

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

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)	
)	Docket No. CWA-07-2017-0040
City of Waukee, Iowa)	COMPLAINT AND
Respondent)	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 Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation, Termination or Suspension of Permits (“Consolidated Rules”), 40 C.F.R. Part 22.
2. Complainant, the U.S. Environmental Protection Agency, Region 7 (“EPA”) and Respondent, city of Waukee, Iowa (“Respondent” or “City”), have agreed to a settlement of this action before the filing of a complaint, and thus this action is simultaneously commenced and concluded pursuant to Rules 22.13(b) and 22.18(b)(2) and (3) of the Consolidated Rules, 40 C.F.R. §§ 22.13(b) and 22.18(b)(2) and (3).
3. This Complaint and Consent Agreement/Final Order serves as notice that the EPA has reason to believe that the Respondent has violated Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311, 1342, and regulations promulgated thereunder.

Parties

4. The authority to take action under Section 309(g) of the CWA, 33 U.S.C. § 1319(g), is vested in the Administrator of the EPA. The Administrator has delegated this authority to the Regional Administrator, EPA, Region 7, who in turn has delegated the authority under Section 309(g) to the Director of the Water, Wetlands and Pesticides Division of EPA, Region 7 (collectively referred to as the “Complainant”).
5. Respondent is and was at all relevant times a municipality organized under the laws of the state of Iowa.

Statutory and Regulatory Framework

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. Section 402 of the CWA, 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 a “navigable water” of the United States, as these terms are defined by Section 502 of the CWA, 33 U.S.C. § 1362.

8. 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. Section 402(p) of the CWA requires, in part, that a discharge of stormwater associated with an industrial activity must comply with the requirements of an NPDES permit issued pursuant to Sections 301 and 402 of the CWA.

9. Pursuant to Section 402(p) of the CWA, the EPA promulgated regulations setting forth the NPDES permit requirements for stormwater discharges at 40 C.F.R. § 122.26.

10. 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.

11. 40 C.F.R. § 122.26(b)(14)(x) defines “storm water discharge associated with industrial activity,” in part, as construction activity including clearing, grading, and excavation, except operations that result in the disturbance of less than five acres of total land area which are part of a larger common plan of development or sale.”

12. The Iowa Department of Natural Resources (“IDNR”) is the state agency with the authority to administer the federal NPDES program in Iowa pursuant to Section 402 of the CWA. The EPA maintains concurrent enforcement authority with authorized states for violations of the CWA.

13. IDNR issued Iowa General Permit No. 2 for Storm Water Discharge Associated with Industrial Activity for Construction Activities (“General Permit”) on October 1, 1992, and subsequently reissued it, currently effective from October 1, 2012, through October 1, 2017.

14. Any individual seeking coverage under the General Permit is required to submit a Notice of Intent (“NOI”) to IDNR.

15. The principal requirement of the General Permit is for the owner to develop and implement a Stormwater Pollution Prevention Plan (“SWPPP”). The SWPPP must identify potential sources of pollution which may reasonably be expected to affect the quality of the storm water discharge from the construction activities, describe and ensure the implementation

of best management practices (“BMPs”) which will be used to reduce the pollutants in storm water discharge associated with industrial activity for construction activities at the construction site and to assure compliance with the terms and conditions of the permit.

EPA’s General Allegations

16. The City is a “person,” as defined by Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

17. The City is and was at all times relevant to this action the owner and operator of Westown Parkway and R22 Intersection Improvement Project construction site (“site”), comprised of approximately 5 acres located at the above referenced intersection in Waukee, Iowa 50263.

18. Stormwater, snow melt, surface drainage and runoff water leave Respondent’s site and discharge through various drainage pathways to an unnamed tributary of Sugar Creek.

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

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

21. Sugar Creek and its tributaries identified in Paragraph 18, above, are “navigable waters” as defined by Section 502(7) of the CWA, 33 U.S.C § 1362(7).

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

23. 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.

24. Respondent filed a NOI with IDNR seeking coverage under the General Permit on or about March 23, 2016.

25. IDNR issued NPDES permit IA28471-28214 (“Permit”) to the City for the site on or about March 25, 2016; the Permit authorization will expire on March 25, 2017. The Permit governs Respondent’s stormwater discharges that are associated with industrial activity at the site.

26. On October 12 and 14, 2016, the EPA performed a Construction Stormwater Compliance Evaluation Inspection (“Inspection”) of Respondent’s site under the authority of

Section 308(a) of the CWA, 33 U.S.C. § 1318(a), to evaluate Respondent's compliance with its Permit and the CWA.

27. During the Inspection, the EPA inspector reviewed and obtained copies of Respondent's documents related to the Permit, including, but not limited to, the site's SWPPP signed by the City on April 5, 2016 and site inspection records. The EPA inspector also toured the site and photographed various stormwater-related areas.

28. A Notice of Potential Violation ("NOPV") was issued by the EPA inspector at the conclusion of the Inspection. Respondent provided a written response to the NOPV dated October 21, 2016 ("Response"). A copy of the Inspection report was sent to Respondent by letter dated January 24, 2017, which identified potential violations including those described below.

EPA's Allegations

Count 1

Failure to Install Measures and Controls

29. The facts stated in Paragraphs 1 through 28 above are re-alleged and incorporated herein by reference.

30. Part IV of Respondent's Permit requires facilities to develop and implement the provisions of their SWPPP as a condition of the permit. Respondent's SWPPP provides that perimeter controls will be installed before commencing land disturbing activities, including clearing or grubbing, and maintained until final stabilization of areas upward of the perimeter control. Respondent's SWPPP also provides that temporary silt barriers shall be placed in areas that slope away from future construction or in which significant erosion may occur. Respondent's SWPPP further provides that temporary and/or permanent seeding shall be done as soon as practical and that erosion and sedimentation shall be controlled after construction is completed by establishing vegetation on all areas not paved, mulched or otherwise protected.

31. Inspection reports and the City's Response indicate that clearing and grubbing activities commenced on or about March 29, 2016 before perimeter controls were in place and that perimeter sediment control devices were not installed until on or about April 5, 2016.

32. During the EPA inspection, the inspector observed:

- a. Lack of stabilization measures or erosion and sediment controls on approximately ten percent or 1/10 of an acre of the disturbed north ditch along Westown Parkway;
- b. Lack of sediment controls prior to stabilization in the south ditch along Westown Parkway;
- c. Significant accumulation of sediment on the riprap at the mouth of a stormwater outlet that conveys stormwater from the City's site; and

- d. Significant amounts of sediment in the unnamed tributary to Sugar Creek traceable back to the City's site.

33. Respondent's alleged failure to install stormwater controls and BMPs at the site to reduce the amount of pollutants in stormwater discharges associated with the industrial activities at the site is a violation of the conditions of the NPDES permit, and as such, is a violation of Sections 301(a) and/or 402(p) of the CWA, 33 U.S.C. §§ 1311(a), 1342(p).

Count 2
Failure to Properly Operate and Maintain Measures and Controls

34. The facts stated in Paragraphs 1 through 33 above are re-alleged and incorporated herein by reference.

35. Part IV of Respondent's Permit requires facilities to develop and implement the provisions of their SWPPP as a condition of the permit. Respondent's SWPPP provides that sediment should be removed from silt fences as appropriate and must be removed when it reaches one-half the height of the barrier. Respondent's SWPPP also provides that silt fences that no longer operate effectively shall be removed and that additional or alternate sediment control devices shall be installed if it becomes apparent the erosion control outlined in the SWPPP is inefficient or ineffective.

36. During the EPA Inspection, the inspector observed sediment accumulated against silt fences and passing through several stages of silt fences before entering the unnamed tributary to Sugar Creek.

37. Respondent's alleged failure to properly operate and maintain adequate measures and controls to reduce the amount of pollutants in stormwater discharges associated with the industrial activities at the site is a violation of the conditions of the NPDES permit, and as such, is a violation of Sections 301(a) and/or 402(p) of the CWA, 33 U.S.C. §§ 1311(a), 1342(p).

Count 3
Failure to Properly Conduct and Document Inspections

38. The facts stated in Paragraphs 1 through 37 above are re-alleged and incorporated herein by reference.

39. Part IV, Section D.4.A of Respondent's Permit requires qualified personnel to inspect disturbed areas once every seven calendar days, including among other things, observing sediment and erosion control measures to ensure that they are operating correctly and inspecting discharge locations to ascertain whether erosion control measures are effective in preventing significant impacts to receiving waters. Part IV, Section D.4.C of Respondent's Permit further requires reports of inspection to be made and kept with the SWPPP for at least three years after final stabilization of the site.

40. Respondent's SWPPP requires that the location of sediment discharges, observation of implementation of the SWPPP and BMPs, BMPs needing repair, and additional BMPs needed be recorded in the inspection report. Respondent's SWPPP also requires that any required maintenance identified in the inspection report be implemented within seven calendar days.

41. Based on a review of the inspection reports provided at the time of EPA's Inspection, the inspections conducted by Respondent did not always inspect all BMPs and discharge points. In addition, the EPA inspector's observations of overwhelmed silt fences and sediment leaving the site and in the unnamed tributary of Sugar Creek indicate that the inspections carried out by Respondent were not effective at identifying BMPs in need of repair and/or additional BMPs needed.

42. Respondent's alleged failure to properly conduct and document inspections of the site is a violation of the conditions of the NPDES permit, and as such, is a violation of Section 402(p) of the CWA, 33 U.S.C. § 1342(p).

Penalty

43. As alleged in the preceding Counts 1, 2 and 3, and pursuant to Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), as adjusted pursuant to 40 C.F.R. § 19.4, Respondent is liable for civil penalties of up to \$20,965 per day for each day during which the violation continues, up to a maximum of \$262,066.

CONSENT AGREEMENT

44. Respondent and the EPA agree to the terms of this Consent Agreement/Final Order.

45. Respondent admits the jurisdictional allegations of this Complaint and Consent Agreement/Final Order and agrees not to contest the EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of this Consent Agreement/Final Order.

46. Respondent neither admits nor denies the factual allegations and legal conclusions asserted by the EPA in this Complaint and Consent Agreement/Final Order.

47. Respondent waives their right to contest any issue of fact or law set forth above, and their right to appeal this Consent Agreement/Final Order.

48. Respondent and Complainant agree to conciliate the matters set forth in this Consent Agreement/Final Order without the necessity of a formal hearing and agree to bear their own costs and attorney's fees incurred as a result of this action.

49. The undersigned representative(s) of Respondent certifies that he or she is fully authorized to enter the terms and conditions of this Consent Agreement/Final Order and to execute and legally bind Respondent to it.

50. Respondent understands and agrees that this Consent Agreement/Final Order shall apply to and be binding upon Respondent and Respondent's agents, successors and/or assigns. Respondent shall ensure that all contractors, employees, consultants, firms or other persons or entities acting for Respondent with respect to matters included herein comply with the terms of this Consent Agreement/Final Order.

51. Respondent certifies by the signing of this Consent Agreement/Final Order that to the best of their knowledge, Respondent's site is in current compliance with Iowa General NPDES Permit No. 2IA28471-28214, and Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342, and applicable regulations.

Penalty Payment

52. Respondent agrees that, in settlement of the claims alleged in this Consent Agreement/Final Order, Respondent shall pay a civil penalty of **Seventeen Thousand One Hundred and Twenty Seven Dollars (\$17,127)** pursuant to the authority of Section 309(g) of the CWA, 33 U.S.C. § 1319(g), to be paid in full no later than 30 days after the effective date of this Consent Agreement/Final Order as set forth below.

53. The payment of penalties must reference docket number "CWA-07-2017-0040" and be remitted using one of the payment methods specified in Appendix A to this Order.

54. Copies of the checks or verification of another payment method for the penalty payments remitted as directed by above, shall be mailed to:

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

and

Shane McCoin
U.S. Environmental Protection Agency – Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219.

55. Respondent agrees that no portion of the civil penalty or interest paid by Respondent pursuant to the requirements of this Consent Agreement/Final Order shall be claimed by Respondent as a deduction for federal, state, or local income tax purposes.

56. Respondent understands that, pursuant to 40 C.F.R. § 13.18, interest on any late payment will be assessed at the annual interest rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717. The interest will be assessed on any 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 or interest.

Effect of Settlement and Reservation of Rights

57. Respondent's payment of the entire civil penalty pursuant to this Consent Agreement/Final Order resolves all civil and administrative claims pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), for alleged violations identified in this Complaint and Consent Agreement/Final Order. Complainant reserves the right to take any enforcement action with respect to any other violations of the CWA or any other applicable law.

58. The effect of settlement described above is conditional upon the accuracy of the Respondent's representations to the EPA, as memorialized in Paragraph 51 of this Consent Agreement/Final Order.

59. Nothing contained in this Consent Agreement/Final Order shall alter or otherwise affect Respondent's obligation to comply with all applicable federal, state and local environmental statutes and regulations and applicable permits.

60. Notwithstanding any other provision of this Consent Agreement/Final Order, the EPA reserves the right to enforce the terms of this Consent Agreement/Final Order by initiating a judicial or administrative action pursuant to Section 309 of the CWA, 33 U.S.C. § 1319, and to seek penalties against Respondent or to seek any other remedy allowed by law.

61. With respect to matters not addressed in this Consent Agreement/Final Order, the EPA reserves the right to take any enforcement action pursuant to the CWA and its implementing regulations, or any other available legal authority, including without limitation, the right to seek injunctive relief, penalties and damages.

General Provisions

62. The Parties acknowledge that this Consent Agreement/Final Order is subject to the public notice and comment required pursuant to Section 309(g)(4) of the CWA, 33 U.S.C. § 1319(g)(4), and 40 C.F.R. § 22.45.

63. Pursuant to 40 C.F.R. § 22.31(b), this Consent Agreement/Final Order shall be effective after signature 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 Consent Agreement/Final Order.

64. The state of Iowa has been provided an opportunity to consult with Complainant regarding this matter in accordance with the requirements of 40 C.F.R. § 22.38(b) and Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1).

65. The headings in this Consent Agreement/Final Order are for convenience of reference only and shall not affect interpretation of this Consent Agreement/Final Order.

66. Respondent and Complainant agree that this Consent Agreement/Final Order may be signed in part and counterpart.

For the Complainant, United States Environmental Protection Agency, Region 7:

Date

Jeffery Robichaud
Acting Director
Water, Wetlands and Pesticides Division

Shane E. C. McCoin
Office of Regional Counsel

For the Respondent, City of Waukeez:



Signature

05/23/2017

Date

Tim Moerman

Name

City Administrator

Title

FINAL ORDER

Pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), and the 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, the foregoing Consent Agreement resolving this matter is hereby ratified and incorporated by reference into this Final Order.

The Respondent is ORDERED to comply with all of the 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

**APPENDIX A
PENALTY PAYMENT INFORMATION**

CHECK PAYMENTS:

US Environmental Protection Agency
Fines and Penalties - CFC
PO Box 979077
St. Louis, MO 63197-9000

WIRE TRANSFERS:

Wire transfers should be directed to the Federal Reserve Bank of New York

Federal Reserve Bank of New York

ABA = 021030004

Account = 68010727

SWIFT address = FRNYUS33

33 Liberty Street

New York NY 10045

Field Tag 4200 of the Fedwire message should read "D 68010727 Environmental Protection Agency"

OVERNIGHT MAIL:

U.S. Bank

1005 Convention Plaza

Mail Station SL-MO-C2GL

ATTN Box 979077

St. Louis, MO 63101

Contact: Natalie Pearson 314-418-4087

ACH (also known as REX or remittance express):

Automated Clearinghouse (ACH) for receiving US currency

PNC Bank

808 17th Street, NW

Washington, DC 20074

Contact: Jesse White 301-887-6548

ABA = 051036706

Transaction Code 22 - checking

Environmental Protection Agency

Account 310006

CTX Format

ONLINE PAYMENT:

There is now an On Line Payment Option, available through the Dept. of Treasury.

This payment option can be accessed from the information below:

WWW.PAY.GOV

Enter "SFO 1.1" in the search field

Open form and complete required fields.