



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6
1445 ROSS AVENUE, SUITE 1200
DALLAS TX 75202-2733

FILED

2013 JAN 16 PM 3:52

JAN 16 2013

REGIONAL HEARING CLERK
EPA REGION VI

CERTIFIED MAIL - RETURN RECEIPT REQUESTED (7007 1490 0002 3734 0472)

Mr. Paul Gray, Deputy Secretary
Highway Operations
New Mexico Department of Transportation
P.O. Box 1149
Santa Fe, New Mexico 87504-1149

Re: Consent Agreement and Final Order, Docket Number CWA-06-2013-27302
New Mexico State Road 290 at Rio Vallecitos

Dear Mr. Gray:

Enclosed is the fully executed Consent Agreement and Final Order ("CAFO") for the matter referenced above. As no comments were received from the general public during the public notice period, the Environmental Protection Agency hereby issues this CAFO. The penalty payment mentioned in the Order has already been received. In addition, the required remedial actions required at the site in question have been completed in an excellent manner.

We therefore consider this matter fully resolved. If you have any questions about this document, or the Clean Water Act, Section 404 program in general, I recommend that you contact Mr. Tom Nystrom at (214) 665-8331.

Sincerely yours,

William K. Honker, P.E.,
Director
Water Quality Protection Division

Enclosures

cc: w/CAFO
Regional Hearing Clerk
William Oberle, Albuquerque District Corps of Engineers

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6

In the Matter of:

New Mexico Department
of Transportation

Respondent

§
§
§
§
§
§
§

Docket No. CWA-06-2013-2702

CONSENT AGREEMENT AND FINAL ORDER

I. PRELIMINARY STATEMENT

1. This Consent Agreement and Final Order (“CAFO”) is issued under the authority vested in the Administrator of the United States Environmental Protection Agency (“EPA”) by Section 309(g) of the Clean Water Act (“the Act”), 33 U.S.C. § 1319(g). This CAFO is issued to simultaneously commence and conclude this proceeding to assess a Class I civil penalty in accordance with 40 C.F.R. §§ 22.13(b) and 22.18(b)(2) and (3), as described in the “Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits.”

2. The Parties agrees that settlement of the relevant matters without litigation will save time and resources, that it is in the public’s interest, and that the entry of this CAFO is the most appropriate means of resolving such matters. Compliance with all the terms and conditions of this CAFO resolves only those violations alleged herein.

3. New Mexico Department of Transportation (“Respondent”) admits the jurisdictional allegations herein; however, Respondent neither admits nor denies the specific Findings of Fact and Conclusions of Law contained in this CAFO. This CAFO states claims upon which relief may be granted.

4. Respondent expressly waives any right to contest the factual allegations or Conclusions of Law contained in this CAFO and waives its right to appeal the Final Order set forth herein.

5. Before the taking of any testimony and without adjudication of any issue of law or fact, the Parties agree to the terms of this CAFO and to its issuance. Respondent consents to the assessment and payment of a civil penalty in the amount and by the method stated below.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

6. Respondent is a political subdivision of the State of New Mexico and therefore considered a "person" as that term is defined at Section 502(5) of the Act, 33 U.S.C. § 1362(5), and 40 C.F.R. §§ 122.2 and 232.2.

7. At all times relevant to the violations alleged herein ("relevant time period"), Respondent controlled or had access to real property, including the channel of the Rio Vallecitos, located upstream from bridge number 5962 on New Mexico State Road 290 on Jemez Pueblo land in Sandoval County, New Mexico.

8. On an unspecified date between September 3, 2008 and September 22, 2008, Respondent discharged, caused the discharge, directed the discharge, and/or agreed with other persons or business entities to discharge dredged and/or fill material as those terms are defined by Section 502 of the Act, 33 U.S.C. § 1362, and 40 C.F.R. § 232.2, from point sources, including heavy equipment in, on, and to the channel of the Rio Vallecitos. This work was associated with bridge 5962 repair and was done without authorization under a permit issued by the United States Army Corps of Engineers ("Corps").

9. The waters identified above in paragraph 8 are "waters of the United States" as that term is defined at Section 502(7) of the Act, 33 U.S.C. § 1362(7), and 40 C.F.R. § 232.2.

10. The discharged dredged material and fill material are "pollutants" as that term is defined at Section 502(6) of the Act, 33 U.S.C. § 1362(6).

11. Each piece of equipment used to carry out the discharges acted as a "point source" as that term is defined at Section 502(14) of the Act, 33 U.S.C. § 1362(14).

12. Under Section 301(a) of the Act, 33 U.S.C. § 1311(a), it is unlawful for any person to discharge a pollutant from a point source to waters of the United States, except with the authorization of, and in compliance with, a permit issued under the Act.

13. Under Section 404 of the Act, 33 U.S.C. § 1344, the Secretary of the Army, acting through the Chief of Engineers for the Corps, is authorized to issue permits for the discharge of dredged or fill material into waters of the United States.

14. At no time during the relevant time period did Respondent have a permit issued by the Corps authorizing the discharges alleged herein.

15. Under Section 309(g)(1)(A) of the Act, 33 U.S.C. § 1319(g)(1)(A), the Administrator is authorized to assess a Class I or Class II civil penalty whenever, on the basis of any available information, the Administrator finds that a person has violated Section 301 of the Act, 33 U.S.C. § 1311.

16. Each day of unauthorized discharge by Respondent is a violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a).

17. Under Section 309(g)(2)(A) of the Act, 33 U.S.C. § 1319(g)(2)(A), Respondent is liable for a civil penalty in an amount not to exceed \$16,000 per day for each day during which a violation continues, up to a maximum of \$37,500.

18. The State of New Mexico was notified and given an opportunity to consult with EPA regarding the proposed assessment of an administrative penalty against Respondent.

19. EPA notified the public of the proposed CAFO and afforded the public forty (40) days to comment on the proposed penalty in accordance with 40 C.F.R. § 22.45. At the expiration of the notice period, EPA had received no comments from the public.

III. TERMS OF SETTLEMENT

A. PENALTY PROVISIONS

20. Based on the foregoing Findings of Fact and Conclusions of Law, EPA Region 6, considering the relevant criteria pursuant to Section 309(g)(3) of the Act, 33 U.S.C. § 1319(g)(3), and under the authority of Section 309(g) of the Act, 33 U.S.C. § 1319(g), hereby orders that Respondent shall pay to the United States a civil penalty in the amount of five thousand dollars (\$5,000.00) to settle the violations as alleged in the Complaint, in accordance with 40 C.F.R. § 22.18(c).

21. Payment shall be made by one of the following methods within thirty (30) days of the effective date of this CAFO:

- a. By mailing a bank check, a cashier's check, or certified check, payable to "Treasurer of the United States," to the following address:

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

- b. By wire transfer to:

Federal Reserve Bank of New York
ABA: 021030004
Account Number = 68010727

SWIFT address = FRNYUS33
33 Liberty Street
New York, NY 10045
Field Tag 4200 of the Fedwire message should read:
"D 68010727 Environmental Protection Agency"

c. By overnight mail (Express, FedEx, DHL, etc.) to:

U.S. Bank
Government Lockbox 979077
U.S. EPA Fines and Penalties
1005 Convention Plaza
SL-MO-C2-GL
St. Louis, MO 63101
Phone: 314-418-4087

d. By credit card payments to: <https://www.pay.gov/paygov>
(enter sfo 1.1 in the search field)

The case name and docket number ("**In the Matter of New Mexico Department of Transportation, Docket No. CWA-06-2013-2702**") should be clearly marked on the check to ensure credit for payment.

22. Respondent shall send simultaneous notice of payment, including a copy of the check, to each of the following:

- (a) Regional Hearing Clerk (6RC-D)
U.S. EPA, Region 6
1445 Ross Avenue, Suite 1200
Dallas, Texas 75202-2733
- (b) Chief, Marine & Wetlands Section (6WQ-EM)
Water Quality Protection Division
U.S. EPA Region 6
1445 Ross Avenue, Suite 1200
Dallas, Texas 75202-2733
- (c) Chief, Water Legal Branch (6RC-EW)
U.S. EPA, Region 6
1445 Ross Avenue, Suite 1200
Dallas, Texas 75202-2733

Respondent's adherence to these procedures will ensure proper credit when payment is received by EPA.

23. Respondent agrees not to claim or attempt to claim a federal income tax deduction or credit covering all or any part of the civil penalty paid to the United States Treasurer.

24. Pursuant to 31 U.S.C. § 3717 and 40 C.F.R. § 13.11, unless otherwise prohibited by law, EPA will assess interest and late payment penalties on outstanding debts owed to the United States and a charge to cover the costs of processing and handling a delinquent claim. Interest on the civil penalty assessed in this CAFO will begin to accrue thirty (30) days after the effective date of the CAFO and will be recovered by EPA on any amount of the civil penalty that is not paid by the respective due date. Interest will be assessed at the rate of the United States Treasury tax and loan rate in accordance with 40 C.F.R. § 13.11(a). Moreover, the costs of the Agency's administrative handling of overdue debts will be charged and assessed monthly throughout the period the debt is overdue. See 40 C.F.R. § 13.11(b).

25. EPA will also assess a \$15.00 administrative handling charge for administrative costs on unpaid penalties for the first thirty (30) day period after the payment is due and an additional \$15.00 for each subsequent thirty day period that the penalty remains unpaid. In addition, a penalty charge of up to six percent (6%) per year will be assessed monthly on any portion of the debt which remains delinquent more than ninety (90) days. See 40 C.F.R. § 13.11(c). Should a penalty charge on the debt be required, it shall accrue from the first day payment is delinquent. See 31 C.F.R. § 901.9(d). Other penalties for failure to make a payment may also apply.

26. Pursuant to Section 309(g)(9) of the Act, 33 U.S.C. § 1319(g)(9), any person who fails to pay on a timely basis a civil penalty ordered or assessed under this section shall be required to pay, in addition to such penalty and interest, the United States' enforcement

expenses, including but not limited to, attorney's fees and costs incurred by the United States for collection proceedings, and a quarterly nonpayment penalty for each quarter during which such failure to pay persists. Such nonpayment penalty shall be twenty percent (20%) of the aggregate amount of such person's outstanding penalties and nonpayment penalties accrued as of the beginning of each quarter.

27. Failure by Respondent to pay the penalty assessed according to the terms of this CAFO, in full, by its due date, may subject Respondent to a civil action to collect the assessed penalty and any accrued interest or penalties.

28. In the event a collection action is necessary, Respondent shall pay,—in addition to any applicable penalty, fees, and interest described herein,—all reasonable costs and expenses, including legal expenses and court costs, incurred by the United States for enforcement and collection proceedings for nonpayment of the amounts agreed hereunder, pursuant to Section 309(g)(9) of the Act, 33 U.S.C. § 1319(g)(9). In any such collection action, the validity, amount, and appropriateness of the penalty, and the terms of this CAFO shall not be subject to review.

B. GENERAL PROVISIONS

29. To execute this Agreement, Respondent shall forward two (2) copies of this CAFO, with original signature, to:

Mr. Tom Nystrom
Water Quality Protection Division (6WQ-EM)
U.S. EPA, Region 6
1445 Ross Avenue, Suite 1200
Dallas, Texas 75202-2733

30. Issuance of this CAFO does not relieve Respondent from its responsibility to comply with all requirements of the Act and the requirements of any permits issued thereunder, as described in Section 309(g)(7) of the Act, 33 U.S.C. § 1319(g)(7), nor does it constitute a waiver

by EPA of its right to enforce compliance with the requirements of Respondent's permits or other requirements of the Act by actions pursuant to Section 309 of the Act, 33 U.S.C. § 1319.

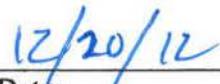
31. The provisions of this CAFO shall be binding upon Respondent, its officers, or officials, managers, employees, and their successors or assigns, in their capacity on behalf of Respondent.

32. Each party agrees to bear its own costs and attorney's fees in this matter, except to the extent that Respondent may be responsible for reasonable costs and expenses of enforcement and collection proceedings for failure to comply with the terms of this CAFO. Furthermore, Respondent specifically waives its right to seek reimbursement of its costs and attorney's fees under the Equal Access to Justice Act, 5 U.S.C. § 504, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. § 601 et seq, and any regulations promulgated pursuant to those Acts.

33. Each undersigned representative of the Parties to this agreement certifies that he or she is fully authorized by the party represented to enter into the terms and conditions of this agreement and to execute and legally bind that party to it. In recognition and acceptance of the foregoing:



For New Mexico Department
of Transportation



Date:



William K. Honker, P.E., Director
Water Quality Protection Division
U.S. EPA, Region 6



Date:

FINAL ORDER

Pursuant to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, 40 C.F.R. Part 22, the foregoing Consent Agreement is hereby ratified. This Final Order shall not in any case affect the right of EPA or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law. This Final Order shall resolve only those causes of action alleged in the Complaint. Nothing in this Final Order shall be construed to waive, extinguish, or otherwise affect Respondent's (or its officers, agents, servants, employees, successors, or assigns) obligation to comply with all applicable federal, state, and local statutes and regulations, including the regulations that were the subject of this action. Respondent is ordered to comply with the terms of settlement and the civil penalty payment instructions as set forth in the Consent Agreement. This CAFO shall become effective upon filing with the Regional Hearing Clerk, pursuant to 40 C.F.R. § 22.31(b).

Issuance Date:

1/16/13

Patrick Rankin
Regional Judicial Officer

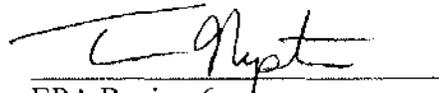
CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of January, 2013, the original of the foregoing Consent Agreement and Final Order was hand delivered to the Regional Hearing Clerk, U.S. EPA, Region 6 (6RC-D), 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202-2733, and that a true and correct copy was placed in the United States Mail, by certified mail, return receipt requested, addressed to the following:

Ms. Allison Marks, Esq.
Office of General Counsel
New Mexico Department of Transportation
P.O. Box 1149, Room 123
Santa Fe, New Mexico 87504-1149

with a copy, first class postage prepaid, to

James P. Bearzi
Bureau Chief
Surface Water Quality Bureau
New Mexico Environment Department
P.O. BOX 5469
Santa Fe, New Mexico USA 87502


EPA Region 6