

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

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:)	
)	
)	Docket No. CWA-07-2021-0058
)	
Kings Construction Co., Inc.)	
)	
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, Kings Construction Co., 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, 402, and 404 of the CWA, 33 U.S.C. §§ 1311, 1342, and 1344 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 the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants except in compliance with, *inter alia*, Sections 402 and 404 of the CWA, 33 U.S.C. §§ 1322 and 1344. 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 404 of the CWA, 33 U.S.C. § 1344, specifically requires a person to obtain a permit from the Secretary of the Army acting through the Chief of Engineers, commonly referred to as the U.S. Army Corps of Engineers (hereinafter “Corps”), for any discharge of “dredged or fill material” into the “navigable waters” of the United States.

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(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.

11. 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.

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. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines “navigable waters,” in part, as the “waters of the United States,” which are defined at 40 C.F.R. § 232.2 and 33 C.F.R. Part 328, and which include tributaries and wetlands adjacent to waters of the United States.

14. Section 40 C.F.R. § 232.2 defines “wetlands” as “those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.”

15. 40 C.F.R. § 232.2 defines “discharge of fill material” as “the addition of fill material into waters of the United States.”

16. 40 C.F.R. § 232.2 defines “fill material” as any material that has the effect of “replacing any portion of a water of the United States with dry land or changing the bottom elevation of any portion of a water of the United States.”

EPA’s General Allegations

17. Respondent is a “person” within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

18. At all times relevant to this action, Respondent operated or otherwise controlled property containing portions of six tributaries to Yankee Tank Creek and a wetland adjacent to one of the tributaries to Yankee Tank Creek located in Sections 3 & 4, Township 13 South, Range 19 East, in Douglas County, Kansas (hereinafter “the Site”). Beginning in 2016, Respondent was involved in a construction project to renovate and develop approximately 265 acres of the former Alvamar Country Club and golf course, which included grading, riparian clearing, and stream impoundment, filling, and channelization. Today, the development operates as the Jayhawk Club.

19. Stormwater, snow melt, surface drainage, and runoff water leave Respondent’s Site into unnamed tributaries that flow approximately 1.5 miles into Yankee Tank Creek, which flows approximately 1.3 miles to the Wakarusa River.

20. On August 16, 2017, the Corps, Kansas City District, received an anonymous complaint that substantial earthwork was occurring in a stream near the complainant’s house and that riparian areas of a stream were being cleared and the potential violator may also be filling the stream.

21. On September 26, 2017, Corps personnel conducted an investigation from public roadways adjacent to the site and determined CWA violations had occurred. The Corps observed substantial amounts of stream that had been channelized and riparian areas cleared. On October

18, 2017 and July 23, 2018, Corps personnel conducted site visits at the Site and confirmed the activity included filling six unnamed tributaries to Yankee Tank Creek and a wetland adjacent to one of the unnamed tributaries to Yankee Tank Creek. The stream impacts total 7,000 linear feet and wetland impacts total 0.904 acre.

22. After the Corps' site visit(s), Corps personnel identified each of the six tributaries and wetland as "waters of the United States."

23. Notices of intent were filed for the project in June 2016 and January 2017. KDHE provided authorization for the project under General Permit number KSR112082 for construction storm water discharges ("General Permit") on July 1, 2016. The General Permit governs stormwater discharges associated with industrial activity, including clearing, grading and excavation. The principal requirement of the General Permit is for the owner to develop and implement a Stormwater Pollution Prevention Plan ("SWPPP"). The General Permit was renewed on January 25, 2017. The Permit remained valid until construction was completed in 2018.

24. On September 27 and October 1, 2018, EPA personnel conducted an inspection at the Site to determine Respondent's compliance with its NPDES permit and the CWA. The EPA inspector estimated Respondent disturbed more than 265 acres at the Site and observed extensive amounts of sediment runoff leaving the Site and discharging into the unnamed tributaries to Yankee Tank Creek.

25. The unnamed tributaries to Yankee Tank Creek and adjacent wetland are "waters of the United States" within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7), 40 C.F.R. § 232.2 and 33 C.F.R. Part 328.

26. The fill material discharged by Respondent into the unnamed tributaries of Yankee Tank Creek and adjacent wetland, as well as the constituents in stormwater runoff from the Site, are "pollutants" within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

27. The earth moving equipment used to grade the Site and place the fill material into the unnamed tributaries to Yankee Tank Creek constitutes a "point source" within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

28. The discharge of the fill material and stormwater containing pollutants into the unnamed tributaries to Yankee Tank Creek and adjacent wetland constitutes the "discharge of a pollutant" within the meaning of Section 502(12) of the CWA, 33 U.S.C. § 1362(12).

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

EPA's Allegations

Count 1: CWA Section 404 Violation

30. The paragraphs above are re-alleged and incorporated herein by reference.

31. Respondent did not obtain a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, prior to the performance of the fill placement described herein, nor did Respondent perform the work described herein under any prior permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344.

32. Respondent's discharge of pollutants from a point source into waters of the United States occurred without a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, and, therefore, these discharges violated Section 301 of the CWA, 33 U.S.C. § 1311.

Count 2: CWA Section 402 Violations

33. The paragraphs above are re-alleged and incorporated herein by reference.

34. Part 7 of Respondent's NPDES General Permit required Respondent to develop and fully implement a SWPPP, including that Respondent "ensure the design, implementation, and maintenance of 'Best Management Practices' (BMPs) in order to eliminate or minimize erosion, sediment, and other pollutants in stormwater runoff from construction activities ..." Part 7 also required Respondent to inspect the Site "on a regular schedule" and to generate reports of inspections.

35. Part 10 of Respondent's NPDES General Permit required Respondent to "maintain all records required by this NPDES general permit for a period of three (3) years."

36. Part 11 of Respondent's NPDES General Permit required Respondent to "properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the requirements of this NPDES general permit, Kansas law, and Federal law."

37. During EPA's inspections, the inspector observed significant amounts of sediment discharging from the Site into unnamed tributaries to Yankee Tank Creek, indicating a lack of controls to eliminate or minimize sediment and other pollutants from leaving the Site.

38. Respondent's failures to comply with its NPDES General Permit are violations of Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1322.

Penalty

39. 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 liable

for civil penalties of up to \$21,933 per day for each day during which the violation continues, up to a maximum of \$274,159.

CONSENT AGREEMENT

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

41. 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.

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

43. Respondent waives their rights to contest any issue of fact or law set forth above, and their rights to appeal this Consent Agreement/Final Order.

44. 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.

45. The undersigned representative(s) of Respondent certify 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.

46. 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.

47. Respondent certifies by the signing of this Consent Agreement/Final Order that Respondent is in current compliance with Sections 301, 402, and 404 of the CWA, 33 U.S.C. §§ 1311, 1342, and 1344 and applicable regulations.

48. Respondent consents to receiving the filed Consent Agreement/Final Order electronically at the following email addresses: *kent@kings-const.com* and *sstotts@polsinelli.com*.

Penalty Payment

49. Respondent agrees that, in settlement of the claims alleged in this Consent Agreement/Final Order, Respondent shall pay a civil penalty of Forty Four Thousand, Nine Hundred and Thirteen dollars (\$44,913) 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.

50. 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-07-2020-0141 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>.

51. Respondent shall simultaneously email copies of the transmittal letter and the check, as directed above, to the following:

R7_Hearing_Clerk_Filings@epa.gov
Regional Hearing Clerk
U.S. Environmental Protection Agency
11201 Renner Boulevard
Lenexa, Kansas 66219

and

muehlberger.christopher@epa.gov
Chris Muehlberger
Office of Regional Counsel
U.S. Environmental Protection Agency
11201 Renner Boulevard
Lenexa, Kansas 66219.

52. 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.

53. 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

54. 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.

55. 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.

56. 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.

57. 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.

58. 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

59. 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.

60. 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.

61. 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).

62. 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.

63. Respondent 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

Diane Huffman
Acting Director
Enforcement and Compliance Assurance Division

Date

Chris Muehlberger
Office of Regional Counsel

For the Respondent Kings Construction Co., Inc.:

DK Signature 04/28/2021 Date

Don C King Name

Vice 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 by electronic mail to Respondent:

Mr. Kent King, Registered Agent
Kings Construction Co., Inc.
PO Box 188
Oskaloosa, Kansas 66066
kent@kings-const.com
sstotts@polsinelli.com

Copy emailed to Attorney for Complainant:

Chris Muehlberger
U.S. Environmental Protection Agency Region 7
muehlberger.christopher@epa.gov

Copy emailed to the Kansas Department of Health and Environment:

Tom Stiles, Assistant Director
tom.stiles@ks.gov

Tom Winn, District Environmental Administrator
tom.winn@ks.gov

Date