

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

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:)
)
Pyramid Contractors, Inc.,)
) Docket No. CWA-07-2020-0155
Respondent)
) CONSENT AGREEMENT/
) FINAL ORDER
)
)
Proceedings under Section 309(g) of the)
Clean Water Act, 33 U.S.C. § 1319(g))
_____)

The U.S. Environmental Protection Agency Region 7 (“EPA”), and Pyramid Contractors, Inc. (“Respondent”) have agreed to a settlement of the alleged violations set forth in this Consent Agreement and Final Order (“CA/FO”). 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, 40 C.F.R. Part 22 (“Consolidated Rules”).

COMPLAINT

Jurisdiction

1. This is an administrative action for the assessment of civil penalties instituted pursuant to Section 309(g)(2)(B) of the Clean Water Act (“CWA”), 33 U.S.C. § 1319(g)(2)(B), and in accordance with the Consolidated Rules.

2. This CA/FO alleges that Respondent discharged pollutants into waters of the United States in violation of Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342.

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 the authority under Section 309(g) to the Director of the Enforcement and Compliance Assurance Division of EPA Region 7 (collectively referred to as the “Complainant”).

4. Respondent is Pyramid Contractors, Inc. Respondent operates a construction site that is an extension of Ridgeview Road north approximately one mile from Highway K-10 to Prairie Star Parkway in Lenexa, Kansas.

Statutory and Regulatory Framework

5. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants, unless such discharge is in compliance with, *inter alia*, Section 402 of the CWA, 33 U.S.C. § 1342, which provides that pollutants may be discharged only in accordance with the terms of a National Pollutant Discharge Elimination System (“NPDES”) permit.

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. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines “navigable waters,” in part, as the “waters of the United States.” In turn, “waters of the United States” has been defined to include, *inter alia*, all waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, and tributaries to such waters. 40 C.F.R. § 122.2.

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, 33 U.S.C. § 1342(p), EPA promulgated regulations at 40 C.F.R. § 122.26 that set forth the NPDES permit requirements for stormwater discharges.

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 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. EPA maintains concurrent enforcement authority with authorized states for violations of the CWA.

13. KDHE NPDES General Permit No. KSR100000 ("Permit") dated July 14, 2017 was effective August 1, 2017; the Permit will expire on July 31, 2022.

14. A person seeking coverage under the Permit is required to submit a Notice of Intent ("NOI") to KDHE.

15. The Permit governs stormwater discharges associated with industrial activity, including clearing, grading and excavation. The principal requirement of the 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 stormwater discharge from the construction activities, and describe and ensure the implementation of best management practices ("BMPs") that 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.

FACTUAL ALLEGATIONS

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

17. At all times relevant to this action, Respondent was an owner or operator of a construction site ("Site") comprised of approximately 75 acres, which is an extension of Ridgeview Road north approximately one mile from Highway K-10 to Prairie Star Parkway in Lenexa, Kansas.

18. At the time of the EPA inspection, described below, Respondent, and/or persons acting on its behalf, had cleared and graded a significant portion of the construction project at the Site.

19. Stormwater, snow melt, surface drainage, and runoff water leave the Site and discharge through various drainage pathways to an unnamed tributary to Mill Creek and Mill Creek.

20. The Site has "stormwater discharges associated with industrial activity" as defined by 40 C.F.R. § 122.26(b)(14), is a "point source" as defined by Section 502(14) of the CWA, 33 U.S.C. § 1362(14), and discharges into an unnamed tributary to Mill Creek and Mill Creek, both "waters of the United States," as defined by 40 C.F.R. § 232.2.

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

22. The discharge of pollutants associated with the construction at the Site, an industrial activity as defined by 40 C.F.R. § 122.26(b)(14), requires a permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

23. On February 1, 2018, Respondent submitted an NOI to KDHE seeking coverage under the Permit, and on March 5, 2018, KDHE authorized the coverage under permit number

KSR113472. This Permit governs stormwater discharges that are associated with industrial activity at the Site.

24. On March 22, 27, 29, and April 2, 2019, EPA personnel, under the authority of Section 308(a) of the CWA, 33 U.S.C. § 1318(a), performed a Construction Stormwater Compliance Evaluation (“Inspection”) to evaluate compliance with the Permit and the CWA.

25. During the Inspection, the EPA inspector reviewed and obtained copies of documents related to the Permit, including without limitation, the Site’s SWPPP dated January 2018 and Site inspection and self-monitoring records. The EPA inspector also toured and photographed the Site.

26. During the Inspection, the EPA inspector observed and documented significant amounts of sediment in the unnamed tributary to Mill Creek and Mill Creek that could be traced back to the Site.

27. At the conclusion of the Inspection, the EPA inspector issued a Notice of Potential Violation (“NOPV”) citing, *inter alia*, failure to properly install and maintain appropriate BMPs, failure to employ good housekeeping practices, failure to amend the SWPPP, failure to conduct and record adequate site inspections, and contribution to excursions above water quality standards. On April 12, 2019, Respondent provided a written response to the NOPV.

28. On May 8, 2019, EPA issued Respondent and the City of Lenexa, who owns the Site, a Notice of Findings of Violation and Order for Compliance (“Order”). On May 24, 2019, Respondent provided a written response to the Order.

FINDINGS OF VIOLATION

Count 1

Failure to Ensure that Discharges do not Contribute to an Excursion of Kansas Surface Water Quality Standards

29. Paragraphs 1 through 28 are re-alleged and incorporated herein by reference.

30. Part 3, Paragraph 4 of the Permit, What This Permit or the Rainfall Erosivity Waiver Does Not Cover, states that the Permit does not authorize construction activities that result in the discharge of stormwater runoff which violates the Kansas Surface Water Quality Standards.

31. During the Inspection referenced above, the EPA inspector observed discharges of stormwater from the Site into the unnamed tributary to Mill Creek, resulting in observed increases of turbidity in both the unnamed tributary and Mill Creek, which demonstrates a violation of Kansas Surface Water Quality Standards.

32. Respondent's alleged failure to ensure that discharges from the Site do not contribute to an excursion of water quality standards is a violation of the conditions and limitations of the Permit, and as such, is a violation of Sections 301(a) and 402(p) of the CWA, 33 U.S.C. §§ 1311(a), 1342(p).

Count 2

**Failure to Properly Install, Operate, and/or Maintain Best Management Practices
(alternatively, Failure to Fully Implement the Provisions of the SWPPP)**

33. Paragraphs 1 through 32 are re-alleged and incorporated herein by reference.
34. Part 7 of the Permit, SWPPP Requirements and Guidelines, states the permittee shall fully implement the provisions of the SWPPP required as a condition of the Permit throughout the term of the construction project.
35. Part 7 of the Permit further states that the permittee shall select, install, utilize, operate and maintain effective BMPs.
36. Part 7.1 of the Permit, General SWPPP Requirements, states the permittee shall ensure the BMPs and/or pollution controls are properly installed and maintained at the locations and relative timeframes specified in the SWPPP.
37. Part 7.2.9. of the Permit, Additional Site Management BMPs, describes additional BMP requirements to minimize contamination of stormwater from building materials, the storage of chemicals, concrete washout, trash, etc. and can collectively be described as good housekeeping measures.
38. Part 7.2.3(11) of the NPDES permit, Detailed SWPPP Plan Requirements, states that the permittee shall minimize the generation of dust through the application of water or other dust suppression techniques.
39. Part 7.2.3(12) of the NPDES permit, Detailed SWPPP Plan Requirements, requires the permittee to minimize off-site tracking of soils by utilizing wheel washing facilities or an appropriately designed construction entrance and exit.
40. During the EPA Inspection referenced above, the inspector observed:
- a. The rock ditch checks ("RDCs") observed during the Inspection were not constructed in accordance with the design described in the SWPPP, none of the RDCs met design specifications and many were either so poorly constructed and/or maintained that the inspector could not discern their original construction height, shape or composition, and the RDCs were largely ineffective at controlling either stormwater velocity or the discharge of sediment from the Site;
 - b. Many RDCs described in the SWPPP were not installed at the Site;

- c. Significant rill erosion along the east side of Ridgeview Road near the bridge abutment and at the south bridge abutment and a general lack of controls in this area;
- d. None of the three construction entrances met the design specifications as very little rock was visible and soil was tracked out onto public roadways/parking areas;
- e. The failure by the permittee to employ good housekeeping practices required by the Permit as evidenced by the presence of a pile of used tires on the north side of 99th Street;
- f. All of the concrete washout pits were full and in need of maintenance and one had overflowed; and
- g. Significant dust being generated on the Site.

41. The failures to comply with the terms and conditions of the Permit resulted in observed impacts to Mill Creek and its tributary.

42. Respondent's alleged failure to properly install, operate, and/or maintain BMPs at the Site or, in the alternative, failure to fully implement the SWPPP, is a violation of the conditions and limitations of the of the Permit, and as such, is a violation of Sections 301(a) and 402(p) of the CWA, 33 U.S.C. §§ 1311(a), 1342(p).

Count 3

Failure to Update and Amend the SWPPP

43. Paragraphs 1 through 42 are re-alleged and incorporated herein by reference.

44. Part 7.3.2 of the Permit, Amendment of the SWPPP, requires that the permittee shall modify or amend the SWPPP, at a minimum, whenever there is a change in design, operation, or maintenance of BMPs, pollution controls, or pollution prevention measures, and whenever the SWPPP is determined to be ineffective in significantly minimizing or controlling erosion and sedimentation, such as excessive site erosion, excessive sediment leaving the Site, or excessive sediment deposits in drainage channels, streams, or lakes.

45. During the EPA inspection referenced above, in addition to the deficiencies listed in Paragraph 40, the inspector also observed:

- h. Three RDCs that were not in the SWPPP;
- i. Mulch berms used as a perimeter control throughout the Site instead of the silt fence as a perimeter control called for in the SWPPP; and
- j. Sediment traps onsite that were not constructed in accordance with specifications detailed in the SWPPP and were not effective.

46. The significance of the rill erosion, sediment migration, and impacts on the receiving streams observed during the inspection required amendment of the SWPPP and the installation of more robust BMPs to meet the requirements of the Permit.

47. Respondent's alleged failure to update and amend the SWPPP is a violation of the conditions and limitations of the Permit, and as such, is a violation of Sections 301(a) and 402(p) of the CWA, 33 U.S.C. §§ 1311(a), 1342(p).

Count 4

Failure to Document Adequate Inspections and Take Appropriate Corrective Action

48. Paragraphs 1 through 47 are re-alleged and incorporated herein by reference.

49. Part 7.2.10 of the Permit requires that the permittee shall ensure the entire Site is inspected on a regular schedule (not to exceed every 14 days), and by the end of the next day following a rain event which results in a rainfall total of 0.5 inches or greater. The Permit further requires that a report of each regularly scheduled inspection and required rain event inspection shall be documented and any deficiencies in the operation and maintenance, effectiveness, adequacy or coverage extent of all installed BMPs shall be noted in the inspection report and corrected within seven days unless infeasible.

50. The EPA inspector reviewed several months of inspection reports generated by Respondent and noted that none of the BMP or other site deficiencies identified during the EPA Inspection, including RDC construction and effectiveness, rill erosion, full concrete washouts, etc. were included in Respondent's recent inspection reports.

51. Respondent's alleged failure to take appropriate corrective actions following deficiencies identified during self-inspections is a violation of the conditions and limitations of the Permit, and as such, is a violation of Sections 301(a) and 402(p) of the CWA, 33 U.S.C. §§ 1311(a), 1342(p).

Penalty

52. As alleged in the preceding Counts 1 through 4, 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 \$22,320 per day for each day during which the violation continues, up to a maximum of \$278,995.

CONSENT AGREEMENT

53. 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.

54. Respondent neither admits nor denies the factual allegations contained in this CA/FO.

55. Respondent waives any right to contest the allegations and its right to appeal the proposed Final Order accompanying this Consent Agreement.

56. Respondent and Complainant each agree to bear their own costs and attorney's fees.

57. Nothing contained in this 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.

58. Respondent certifies that it is fully authorized to enter the terms and conditions of this CA/FO and to execute and legally bind Respondent to it.

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

60. Respondent certifies by the signing of this CA/FO that Respondent is in compliance with Kansas General Permit No. KSR 113472, and Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342, and all applicable regulations.

Penalty Payment

61. Respondent agrees that, in settlement of the claims alleged in this CA/FO, Respondent shall pay a civil penalty of **Sixty Seven Thousand Dollars (\$67,000)** 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 ninety (90) days after the effective date of this CA/FO as set forth below.

62. By signing this order, Respondent certified that it cannot pay the penalty within 30 days of the effective date of the CA/FO without experiencing an undue financial hardship. In addition to this statement, Respondent has submitted a signed and certified statement to EPA of its current financial condition articulating a basis for its contention that it cannot pay the penalty within 30 days of the effective date without experiencing an undue financial hardship.

63. The payment of penalties must reference docket number "CWA-07-2020-0155" and the name of the case. Payment shall be made by cashier or certified check made payable to "United States Treasury." Payment must be remitted to:

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

64. Copies of the check or verification of another payment method for the penalty

payments remitted as directed by above, shall be sent to:

Regional Hearing Clerk
R7_Hearing_Clerk_Filings@epa.gov;

and

Cathie Chiccine
Office of Regional Counsel
Chiccine.catherine@epa.gov

65. Respondent agrees that 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.

66. 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

67. Respondent's payment of the entire civil penalty pursuant to this CA/FO 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.

68. The effect of settlement described above is conditional upon the accuracy of the Respondent's representations to EPA, as memorialized in Paragraph 60 of this CA/FO.

69. 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.

70. Notwithstanding any other provision of this CA/FO, 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, and to seek penalties against Respondent or to seek any other remedy allowed by law.

71. With respect to matters not addressed in this CA/FO, 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

72. Respondent consents to receiving the filed Consent Agreement and Final Order electronically at the following e-mail address: jmerrigan@spencerfane.com

73. The Parties acknowledge that this CA/FO 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.

74. Pursuant to 40 C.F.R. § 22.31(b), this CA/FO 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 CA/FO.

75. The state of Kansas 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).

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

77. Respondent and Complainant agree that this CA/FO may be signed in part and counterpart.

COMPLAINANT:
U.S. ENVIRONMENTAL PROTECTION AGENCY

David Cozad
Director
Enforcement and Compliance Assurance Division

Date

Catherine R.M. Chiccine
Assistant Regional Counsel

Date

RESPONDENT:

For Pyramid Contractors, Inc.:

PAT WEAVER, PROJECT MGR
Name/Title


Signature

11/21/21
Date

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.

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

CERTIFICATE OF SERVICE

I certify that that a true and correct copy of the foregoing Consent Agreement and Final Order was sent this day in the following manner to the addressees:

Copy via Email to Complainant:

Catherine R. M. Chiccine
U.S. Environmental Protection Agency, Region 7
Chiccine.catherine@epa.gov

Copy via Email to Respondent:

Pyramid Contractors
c/o Jessica Merrigan
Spencer Fane LLP
jmerrigan@spencerfane.com

Dated this _____ day of _____, _____.

Signed