

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

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	Docket No. CWA-07-2017-0365
Benton's Sand and Gravel, Inc.	)	
Cedar Falls, 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, Benton's Sand and Gravel, Inc. ("Respondent") 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 and 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 corporation 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) defines “stormwater discharge associated with industrial activity,” as “the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw material storage areas at an industrial plant.” Included in the categories of facilities considered to be engaging in “industrial activity” are facilities under Standard Industrial Classifications (“SIC”) 10 through 14, mineral industry, including SIC code 1442. *See* 40 C.F.R. §122.26(b)(14)(iii). SIC code 1442 specifically includes establishments primarily engaged in operating sand and gravel pits and dredges, and in washing, screening, or otherwise preparing sand and gravel for construction uses.

12. The Iowa Department of Natural Resources (“IDNR”) is the state agency within the state of Iowa 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.

13. Pursuant to Section 402(i) of the CWA, 33 U.S.C. § 1342(i), the EPA retains concurrent enforcement authority with authorized states for violations of the CWA.

**EPA's General Allegations**

14. Respondent is a "person," as defined by Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

15. At all times relevant for this action, Respondent is and was the owner and/or operator of a facility that dredges, stockpiles, and supplies sand, gravel, stone, recycled asphalt and concrete ("facility" or "site"), operating under SIC code 1442, located at 905 Center Street, Cedar Falls, Iowa 50613.

16. Snag Creek flows through the center of the facility property. Stormwater, snow melt, surface drainage and runoff water leave Respondent's site through one of two outfalls and flow east to ponds connected to Snag Creek, which flows to the Cedar River.

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

18. The facility has "stormwater discharges associated with industrial activity" as defined by 40 C.F.R. § 122.26(b)(14).

19. Stormwater discharges associated with industrial activity are "point sources" as defined by Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

20. Snag Creek, ponds connected to Snag Creek, and the Cedar River identified in Paragraph 16, above, are "navigable waters" as defined by Section 502(7) of the CWA, 33 U.S.C. § 1362(7).

21. Stormwater runoff from industrial activity at Respondent's above referenced facility 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).

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

23. On October 1, 1992, IDNR granted authorization to the facility under Iowa General Permit No. 3, authorization number 0907-0941, for discharges of stormwater runoff to Snag Creek, subject to compliance with conditions and limitations set forth in the applicable NPDES Permit. The facility has received continuing coverage under the permit through September 30, 2021 (hereinafter "NPDES Permit").

24. On December 7, 2016, the EPA performed an Industrial Stormwater 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.

25. During the Inspection, the EPA inspector toured the facility, observed discharge locations, and photographed various stormwater-related areas.

26. A Notice of Potential Violation ("NOPV") was issued by the EPA inspector at the conclusion of the Inspection.

27. Following the Inspection, by email dated December 14, 2016, the Respondent submitted a copy of the facility's stormwater pollution prevention plan ("SWPPP") dated December 30, 2013, and copies of monitoring records and site inspection reports to the EPA inspector.

28. A copy of the Inspection report was sent to Respondent by the EPA by letter dated March 13, 2017.

### **EPA's Specific Allegations**

#### **Count 1 Unauthorized Discharges**

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

30. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants, unless such discharge is in compliance with an NPDES permit. Part III.A of Respondent's NPDES Permit requires that discharges covered by the permit shall be composed entirely of stormwater. Part III.C requires that facilities implement practices that reduce pollutants in stormwater discharges.

31. During the EPA Inspection, the inspector observed sediment in Outfall No. 1 and lack of controls for the facility's outfalls and material stockpiles in close proximity to the outfalls and waters connected to Snag Creek. Observations and information obtained during the EPA Inspection confirmed that Respondent failed to implement practices to reduce pollutants in stormwater discharges, as alleged in further detail below.

32. Based on the size of the facility, the distance from the facility to Snag Creek and waters connected to Snag Creek, the slope and condition of the land across that distance, and failure to implement practices to reduce pollutants in stormwater discharges, stormwater containing pollutants from the facility will discharge into Snag Creek during significant precipitation events. Unauthorized discharges are violations of the conditions of Respondent's NPDES permit and Sections 301(a) and/or 402(p) of the CWA, 33 U.S.C. §§ 1311(a), 1342(p).

#### **Count 2 Inadequate SWPPP / Failure to Update SWPPP**

33. The facts stated in Paragraphs 1 through 32 above are re-alleged and incorporated herein by reference.

34. Part III.C.4.A of Respondent's NPDES Permit requires the facility to develop a SWPPP that identifies potential sources of pollution and includes a site map showing the drainage area of each storm water outfall and existing control measures. Parts III.C.2.A. and IV.G of Respondent's NPDES Permit require the SWPPP to be signed by an appropriate person, which for corporations is a principal executive officer of at least the level of vice-president, and Part IV.H requires the signatory to make a certification.

35. Part III.C.3 of Respondent's NPDES Permit requires the permittee to amend the SWPPP whenever there is a change in design, construction, operation, or maintenance, which has a significant effect on the potential for the discharge of pollutants to waters of the U.S. or if the SWPPP proves ineffective in achieving the general objectives of controlling pollutants in stormwater discharges.

36. Based on observations and information collected from the EPA Inspection and review of Respondent's SWPPP, the SWPPP failed to include required components, including, but not limited to, appropriate signatory, identification of all outfalls, correct sampling locations, and accurate description of conditions and controls on site, requiring amendment of the SWPPP.

37. Respondent's failure to prepare and update, as appropriate, an adequate SWPPP is a violation of the conditions of Respondent's NPDES Permit, and as such, is a violation of Section 402(p) of the CWA, 33 U.S.C. § 1342(p).

### **Count 3**

#### **Failure to Implement SWPPP / Failure to Implement Adequate Controls**

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

39. Part III.C. of Respondent's NPDES Permit requires the facility to implement the provisions of the SWPPP. Part III.C.4.B of Respondent's NPDES Permit requires the facility to implement storm water management controls appropriate to the identified potential sources of pollutants at the facility.

40. The facility's SWPPP provides that all storage piles will be located away from drainage patterns, if at all possible, and either isolated on gravel from drainage flows or surrounded by erosion controls. The facility's SWPPP further provides for erosion and sediment controls including a five-foot native plant buffer along Snag Creek, silt fences where stormwater drainage becomes established through the buffer, rock ditch checks along the south property, and a sedimentation basin.

41. During the EPA Inspection, the inspector observed several stockpiles in close proximity to the outfalls and lacking controls. The inspector did not observe a native plant buffer, silt fences, rock ditch checks, or other erosion controls in or near the outfalls to waters connected to Snag Creek and did not observe a sedimentation basin on the site.

42. During the EPA Inspection, the inspector observed sediment in Outfall No. 1, indicating that the controls in the SWPPP are not being implemented or are inadequate.

43. Respondent's failure to implement the SWPPP and/or implement adequate stormwater management controls is a violation of the conditions of Respondent's NPDES Permit, and as such, is a violation of Section 402(p) of the CWA, 33 U.S.C. § 1342(p).

**Count 4  
Failure to Maintain Records On Site**

44. The facts stated in Paragraphs 1 through 43 above are re-alleged and incorporated herein by reference.

45. Part III.C.2.A of Respondent's NPDES Permit requires the facility to retain the SWPPP on site. Parts III.C.4.B(9), III.C.4.C(3), and V.E of Respondent's NPDES Permit require information describing the quality and quantity of stormwater discharges and inspection and maintenance activities, reports of visual inspections, and records of all monitoring information to be retained as part of the SWPPP for at least three years following the date of the measurement, report, or inspection.

46. At the time of the EPA inspection, the facility's SWPPP, inspection reports, and monitoring records were not available on site.

47. Respondent's failure to retain records on site is a violation of the conditions of Respondent's NPDES Permit, and as such, is a violation of Section 402(p) of the CWA, 33 U.S.C. § 1342(p).

**Count 5  
Failure to Adequately Perform and Document Inspections**

48. The facts stated in Paragraphs 1 through 47 above are re-alleged and incorporated herein by reference.

49. Part III.C.4.C of Respondent's NPDES Permit requires Respondent to conduct and document visual inspections of designated equipment and the plant area at a minimum of once per year. Pursuant to Part III.C.4.C(1), inspections shall include material handling areas and other potential sources of pollution for evidence of pollutants entering the drainage system, structural control measures to ensure that they are operating correctly, and equipment needed to implement the SWPPP. Part III.C.4.C(2) requires that the SWPPP be revised as appropriate based on the results of the inspection. Part III.C.4.C(3) requires that inspections be documented in a report summarizing the scope of the inspection, major observations, and actions taken.

50. A review of inspection reports provided by email after the EPA Inspection showed that Respondent failed to identify and discuss the condition of all BMPs and describe and document corrective actions.

51. Respondent's failure to adequately perform and document inspections is a violation of the conditions of Respondent's NPDES Permit, and as such, is a violation of Section 402(p) of the CWA, 33 U.S.C. § 1342(p).

**Count 6  
Failure to Perform Monitoring and/or Retain Records**

52. The facts stated in Paragraphs 1 through 51 above are re-alleged and incorporated herein by reference.

53. Part V.B.3 of Respondent's NPDES Permit requires facilities with stormwater discharge associated with industrial activity from construction sand and gravel to measure total suspended solids ("TSS") and nitrate plus nitrite nitrogen, together with specified information regarding the sample and conditions during the sampling, at least annually. The facility must sample stormwater discharge from each outfall, unless the facility complies with the requirements of Part V.B.5 to demonstrate that one outfall is a representative discharge.

54. Parts V.E and VI.N of Respondent's NPDES Permit require the permittee to retain records of all monitoring information for a period of at least three years from the date of measurement or for the duration of the permit, whichever is longer.

55. A review of monitoring records provided by email after the EPA Inspection showed that in 2016, only one sample was taken and the record did not report information required to establish it as representative of both outfalls. The record also failed to identify which outfall was sampled or to include a complete laboratory report. No monitoring records were available for years 2014 and 2015.

56. Respondent's failure to perform monitoring, properly perform monitoring, and/or to retain monitoring records is a violation of the conditions of Respondent's NPDES Permit, and as such, is a violation of Section 402(p) of the CWA, 33 U.S.C. § 1342(p).

**Count 7  
Failure to Conduct Employee Training**

57. The facts stated in Paragraphs 1 through 56 above are re-alleged and incorporated herein by reference.

58. Part III.C.4.B(8) of Respondent's NPDES Permit requires the SWPPP to identify periodic dates for employee training and requires training to inform all personnel of the goals of the SWPPP and to address such topics as spill response, good housekeeping, and material management practices.

59. The facility's SWPPP provides that employee training will be completed on a yearly basis and includes a blank training log.

60. During the EPA Inspection, the inspector noted that there were no records of employee training available.

61. Respondent's failure to conduct employee training is a violation of the conditions of Respondent's NPDES Permit, and as such, is a violation of Section 402(p) of the CWA, 33 U.S.C. § 1342(p).

### **Penalty**

62. As alleged in the preceding Counts, 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 potentially liable for civil penalties of up to \$20,965 per day for each day during which the violation continues, up to a maximum total of \$262,066.

### **CONSENT AGREEMENT**

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

64. 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.

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

66. 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.

67. 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.

68. 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.

69. 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.

70. Respondent certifies by the signing of this Consent Agreement/Final Order that to the best of their knowledge, Respondent's facility is in current compliance with NPDES Permit No. 0908-0942, and Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342, and applicable regulations.



**Penalty Payment**

71. Respondent agrees that, in settlement of the claims alleged in this Consent Agreement/Final Order, Respondent shall pay a civil penalty of **Nine Thousand Seven Hundred and Forty-Two Dollars (\$9,742)** 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 thirty (30) days after the effective date of this Consent Agreement/Final Order as set forth below.

72. The payment of penalties must reference docket number "CWA-07-2017-0365" and be remitted using one of the payment methods specified in Appendix A to this Order.

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

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

and

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

74. 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.

75. 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**

76. 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.

77. The effect of settlement described above is conditional upon the accuracy of the Respondent's representations to the EPA, as memorialized in Paragraph 70 of this Consent Agreement/Final Order.

78. 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.

79. 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.

80. 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**

81. 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.

82. 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.

83. 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).

84. 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.

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

**For the Complainant, U.S. Environmental Protection Agency:**

Issued this \_\_\_\_\_ day of \_\_\_\_\_, 2017.

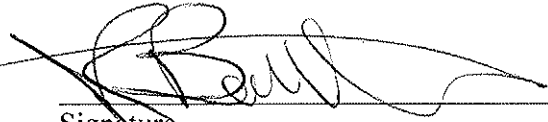
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Jeffery Robichaud  
Acting Director  
Water, Wetlands and Pesticides Division

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Shane E. C. McCain  
Assistant Regional Counsel  
Office of Regional Counsel

**For the Respondent, Benton's Sand and Gravel, Inc.:**

  
\_\_\_\_\_

Signature

9/6/17  
\_\_\_\_\_

Date

John Benton  
\_\_\_\_\_

Name

President  
\_\_\_\_\_

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 17<sup>th</sup> Street, NW  
Washington, DC 20074  
Contact: Jesse White 301-887-6548  
ABA = 051036706  
Transaction Code 22 - checking  
Environmental Protection Agency  
Account 310006  
CTX Format

**ON LINE 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.