

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

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
City of Ames, Iowa,) Docket No. CWA-07-2023-0081
)
RW Excavating Solutions, LC,) COMPLAINT AND
) CONSENT AGREEMENT/
and) FINAL ORDER
)
Keller Excavating, Inc.,)
)
Respondents)
)
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 Respondents, city of Ames, Iowa, RW Excavating Solutions, LC, and Keller Excavating, Inc., (“Respondents”), 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 Respondents have violated Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311, 1342, and regulations promulgated thereunder.

Parties

4. The authority to take action under Section 309(g) of the CWA, 33 U.S.C. § 1319(g), is vested in the Administrator of the EPA. The Administrator has delegated this authority to the Regional Administrator, EPA Region 7, who in turn has delegated the authority under Section 309(g) to the Director of the Enforcement and Compliance Assurance Division of EPA Region 7 (collectively referred to as the “Complainant”).

5. Respondent city of Ames, Iowa, is and was at all relevant times a municipality in the state of Iowa.

6. Respondent RW Excavating, LC (hereinafter “RW”), is and was at all relevant times a limited liability company under the laws of the state of Iowa.

7. Respondent Keller Excavating, Inc. (hereinafter “Keller”), is and was at all relevant times a corporation under the laws of the state of Iowa.

Statutory and Regulatory Framework

8. 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.

9. 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.

10. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines “navigable waters” as the “waters of the United States,” which in turn 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.

11. 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.

12. 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.

13. 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.

14. In part, 40 C.F.R. § 122.26(b)(14)(x) defines “industrial activity” as including “Construction activity including clearing, grading and excavation, except operations that result in the disturbance of less than five acres of total land area.”

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

16. Section 309(a) of the CWA, 33 U.S.C. § 1319(a), authorizes the issuance of an order against any person who violates Section 301 of the CWA, 33 U.S.C. § 1311, requiring such person to comply.

EPA’s General Allegations

17. Respondents are “persons” as defined by Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

18. At all times relevant to this action, Respondents owned, operated, or otherwise controlled the construction project known as the Ioway Creek Restoration and Flood Mitigation Project, situated 2000 feet on each side of Ioway Creek along South Duff Avenue, Ames, Iowa (hereinafter the “Site” or “Project”). The Project consisted of clearing and grading 40 acres for creek restoration. Respondents RW and Keller were general contractors responsible for day-to-day construction activities at the Site, including compliance with the NPDES permit.

19. Stormwater, snow melt, surface drainage, and runoff water leave Respondents’ Site via multiple drainage paths to Ioway Creek.

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

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

22. Ioway Creek is a perennial tributary to the Skunk River which, in turn, is a tributary to the Mississippi River, which is a traditionally navigable water. Ioway Creek is, therefore, considered a “water of the United States.”

23. Stormwater runoff from Respondents' industrial activity at the Site results in the addition of pollutants from a point source to navigable waters, and thus is the "discharge of a pollutant" as defined by CWA Section 502(12), 33 U.S.C. § 1362(12).

24. Respondents' discharge of pollutants associated with 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.

25. On March 12, 2021, the IDNR granted authorization to the city of Ames for storm water discharge associated with construction activity at the Site under the NPDES General Permit No. 2, number IA-38791-38424 (the "Permit"). Coverage was initially provided through March 12, 2022, but was extended twice, with a current expiration date of March 12, 2024. This NPDES general permit governs Respondents' stormwater discharges that are associated with industrial activity at the Site, including clearing, grading, and excavation.

26. The principal requirement of the NPDES Permit is for the owner and operator 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, describe and ensure the implementation of best management practices ("BMPs") that will be used to reduce the pollutants in stormwater discharge associated with construction activities at the construction Site, and to assure compliance with the terms and conditions of the Permit.

27. Part II.C.G.(1) of the Permit requires that a SWPPP be developed before obtaining coverage under the Permit and implemented with the start of construction activities.

28. As part of its NPDES permit application, the city of Ames certified that a SWPPP had been developed for the Site. On April 22, 2021, Respondents provided the SWPPP to IDNR when IDNR inspected the Site (the "April 2021 SWPPP").

29. IDNR conducted inspections of the Site, or portions thereof, on April 23, 2021, December 22, 2021, April 28, 2022, November 9, 2022, and March 7, 2023, photographing the Site and documenting violations of the Permit (collectively, the "IDNR inspections").

30. On December 29, 2021, IDNR sent a Notice of Violation to the city of Ames regarding the Project. The Notice of Violation specifically stated that "There were no sediment or erosion controls installed anywhere along the entire stream where the existing trees were removed last spring." On May 3, 2022, IDNR sent another Notice of Violation to the city of Ames regarding vehicles tracking sediment from the Site onto South Duff Avenue, stating that tracking sediment offsite was a failure to contain sediment as required by federal and Iowa law.

31. On February 9 and 10, 2022, EPA personnel, under the authority of Section 308(a) of the CWA, 33 U.S.C. § 1318(a), inspected the Site to determine Respondents' compliance with the NPDES permit and the CWA. During the EPA's inspection, or shortly thereafter, Respondents provided construction plans for the Project, including an updated

SWPPP (the “February 2022 SWPPP”), and self-inspection reports. Also during the EPA’s inspection, EPA personnel toured the Site and photographed various stormwater-related areas. EPA personnel then re-inspected the Site on May 9, 2022, and August 15, 2022 (collectively, the “EPA inspections”).

EPA’s Allegations

Count 1

Failure to Properly Design, Install, Implement and/or Maintain Pollution Prevention Measures and Failure to Fully Implement the Provisions of the April 2021 and February 2022 SWPPPs

32. Paragraphs 1 through 31 above are re-alleged and incorporated herein by reference.

33. Part III.C.1 of the Permit requires Respondents to “Design, install and maintain effective erosion controls and sediment controls to minimize the discharge of pollutants.”

34. Part III.C.1.E of the Permit requires Respondents to, at a minimum, “Minimize sediment discharges from the site. The design, installation and maintenance of erosion and sediment controls must address factors such as the amount, frequency, intensity and duration of precipitation, the nature of resulting storm water runoff and soil characteristics including the range of soil particles sizes expected to be present on the site.”

35. Part IV of the Permit requires that a SWPPP be developed and implemented to reduce the pollutants in storm water discharge associated with construction activity at the Site and assure compliance with the terms and conditions of the Permit. The SWPPP was required to be “prepared in accordance with good engineering practices.” Implementation of the provisions of the developed SWPPP is required as a condition of the Permit.

36. Subsection 3 of both the April 2021 and February 2022 SWPPPs requires of Respondents that “prior to beginning clearing and grubbing operations, excavation, or other soil disturbing operations that may result in sediment leaving the project site, silt fence/ditch checks shall be placed to contain sediment released during the construction activities.”

37. Subsection 3 of both SWPPPs requires Respondents, at a minimum, to implement silt fencing and stabilized construction entrances prior to the start of any major construction activity.

38. Subsection 3 of both SWPPPs further specifies that “as the work progresses, additional erosion control measures shall be installed as required to minimize erosion and sediment transport.”

39. Subsection 8 of both SWPPPs specifies that “The general contractor is required to maintain all erosion control measures in proper working order, including cleaning, repairing, or replacing them throughout the contract period. The owner shall be responsible for these measures following the general contractor’s contract period.”

40. During the inspections conducted by the EPA and IDNR, the inspectors observed and documented multiple areas of the Site where appropriate pollution prevention measures were not installed, implemented, and/or maintained and, where provisions of the SWPPPs required the installation, implementation, and/or maintenance of pollution prevention measures, such measures were not followed, including:

- a. Silt fencing and structural controls were not installed prior to the Site becoming active and disturbed with the clearing and stacking of trees;
- b. Silt fencing and structural controls were not in place prior to the Site becoming active and disturbed with grubbing and grading;
- c. Straw wattles along the stream bank ridges were not installed properly and not maintained;
- d. Silt fencing that was installed at the Site became undermined and ineffective; and
- e. No pollution prevention measures were in place to prevent sediment from being released or tracked out of the Site from dump trucks.

41. Respondents’ alleged failures to properly design, install, implement, and/or maintain pollution prevention measures and failures to fully implement the provisions of the SWPPPs are violations of the conditions or limitations of the NPDES permit, and as such, are violations of Section 402(p) of the CWA, 33 U.S.C. § 1342(p).

Count 2

Failure to Comply with Inspection Requirements

42. Paragraphs 1 through 41 above are re-alleged and incorporated herein by reference.

43. Part IV.D.4 of the Permit requires that any SWPPP include direction that “Qualified personnel (provided by the discharger) shall inspect disturbed areas of the construction site that have not been stabilized with a perennial, vegetative cover of sufficient density to preclude erosion at least once every seven calendar days.”

44. Further, Part IV.D.4.A of the Permit requires that “Disturbed areas and areas used for storage of materials that are exposed to precipitation shall be inspected for evidence of, or the potential for, pollutants entering the drainage system. Erosion and sediment control measures identified in the plan shall be observed to ensure that they are operating correctly.”

45. Subsection 9 of both the April 2021 and February 2022 SWPPPs states that

Respondents, at a minimum, would do the following as part of the required inspections:

- a. Inspect disturbed areas and areas used for storage of materials and vehicles for evidence of pollutants leaving the site and/or entering the drainage system;
- b. Inspect erosion and sediment control measures to ensure they are functioning correctly;
- c. Inspect discharge locations to ascertain if the current control measures are effective in preventing significant impacts to the receiving waters; and
- d. Implement the required maintenance or changes within three calendar days following the day of the inspection.

46. A review of the inspection reports at the Site showed that Respondents did not identify the erosion and sediment control measures that were missing, in disrepair, in need of maintenance, or otherwise needing to be replaced in accordance with the SWPPPs and Permit.

47. Respondents' alleged failures to comply with the inspection requirements of the SWPPPs and Permit are violations of the conditions of limitations of the Permit and, as such, is a violation of Section 402(p) of the CWA, 33 U.S.C. § 1342(p).

Penalty

48. 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, Respondents are liable for civil penalties of up to \$25,847 per day for each day during which the violation continues, up to a maximum of \$323,081.

CONSENT AGREEMENT

49. Respondents and the EPA agree to the terms of this Consent Agreement/Final Order.

50. Respondents admit the jurisdictional allegations of this Complaint and Consent Agreement/Final Order and agree not to contest the EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of this Consent Agreement/Final Order.

51. Respondents neither admit nor deny the factual allegations asserted by the EPA in this Complaint and Consent Agreement/Final Order. In order to avoid the costs and risks of litigation, Respondents wish to settle this matter through this Consent Agreement/Final Order.

52. Respondents waive their rights to contest any issue of fact or law set forth above, and their rights to appeal this Consent Agreement/Final Order.

53. Respondents 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.

54. The undersigned representatives of Respondents certify that they are fully authorized to enter the terms and conditions of this Consent Agreement/Final Order and to execute and legally bind Respondents to it.

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

56. Respondents certify by the signing of this Consent Agreement/Final Order that Respondents' Site is in current compliance with NPDES General Permit No. 2, number IA-38791-38424, as well as Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342, and applicable regulations.

Penalty Payment

57. Respondents agree that, in settlement of the claims alleged in this Consent Agreement/Final Order, Respondents shall pay a civil penalty of One Hundred Sixty Five Thousand Dollars (\$165,000) 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 30 days after the effective date of this Consent Agreement/Final Order as set forth below.

58. Respondents 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, site address, and docket number CWA-07-2023-0081 to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979078
St. Louis, Missouri 63197-9000

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

59. Respondents shall simultaneously send copies of the transmittal letter and the check, as directed above, to the following:

Regional Hearing Clerk

U.S. Environmental Protection Agency
11201 Renner Boulevard
Lenexa, Kansas 66219

and

Sam Bennett
Office of Regional Counsel
U.S. Environmental Protection Agency
11201 Renner Boulevard
Lenexa, Kansas 66219

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

61. 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

62. Respondents' 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.

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

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

65. 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 Respondents or to seek any other remedy allowed by law.

66. 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

67. 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.

68. 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.

69. 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).

70. 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.

71. Respondents consent to service of this Consent Agreement/Final Order via electronic mail.

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

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

Date

David Cozad
Director
Enforcement and Compliance Assurance Division

Date

Sam Bennett
Office of Regional Counsel

For the Respondent, City of Ames, Iowa:



Signature



Date



Name



Title

For the Respondent, RW Excavating Solutions, LC:



Signature

9/21/23

Date

Dan E. Wilson

Name

Managing Member

Title

For the Respondent, Keller Excavating, Inc.:

<u>Taloyre Keller</u> Signature	<u>10/4/2023</u> Date
<u>Taloyre Keller</u> Name	
<u>Secretary/Treasurer</u> 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.

Respondents are 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 each Respondent:

Tracy Peterson
Tracy.peterson@cityofames.org
City of Ames, Iowa

Dan Wilson
lwilson@rwexcavating.com
RW Excavating Solutions, LC

Darin Keller
office@kellerexcavating.com
Keller Excavating, Inc.

Copy emailed to Attorney for Complainant:

Sam Bennett
bennett.samuel@epa.gov
U.S. Environmental Protection Agency Region 7

Copy emailed to the Iowa Department of Natural Resources:

Ted Petersen
ted.petersen@dnr.iowa.gov
Iowa Department of Natural Resources

Date