

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

IN THE MATTER OF:)
)
) Docket No. CWA-07-2017-0146
MISSOURI SMELTING TECHNOLOGY,)
INC.)
)
Troy, Missouri)
) CONSENT AGREEMENT/
) FINAL ORDER
Respondent)
)
Proceedings under Section 309(a)(3) of the)
Clean Water Act, 33 U.S.C. § 1319(a)(3))
_____)

Preliminary Statement

The United States Environmental Protection Agency (“EPA”), Region 7 (“Complainant”) and Missouri Smelting Technology, Inc. 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) of 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. §§ 22.13(b) and 22.18(b)(2). This is a “Class I” penalty action pursuant to Section 309(g)(2)(A) of the CWA, 33 U.S.C. 1319(g)(2)(A). This Consent Agreement and Final Order (“CA/FO”) shall be entered and become effective only after the conclusion of the period of 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.

A. ALLEGATIONS

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, 40 C.F.R. Part 22.

2. This CA/FO serves as notice that the EPA has reason to believe that Respondent has violated Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311, 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 the EPA. The Administrator has delegated this authority to the Regional Administrator, EPA, Region 7, who in turn has delegated it to the Director of the Water, Wetlands and Pesticides Division of EPA, Region 7.

4. The Respondent in this case is Missouri Smelting Technology, Inc., (“MOST” or “Respondent”).

Statutory and Regulatory Framework

5. 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.

6. 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.

7. The Missouri Department of Natural Resources (“MDNR”) is the state agency within the state of Missouri that has been authorized by the EPA to administer the federal NPDES program pursuant to Section 402 of the CWA, 33 U.S.C. § 1342, and applicable implementing regulations. The EPA maintains concurrent enforcement authority with authorized states for violations of the CWA. The EPA has notified MDNR of this enforcement action and CA/FO.

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 conform to the requirements of a NPDES permit issued pursuant to Sections 301 and 402 of the CWA. 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.

9. 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.

10. 40 C.F.R. § 122.26(b)(14)(xi) defines “stormwater discharge associated with industrial activity,” in part, as discharges from facilities classified as Standard Industrial Classification (“SIC”) code of 34xx (except 3441) (Fabricated Metal Products, except Machinery and Transportation Equipment).

11. The MDNR is the state agency with the authority to administer the federal NPDES program in Missouri pursuant to Section 402 of the CWA. The EPA maintains concurrent enforcement authority with authorized states for violations of the CWA.

12. The MDNR has issued General Permit #MO-R203 (General Permit) for stormwater discharges associated with the industrial activity related to Ferrous and Nonferrous foundries, casting, extrusion, rolling, galvanizing and finishing, structural steel production, light metal fabrication, electrical equipment manufacturing, including facilities with the SIC Code of 3499. The current 5-year permit for this General Permit has an effective date of October 1, 2014, and an expiration date of August 31, 2019.

Factual Allegations

13. Respondent is and was at all times relevant to this action the owner and/or operator of a facility known as Missouri Smelting Technology, Inc., located at 50 Cherry Blossom Way, Troy, Missouri 63379 ("Facility"), operating under SIC code 3499 (Fabricated Metal Products, except Machinery and Transportation Equipment).

14. Stormwater, snow melt, surface drainage and runoff water leave Respondent's Facility and discharge into Whitcomb Branch which is a tributary to the Cuivre River which in turn is a tributary to the Mississippi River.

15. The runoff and drainage from Respondent's Facility is "stormwater" as defined by 40 C.F.R. § 122.26(b)(13). Stormwater contains "pollutants" as defined by Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

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

17. The Mississippi River and its tributaries, as identified in Paragraph 14, above, are each a "navigable water" as defined by Section 502(7) of the CWA, 33 U.S.C. § 1362(7).

18. Stormwater runoff from Respondent's industrial activity 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).

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

20. At all times relevant to this action, Respondent's facility has been subject to the referenced General Permit. After receipt of a Notice of Intent ("NOI") from Respondent, dated on or about April 21, 2014, the MDNR re-issued authorization under the General Permit (Permit No. #MO-R203255) to Respondent on September 26, 2014 ("Permit" or "Respondent's Permit").

21. Respondent has operated under the General Permit at all times relevant to this CA/FO.

22. On or about November 18, 2015, the EPA performed an Industrial Stormwater Compliance Evaluation Inspection ("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 Permit and the CWA.

23. During the Inspection, the EPA inspector reviewed Respondent's records related to the Permit and observed the facility and the receiving stream to which stormwater is discharged.

24. At the conclusion of the Inspection, the EPA inspector issued to Respondent a Notice of Potential Violation ("NOPV") identifying potential violations of Respondent's Permit, including, but not limited to, failure to conduct proper sample collection for pH in accordance with 40 C.F.R. Part 136 and failure to complete Corrective Action Reports ("CARs") following benchmark exceedances which describe efforts taken to identify and address the cause(s) of the high levels.

25. On or about November 19, 2015, Respondent provided a response to the NOPV. On February 28, 2017, Respondent and the EPA entered into an Administrative Order for Compliance on Consent ("Order", EPA Docket No. CWA-07-2016-0089) which establishes compliance actions required by Respondent to achieve compliance with the alleged violations. The parties have now reached agreement on settlement of the EPA's claims for penalties for the violations alleged below.

Alleged Violations

Count 1:

Failure To Conduct, Report and/or Document Corrective Actions Following Benchmark Exceedances

26. The facts stated in Paragraphs 5 through 25 above are herein incorporated.

27. The Monitoring Requirements section of Respondent's Permit provides benchmark parameters to be sampled and requires that such samples be collected once per quarter ("reference benchmarks"). Item Number "2" of Permit's Monitoring Requirements section states:

If a sample exceeds a benchmark, the facility must review the Stormwater Pollution Prevention Plan ("SWPPP") and Best Management Practices ("BMPs") to determine what improvements or additional controls are needed to reduce that pollutant in the stormwater discharge(s). Failure to improve BMPs or take corrective action to address a benchmark exceedance and failure to make tangible progress towards achieving a benchmark is a permit violation.

28. Item "3" of the Permit's Monitoring Requirements section states:

Any time a benchmark exceedance occurs a Corrective Action Report ("CAR") must be completed and documented in the SWPPP. A CAR is a document that records the efforts undertaken by the facility to improve BMPs to meet benchmarks in future samples.

29. Section 6.2.2 of Respondent's SWPPP provides the Facility's procedure for addressing "Benchmark Exceedances." Section 6.2.3 of Respondent's SWPPP provides the Facility's procedures for completing CARs and repeats the Permit language as stated in Paragraph 27, above, and additionally states, "Any documentation related to Corrective Action Reports should be kept in Appendix I of this report (SWPPP)".

30. Respondent's benchmark sampling results have regularly exceeded benchmark levels (for Aluminum, Copper, and/or Iron) dating back to the 4th Quarter 2014. The table below depicts the results of Respondent's stormwater monitoring (bold indicates benchmark exceedance):

Parameter	Benchmark Concentration	4 th Qtr 2014	1 st Qtr 2015	2 nd Qtr 2015	3 rd Qtr 2015	4 th Qtr 2015	1 st Qtr 2016
Aluminum	750 µg/L	1200	320	1100	2200	2500	570
Copper	21.2 µg/L	17	14	25	17	28	23
Iron	1,000 µg/L	830	84	830	2500	1600	430
Oil & Grease	10 mg/L	<5.0	<5.1	<5.1	<5.0	<5.0	<5.0
pH	6.5-9.0 standard units	8.5	8.0	7.8	7.9	8.32	8.16
Total Suspended Solids	100 mg/L	53	3.2	33	87	43	26
Zinc	176.7 µg/L	110	-	120	76	63	39

31. Until at least August 2015, Respondent failed to conduct appropriate corrective actions to reduce pollutant levels below the Permit's reference benchmarks, and failed to complete the required CARs and update the facility's SWPPP in order to document the required corrective actions.

32. Respondent's failure to perform and/or document adequate corrective actions following benchmark exceedances and to submit the required CARs and/or update the facility's SWPPP are each violations of the terms and conditions of its Permit, and are violations of Section 402(p) of the CWA, 33 U.S.C. § 1342(p), and implementing regulations.

**Count 2:
Failure to Follow Proper Sampling Procedures**

33. The facts stated in Paragraphs 5 through 25 above are herein incorporated.

34. Standard Conditions Part I of Respondent's Permit provide Monitoring and Reporting Requirements and requires that such samples are collected and analyzed in accordance

with 40 C.F.R. Part 136. The Monitoring Requirements section of the Permit provides the sampling parameters that the Respondent is required to sample including hydrogen ion activity (pH) to be measured in standard units.

35. Section 6.2.1 of Respondent's SWPPP incorporates the benchmark sampling parameters listed in the Permit along with the sampling frequency.

36. Based on the EPA's review of relevant information, Respondent failed to analyze pH within the allowable holding time as required by applicable provisions of 40 C.F.R. Part 136. As stated in Paragraph 25, the Respondent provided a response to the EPA's NOPV and represents that it has ordered an appropriate pH meter that will monitor pH within the 15-minute sampling timeframe.

37. Respondent's failure to follow proper sampling and analysis procedures in accordance with 40 C.F.R. Part 136 is a violation of the terms and conditions of its Permit, and is a violation of Section 402(p) of the CWA, 33 U.S.C. § 1342(p), and implementing regulations.

B. CONSENT AGREEMENT

1. Respondent and the EPA agree to the terms of this CA/FO and Respondent agrees to comply with the terms of this CA/FO.

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

3. Respondent neither admits nor denies the factual allegations and legal conclusions set forth above.

4. Respondent waives its right to a judicial or administrative hearing on any issue of fact or law set forth above, and its right to appeal this CA/FO.

5. Respondent and Complainant agree to conciliate the matters set forth in this CA/FO 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.

6. The undersigned representative of Respondent certifies that he or she is fully authorized to enter the terms and conditions of this CA/FO and to execute and legally bind Respondent to it.

7. Nothing contained in this CA/FO shall alter or otherwise affect Respondent's obligation to comply with all applicable federal, state, and local environmental statutes and regulations and applicable permits.

8. This CA/FO addresses all civil and administrative claims for CWA violations that are specifically alleged herein. Complainant reserves the right to take any enforcement action with respect to any other violations of the CWA or any other applicable law.

9. Respondent and the EPA have entered into an Administrative Order for Compliance on Consent ("Order", EPA Docket No. CWA-07-2016-0089) which establishes compliance actions required by Respondent to achieve compliance with the alleged violations. Respondent certifies by the signing of this CA/FO that to the best of its knowledge, Respondent's Facility is in compliance with the referenced Order.

10. The effect of the settlement described in Paragraph B.8 above is conditional upon the accuracy of Respondent's representations to the EPA, as memorialized in Paragraph B.9 of this CA/FO.

11. Respondent agrees to undertake and expend a minimum of \$43,500 to perform a Supplemental Environmental Project ("SEP") consisting of the construction of a canopy structure to provide cover in an area used for unloading, storage, and/or processing of scrap metal. The parties agree that performance of the SEP is intended to prevent pollutants from contaminating stormwater runoff which could then be carried into the adjacent Whitcomb Branch which is a tributary to the Cuivre River which in turn is a tributary to the Mississippi River. The EPA recognizes this action is not required by the referenced NPDES permit or the CWA.

12. Respondent agrees that within thirty (30) days of the effective date of the Final Order, Respondent shall submit a Work Plan to the EPA that describes the details and implementation of the SEP described in Paragraph B.11, above. The Work Plan shall include, but not be limited to: (a) the scope of work for the SEP; (b) the estimated start date and completion date for the SEP; and (c) the names of persons implementing the SEP and the qualifications of each such person. The EPA will review the Work Plan and approve it or provide Respondent written comments within thirty (30) days of receipt. If requested by Respondent, the EPA will provide Respondent an opportunity to discuss the written comments. Respondent shall resubmit the Work Plan in a form that responds to the EPA's comments within thirty (30) days after receipt of the EPA's written comments. The Work Plan shall become a Final Work Plan upon approval by the EPA. Respondent shall complete the SEP consistent with the approved schedule included in the Final Work Plan, but in no event later than eighteen (18) months from the effective date of the Final Order.

13. Respondent shall notify the EPA in writing within two weeks after the completion of the SEP. Within thirty (30) days after the completion of the SEP, Respondent shall submit to the EPA a SEP Completion Report that shall include, but not be limited to, the following:

- a. A description of the activities that Respondent completed in its implementation of the SEP Work Plan.
- b. A signed and notarized certification that none of the cost incurred in implementation of the SEP was funded in any part by a federal grant or other form of federal financial assistance.
- c. An itemized accounting of the costs incurred per project in performance of the SEP.

14. Respondent shall pay stipulated penalties in the following circumstances:
- a. Except as provided in subparagraphs (b) and (c) below, for a SEP, which has not been completed satisfactorily pursuant to the approved SEP Work Plan as described above and as determined by the EPA, Respondent shall pay a stipulated penalty to the United States in the amount of Twenty-Six Thousand, One Hundred Dollars (\$26,100), along with interest accrued at the statutory rate.
 - b. If the SEP is not completed satisfactorily, but the EPA determines that Respondent made good faith and timely efforts to complete the project and certifies, with supporting documentation, that at least 90% of the amount of money required to be spent for the project (90% of \$43,500, or \$39,150) was expended on the SEP, Respondent shall not pay any stipulated penalty.
 - c. If the SEP is satisfactorily completed, but the Respondent spent less than 90% of the amount of money required to be spent for the project, Respondent shall pay a stipulated penalty equal to the difference between the amount of the required SEP expenditure (\$43,500) and the amount expended in implementing the SEP.

15. Payment of the stipulated penalties as specified in Paragraph B.14 above shall be immediately due and payable upon notice by the EPA to Respondent, and shall be made in accordance with the Payment Procedures specified in Paragraphs B.20 and B.21, below.

16. Respondent hereby certifies that, as of the date of this CA/FO, Respondent is not required to perform or develop the SEP by any federal, state or local law or regulation; nor is Respondent required to perform or develop the SEP by agreement, grant, or as injunctive relief in any other enforcement action or in compliance with state or local requirements. Respondent further certifies that Respondent has not received, and is not presently negotiating to receive, credit in any other enforcement action for the SEP.

17. The EPA and its authorized representatives shall have access to the property Respondent owns that is the location of the SEP at all reasonable times to monitor Respondent's implementation of the SEP. Respondent shall use its best efforts to obtain for the EPA access to property not owned by Respondent that is the location of a SEP at all reasonable times to monitor Respondent's implementation of the SEP. Best efforts shall include payment of reasonable costs to obtain access. Nothing herein shall be construed to limit the EPA's access authority under the CWA or any other law.

18. Respondent agrees that, in settlement of the claims alleged in this CA/FO, Respondent shall pay a penalty of \$7,313 as set forth in Paragraphs B.20 and B.21, below.

19. Respondent understands that failure to pay any portion of the mitigated civil penalty or stipulated penalties on the proper due dates may result in the commencement of a civil

action in Federal District Court to collect said penalty, along with interest thereon at the applicable statutory rate.

Payment Procedures

20. Respondent shall pay a mitigated civil penalty of Seven Thousand, Three Hundred and Thirteen Dollars (\$7,313) within thirty (30) days of the effective date of the Final Order.

21. Payment of the penalty shall be by cashier or certified check made payable to the "United States Treasury" and remitted to:

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

This payment shall reference docket number CWA-07-2017-0146.

Copies of the check shall be mailed to:

Howard Bunch
Sr. Assistant Regional Counsel
U.S. Environmental Protection Agency - Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219;

and to

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

22. 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

23. This CA/FO shall apply to and be binding upon Respondent and Respondent's agents, successors, 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 CA/FO.

General Provisions

24. Notwithstanding any other provision of this CA/FO, the EPA reserves the right to enforce the terms of the Final Order portion of this CA/FO 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.

25. Complainant 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.

26. The Final Order shall be entered and become effective only after the conclusion of the period of public notice and comment required pursuant to Section 309(g)(4) of CWA, 33 U.S.C. § 1319(g)(4), and 40 C.F.R. § 22.45. Unless otherwise stated, all time periods stated herein shall be calculated in calendar days from such date.

27. Respondent and Complainant shall bear their respective costs and attorney's fees.

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

29. Respondent and Complainant agree that this CA/FO can be signed in part and counterpart.

FOR COMPLAINANT:
U.S. ENVIRONMENTAL PROTECTION AGENCY

Date

Jeffery Robichaud
Acting Director
Water, Wetlands and Pesticides Division

Date

Howard C. Bunch
Sr. Assistant Regional Counsel
Office of Regional Counsel

FOR RESPONDENT:
MISSOURI SMELTING TECHNOLOGY, INC.

5/23/17
Date


Signature

MARK A. BAFFA EVP
Name
Title

C. **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

Karina Borromeo
Regional Judicial Officer