

60. Should the civil penalty not be paid as provided above, interest will be assessed at the annual rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717. The interest will be assessed on the overdue amount from the due date through the date of payment. Failure to pay the civil penalty when due may result in the commencement of a civil action in Federal District Court to collect said penalty, together with costs and interest thereon.

61. No portion of the civil penalty or interest paid by Respondent pursuant to the requirements of this CA/FO shall be claimed by Respondent as a deduction for federal, state or local income tax purposes.

Parties Bound

62. This CA/FO shall apply to and be binding upon Respondent, its agents, successors and assigns. Respondent shall ensure that its directors, officers, employees, contractors, consultants, firms or other persons or entities acting under or for them with respect to matters included herein comply with the terms of this CA/FO.

Reservation of Rights

63. EPA reserves the right to enforce the terms of this CA/FO by initiating a judicial or administrative action pursuant to Section 309 of the CWA, 33 U.S.C. § 1319.

64. With respect to matters not addressed in this CA/FO, EPA reserves the right to take any enforcement action pursuant to the CWA, or any other available legal authority, including without limitation, the right to seek injunctive relief, monetary penalties and punitive damages.

Effective Date

65. Pursuant to 40 C.F.R. § 22.31(b), this Consent Agreement/Final Order shall be effective after entry by the authorized Regional official and upon filing with the Regional Hearing Clerk, U.S. Environmental Protection Agency, 11201 Renner Boulevard, Lenexa, Kansas 66219. All time periods herein shall be calculated therefrom in calendar days unless otherwise provided in this CA/FO.

COMPLAINANT:
U.S. ENVIRONMENTAL PROTECTION AGENCY

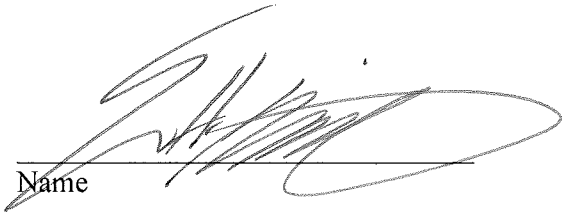
Jeffery Robichaud
Acting Director
Water, Wetlands and Pesticides Division

Date

Katherine Reitz
Attorney Advisor

Date

RESPONDENT:
BETTIS ASPHALT AND CONSTRUCTION, INC.:


Name

4-24-17
Date

PRESIDENT
Title

FINAL ORDER

Pursuant to 40 C.F.R. 22.18(b)-(c) of EPA's Consolidated Rules of Practice, the foregoing Consent Agreement resolving this matter is incorporated by reference into this Final Order and is hereby ratified.

The Respondent is ORDERED to comply with all terms of the Consent Agreement. In accordance with 40 C.F.R. § 22.31(b), the effective date of the foregoing Consent Agreement and this Final Order is the date on which this Final Order is filed with the Regional Hearing Clerk.

IT IS SO ORDERED.

Date

Signature

Name

Title