

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

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
The Asphalt Sales Company) Docket No. CWA-07-2022-0097
Olathe, Kansas)
)
Respondent) COMPLAINT AND
) CONSENT AGREEMENT /
) FINAL ORDER
Proceedings under Section 309(g) of the)
Clean Water Act, 33 U.S.C. § 1319(g))
_____)

COMPLAINT

Jurisdiction

1. This is an administrative action for the assessment of civil penalties instituted pursuant to Section 309(g) of the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act (“CWA”), 33 U.S.C. § 1319(g), and in accordance with the 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, The Asphalt Sales Company, 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 Section 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 Enforcement and Compliance Assurance 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 Kansas.

Statutory and Regulatory Framework

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

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 CWA, 33 U.S.C. § 1362.

8. Section 402(p) of 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 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 CWA.

9. Pursuant to Section 402(p) of 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), 122.26(c) requires 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 stormwater and that is directly related to manufacturing, processing or raw material storage areas at an industrial plant.”

12. Included in the categories of facilities considered to be engaging in “industrial activity” are facilities under Standard Industrial Classifications (“SIC”) Industry Group 29. *See* 40 C.F.R. § 122.26(b)(14)(ii). Within Group 29, SIC code 2951 specifically includes facilities engaged in manufacturing asphalt.

13. Respondent received Permit No. 763 from Kansas Department of Health and Environment (“KDHE”) to operate a construction and demolition (“C&D”) landfill at the site on August 24, 1998.

14. Kansas regulations define “contact water” as “liquid, consisting primarily of precipitation, that has infiltrated through the C&D waste or has been in contact with the C&D waste for any period of time. This term shall include all runoff from the active area of the C&D landfill and all liquid derived from the C&D waste.” K.A.R. 28-29-300.

15. Kansas regulations require owners and operators of C&D landfills to design and construct a contact water control system to control stormwater runoff from the active area of the

C&D landfill, including storage, on-site treatment, beneficial reuse, hauling off-site and/or discharge of C&D contact water. K.A.R. 28-29-304(e)(2). Kansas regulations specify that discharge of C&D contact water to surface waters requires an NPDES permit. K.A.R. 28-29-304(e)(2)(E).

16. KDHE is the state agency with the authority to administer the federal NPDES program in Kansas pursuant to Section 402 of CWA. EPA maintains concurrent enforcement authority with authorized states for violations of CWA.

EPA's General Allegations

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

18. At all times relevant to this action, Respondent was the owner and operator of an asphalt plant, construction and demolition landfill, and support facilities operating under primary SIC code 4953 and secondary SIC code 2951 ("Facility" or "Site").

19. The Facility comprises approximately 87 acres, located less than 300 feet west of Cedar Creek. The Facility generates approximately 300,000 tons of asphalt each year and receives approximately 1,000 tons of C&D waste in the landfill each week.

20. Contact water in the Facility's active landfill area flows to an onsite storage pond adjacent to the landfill (hereinafter the "Contact Water Pond").

21. The northeast portion of the Site, where the east access road enters from 159th Street, contains a berm on the northern boundary. Stormwater, snow melt, surface drainage, and runoff water from both the north side of the berm and from 159th Street flows into a rock-lined swale and is discharged through Outfall 001, located at the far northeast corner of the Site, to Cedar Creek.

22. Stormwater, snow melt, surface drainage, and runoff from the rest of the Site, (hereinafter the "North and South Drainage Areas"), flows through a channelized unnamed tributary running through the Site to a concrete headworks structure with two pipes, one large and one small. The small pipe routes flow into a settlement basin located near the east boundary of the Site (hereinafter the "Sediment Pond"), which discharges to Outfall 002 when the water in the pond reaches a certain level and overflows. The large pipe bypasses flow around the Sediment Pond, typically but not exclusively during high flow events, and discharges it through a second pipe to Outfall 002.

23. The Facility stores materials used as feedstock for asphalt production in stockpiles outside, including mining chat, crushed limestone, sand, trap rock, and recycled asphalt, in the North and South Drainage Areas. Runoff from those stockpiles flows through the channelized tributary, either into the Sediment Pond or around the Sediment Pond, and discharges through Outfall 002.

24. Outfall 002 is located at a culvert near the center of the east boundary of the Site, and discharges both overflow from the Sediment Pond and flows bypassed around the Sediment Pond into an unnamed tributary to Cedar Creek.

25. The unnamed tributary of Cedar Creek flows approximately 300 feet east of the Facility to Cedar Creek. Cedar Creek flows north into Lake Olathe, which is located approximately 2.5 miles from the Facility.

26. Cedar Creek is impaired by *E. coli*, Nitrate and Total Phosphorus, for which Total Maximum Daily Loads (“TMDLs”) have been placed to address these impairments.

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

28. 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 CWA, 33 U.S.C. § 1362(14).

29. Lake Olathe, Cedar Creek and its tributaries are “navigable waters” as defined by Section 502(7) of the CWA, 33 U.S.C. § 1362(7).

30. Stormwater runoff from industrial activity at Respondent’s 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).

31. 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)(ii), (v), requires a permit issued pursuant to Section 402 of CWA, 33 U.S.C. § 1342.

32. On June 28, 2017, KDHE granted authorization to the Facility under Kansas General Permit for Stormwater Runoff Associated with Industrial Activity (“General Permit”) for discharges of stormwater runoff to an unnamed tributary of Cedar Creek, subject to compliance with conditions and limitations set forth in the permit, under NPDES Permit No. KSR001080 (hereinafter “Respondent’s NPDES Permit”). This General Permit was signed by KDHE and became effective on November 1, 2016, and was renewed on November 1, 2021, with an expiration date of October 31, 2026.

33. On January 28, 2021, EPA personnel, under the authority of Section 308(a) of CWA, 33 U.S.C. § 1318(a) inspected the Site (“Inspection”) to determine Respondent’s compliance with its NPDES permit and the CWA.

34. During the Inspection, the EPA inspector reviewed Respondent’s records and obtained copies of Respondent’s documents related to the NPDES Permit, including but not limited to, the Facility’s stormwater pollution prevention plan (“SWPPP”) and inspection

records. The EPA inspector also toured the facility, observed discharge locations, and photographed various stormwater-related areas.

35. A copy of the Inspection report was sent electronically to Respondent by the EPA on March 2, 2021.

36. On June 29, 2021, EPA issued a request for information to Respondent pursuant to the authority of Section 308(a) of the CWA, 33 U.S.C. § 1318(a), requiring submittal of information regarding, among other things, the chat materials stored at the Facility. Respondent submitted its response to the request by letter dated August 31, 2021, accompanied by a Statement of Certification signed August 30, 2021 (“Respondent’s 308 Response”), and included Respondent’s revised SWPPP dated April 2021.

37. According to Respondent’s 308 Response, the Facility currently stores an estimated 3200 – 4200 tons of chat materials in two stockpiles: one containing drag sand chat and one containing quarter inch chips of chat. Section 2.4 of Respondent’s revised SWPPP includes these stockpiles in the list of materials exposed to stormwater and refers to the drag sand chat as “dirty” (unwashed) chat and to the quarter inch chips of chat as “clean” (washed) chat.

38. On May 11, 2022, Complainant and Respondent entered into an Administrative Order for Compliance on Consent requiring Respondent to take all necessary actions to correct the deficiencies and eliminate and prevent recurrence of the violations cited below, and to come into compliance with all the applicable requirements of its NPDES Permit.

EPA’s Findings of Violation

Count 1

Unauthorized Discharge of Contact Water

39. The facts stated above are re-alleged and incorporated herein by reference.

40. 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 pursuant to CWA Section 402, 33 U.S.C. § 1342.

41. Part 1.4.h of Respondent’s NPDES Permit provides that the permit does not cover discharges of process wastewaters that are required to obtain a separate NPDES permit for the discharge.

42. Part 2.1 of Respondent’s NPDES Permit requires the permittee to fully implement the SWPPP. Section 4.1.4 of Respondent’s SWPPP provides that contact water will not leave the Site.

43. Contact water is required by Kansas regulations to obtain an NPDES Permit for discharge to surface waters. The discharge of contact water is not covered by Respondent’s

industrial stormwater NPDES Permit, and the Facility does not have another NPDES Permit authorizing the discharge of contact water.

44. During the EPA Inspection, the inspector observed a hose running from the Contact Water Pond at the Site's C&D Landfill to the Sediment Pond. According to the Facility representative, contact water had been pumped to the Sediment Pond from the Contact Water Pond multiple times during the past two years.

45. Stormwater commingled with contact water in the Sediment Pond is contact water.

46. Under certain precipitation and runoff conditions that have occurred on multiple occasions during the past two years, the Sediment Pond overflows, discharging through Outfall 002 into the unnamed tributary to Cedar Creek.

47. Respondent's alleged unauthorized discharges of contact water through Outfall 002 are violations of Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

**Count 2
Unauthorized Bypass / Failure to Implement Adequate BMPs**

48. The facts stated above are re-alleged and incorporated herein by reference.

49. Section 4.9 of Respondent's NPDES Permit prohibits bypasses "necessary to maintain compliance with the general permit ... except where necessary to prevent loss of human life, personal injury, or severe property damage, and where no feasible alternative to the bypass exists." Section 4.9 of Respondent's NPDES Permit also provides that if a bypass occurs, the SWPPP shall be updated to prevent future occurrences in accordance with the requirements and conditions of the General Permit.

50. Section 4.1.5 of Respondent's SWPPP states that runoff from the North and South Drainage Areas, including runoff from the stockpiles stored in those areas, is directed to the Sediment Pond, which "retains the runoff allowing suspended sediment particles to settle out." Similarly, the SWPPP attachment "Description of Exposed Significant Material" states that runoff from that the stockpiles of crushed limestone, natural sand, recycled asphalt pavement, trap rock, drag sand chat, and clean chat will flow to the Sediment Pond.

51. During the EPA Inspection, the inspector noted that during high flow events, which have occurred on multiple occasions over the past five years, runoff from the North and South Drainage Areas, including runoff from the chat piles and other outdoor stockpiles, would flow uncontrolled into the large pipe in the headworks structure, bypassing the Sediment Pond and discharging directly through Outfall 002 to the unnamed tributary to Cedar Creek.

52. Respondent's alleged unauthorized bypass of the Sediment Pond and failure to implement adequate stormwater management controls are violations of the conditions of

Respondent's NPDES permit that result in the discharge of pollutants in stormwater, and as such, are violations of Sections 301(a) and 402(p) of CWA, 33 U.S.C. §§ 1311(a), 1342(p).

Count 3

Failure to Implement SWPPP / Failure to Maintain BMPs

53. The facts stated above are re-alleged and incorporated herein by reference.

54. Part 2.2 of Respondent's NPDES Permit requires Respondent to develop and implement a SWPPP to ensure the design, implementation, management, and maintenance of Best Management Practices ("BMPs") in order to reduce the amount of pollutants in stormwater discharges associated with the industrial activities at the Facility. Part 2.2 of Respondent's NPDES Permit also provides that implementation of the BMPs specified in the SWPPP are enforceable requirements of the Permit.

55. Part 2.4.3 of Respondent's NPDES Permit requires the SWPPP to list and describe the BMPs, including a schedule for inspection and maintenance of controls.

56. Section 4.1.5 of Respondent's SWPPP and the attached "Description of Exposed Significant Material" identify the Sediment Pond as the BMP for the North and South Drainage Areas, including specifically for the stockpiles of crushed limestone, natural sand, recycled asphalt pavement, trap rock, drag sand chat and clean chat stored there, and require that the Sediment Pond will be cleaned when the sediment accumulation reaches 20% volume.

57. During the EPA Inspection, the inspector observed considerable amounts of sediment in the Sediment Pond, mostly near the headworks where the pond receives stormwater from the Facility. The accumulated sediment appeared to exceed 20% of the Sediment Pond's volume.

58. Respondent's alleged failure to implement its SWPPP and maintain the Sediment Pond is a violation of the SWPPP and Respondent's NPDES permit, and as such, is a violation of Section 402(p) of CWA, 33 U.S.C. § 1342(p).

Count 4

Failure to Conduct Adequate Visual Examination of Stormwater Discharge

59. The facts stated above are re-alleged and incorporated herein by reference.

60. Part 2.4.5.a of Respondent's NPDES Permit and Section 5.2 of the SWPPP require that Respondent conduct a visual examination of stormwater quality once a year at a minimum during a stormwater discharge from the Facility, and that Respondent record the nature of the discharge, visual quality of the discharge, probable sources of any impacts, and follow up actions required to address impacts to stormwater discharges.

61. Part 2.4.6.c and Section 7.0 of Respondent's SWPPP requires the SWPPP to be modified if visual inspection of the stormwater discharges indicates the SWPPP appears to be ineffective in eliminating or significantly minimizing pollutants from sources identified in the SWPPP.

62. Based on a review of records provided following the EPA Inspection, the Facility was not conducting visual examinations during stormwater discharges.

63. Respondent's alleged failure to perform visual inspections during stormwater discharges is a violation of the SWPPP and Respondent's NPDES permit, and as such, is a violation of Section 402(p) of CWA, 33 U.S.C. § 1342(p).

Penalty

64. As alleged by EPA above, 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, for violations that occurred after November 2, 2015, where penalties are assessed on or after January 12, 2022, Respondent is liable for civil penalties of up to \$23,989 per day for each day during which the violation continues, up to a maximum of \$299,857.

CONSENT AGREEMENT

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

66. 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.

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

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

69. 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.

70. Respondent consents to receive service of the filed Consent Agreement and Final Order electronically at the following email address: tmcanany@everestkc.net.

71. The undersigned representative of Respondent certifies that they are fully authorized to enter the terms and conditions of this Consent Agreement/Final Order and to execute and legally bind Respondent to it.

72. 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.

73. Respondent certifies by the signing of this Consent Agreement/Final Order that the Facility is scheduled to be in compliance with EPA's May 11, 2022, Administrative Order for Compliance on Consent, Docket No. CWA-07-2022-0041, which will bring the Facility into compliance with its NPDES Permit and Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342, and applicable regulations.

Penalty Payment

74. Respondent agrees that, in settlement of the claims alleged in this Consent Agreement/Final Order, Respondent shall pay a civil penalty of **Eighty-Two Thousand and Seven Hundred and Ninety-Eight Dollars (\$82,798)** pursuant to the authority of Section 309(g) of the CWA, 33 U.S.C. § 1319(g).

75. Respondent shall pay the penalty identified above by certified or cashier's check made payable to "Treasurer, United States of America," with a transmittal that identifies the case name, facility address, and docket number CWA-07-2022-0097 to:

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

or by alternate payment method described at <http://www.epa.gov/financial/makepayment>.

76. A copy of the check or other information confirming payment shall simultaneously be emailed to the following:

Regional Hearing Clerk
R7_Hearing_Clerk_Filings@epa.gov; and

Shane McCoin, Attorney
mccoin.shane@epa.gov

77. 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.

78. 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

79. 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.

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

81. 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.

82. 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.

83. 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

84. 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.

85. 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.

86. 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).

87. 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.

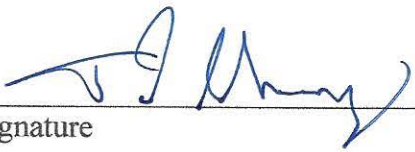
88. Respondent and Complainant agree that this Consent Agreement/Final Order may be signed electronically in part and counterpart.

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

David Cozad
Director
Enforcement and Compliance Assurance Division

Shane McCain
Assistant Regional Counsel
Office of Regional Counsel

For the Respondent, The Asphalt Sales Company:



Signature

Date

7-21-22

Ted McAnany
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

Karina Borromeo
Regional Judicial Officer

Certificate of Service

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

Copy emailed to representatives for Respondent:

tmcanany@everestkc.net
Mr. Ted McAnany, President
The Asphalt Sales Company

SStotts@Polsinelli.com
Stacy Stotts, attorney for Asphalt Sales
Polsinelli PC

Copy emailed to KDHE:

Tom.stiles@ks.gov
Mr. Tom Stiles, Director
Kansas Department of Health and Environment, Bureau of Water

Copy emailed to representatives for Complainant:

mccoin.shane@epa.gov
Shane McCoin
EPA Region 7 Office of Regional Counsel

hamera.don@epa.gov
Don Hamera
EPA Region 7 Enforcement and Compliance Assurance Division

Signature