

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VII

901 NORTH FIFTH STREET
KANSAS CITY, KANSAS 66101

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ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)

MISSOURI DEPARTMENT OF)
TRANSPORTATION)
Respondent)

Docket No. CWA-07-2008-0043

Proceedings under Section 309(g) of the)
Clean Water Act, 33 U.S.C. § 1319(g))

Consent Agreement/Final Order

INTRODUCTION

The United States Environmental Protection Agency, Region VII ("EPA") and the Missouri Department of Transportation ("Respondent" or "MoDOT") have agreed to a settlement of this action before filing of a complaint, and 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, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits (Consolidated Rules) 64 Fed. Reg. 40181, 40183 (July 23, 1999), to be codified at 40 C.F.R. §§ 22.13(b), 22.18(b)(2).

This Consent Agreement/Final Order is a complete and final settlement of all civil and administrative claims and causes of action for the violations set forth in this Consent Agreement/ Final Order relating to the Respondent's failure to comply with the General Operating Permit for Highway Construction in the state of Missouri, also known as the National Pollution Discharge Elimination System ("NPDES") permit.

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. The Missouri Department of Natural Resources ("MDNR") is the state agency with the authority to administer the federal NPDES program in Missouri pursuant to Section 402 of the CWA, 33 U.S.C. § 1342. EPA maintains concurrent enforcement authority with Missouri, as an authorized state, for violations of the CWA.

3. This Consent Agreement/Final Order serves as notice that EPA has reason to believe that Respondent has acted in violation of its NPDES Permit in violation of Section 402 of the CWA, 33 U.S.C. § 1342.

STATUTORY AND REGULATORY FRAMEWORK

4. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants into navigable waters from a point source, except in compliance with, inter alia, a permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342. Section 402 of the CWA, 33 U.S.C. § 1342, provides that pollutants may be discharged only in accordance with the terms of a NPDES permit issued pursuant to that Section.

5. Section 502(12) of the CWA, 33 U.S.C. § 1362(12), defines “discharge of a pollutant” to include “any addition of any pollutant to navigable waters from any point source.”

6. Section 502(6) of the CWA, 33 U.S.C. § 1362(6), defines “pollutant” to include, inter alia, dredged spoil, rock, sand and cellar dirt.

7. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines “navigable waters” as “the waters of the United States, including the territorial seas.”

8. Federal regulations at 40 C.F.R. § 232.2 and 33 C.F.R. Part 328 define waters of the United States, in part, as, “ lakes, rivers and streams.”

9. Section 402(p) of the CWA, 33 U.S.C. §1342(p), requires, in part, that a discharge of storm water associated with industrial activity must conform with the requirements of a NPDES permit issued pursuant to Sections 301 and 402 of the CWA, 33 U.S.C. §§1311 and 1342.

10. The Federal regulation at 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 (5) acres of total land area which are not part of a larger common plan of development or sale.

11. Section 502(5) of the CWA, 33 U.S.C. § 1362(5), defines “person” to include a municipality, commission, or political subdivision of a State.

12. Section 309(g) of the CWA, 33 U.S.C. § 1319(g), authorizes the commencement of an action for administrative penalties against any person who violates Section 301, 33 U.S.C. § 1311.

13. Section 402 of the CWA requires a person issued a permit under NPDES to comply with the permit.

FACTUAL BACKGROUND

14. MDNR issued a NPDES General Permit to MoDOT for storm water discharges from construction or land disturbance sites, NPDES Permit Number MO-R100007, effective May 31, 2002 through May 30, 2007 and subsequently extended through May 30, 2012 (“Permit”). The Permit authorizes construction or land disturbance activity for storm water discharges.

15. On or about March 1, 2006, Respondent initiated construction activities to upgrade Highway 40/61 in O’Fallon, St. Charles County, Missouri between Winghaven Boulevard and Highway K (“Construction Site”). Respondent used earth-moving equipment to clear, grade and excavate more than five acres of land.

16. The Construction Site is sloped towards i) Schote Creek, ii) an unnamed tributary to Dardenne Creek and iii) Dardenne Creek.

17. On March 22, 2007, EPA conducted an inspection of the Construction Site pursuant to the authority of Section 308 of the CWA, 33 U.S.C. § 1318, of the CWA (“EPA inspection”).

18. Part 9 of the Permit requires Respondent to develop and implement a Storm Water Pollution Prevention Plan (“SWPPP”) which incorporates, among other things, erosion control practices including measures for stabilization of disturbed areas.

- a. During the EPA inspection, EPA determined that Respondent failed to
 - i) construct ditch checks at the height and width specified in the SWPPP;

ii) use rocks that are of the size specified in the SWPPP; iii) place filter fabric underneath all the ditch checks as specified in the SWPPP; and iv) construct the number of ditch checks specified in the SWPPP.

Respondent's failure to construct rock ditch checks that conform to the requirements of the SWPPP is a violation of the Permit.

b. During the EPA inspection, EPA observed a silt fence located on the Construction Site on a slope east of the unnamed tributary of Dardenne Creek and found that it was approximately 200 feet short of the length of the disturbed land. No other pollution control measures were in place for that 200 feet to prevent migration of disturbed soil to the Dardenne Creek tributary and Dardenne Creek. Respondent's failure to establish or maintain any erosion control measure in a 200 foot area where land was disturbed is a violation of the Permit.

c. During EPA's inspection, EPA observed a disturbed area at the Construction Site east of Schote Creek that had not been stabilized with a vegetative cover. EPA learned during the inspection that Respondent had allowed the slope to remain unstabilized for approximately six months. Respondent's failure to implement temporary stabilization measures in a disturbed area is a violation of the Permit.

19. Part 12 of the Permit requires Respondent to inspect the land disturbance site at a minimum, once a week and within 72 hours following heavy rains. Between August 1, 2006 and March 31, 2007, Respondent failed to inspect the Construction Site on a weekly basis at least 11 times and failed to inspect within 72 hours after rain events at

least nine times. Respondent's failure to inspect the Construction Site weekly and within 72 hours after rain events is a violation of the Permit.

20. Schote Creek and the unnamed tributary to Dardenne Creek flow through the Construction Site. Dardenne Creek flows into the Mississippi River. During the EPA inspection, EPA observed erosion at the Construction Site in areas that were sloped towards Schote Creek and the unnamed tributary to Dardenne Creek.

21. At all times relevant to this administrative action, Dardenne Creek, Schote Creek, and the unnamed tributary are each a "water of the United States" as defined by 40 C.F.R. § 232.2 and 33 C.F.R. § 328.3.

22. The earth-moving equipment used at the direction of Respondent for construction activities is a "point source" within the meaning of Section 502(14) of the Act, 33 U.S.C. § 1362(14).

23. During the period of construction activities at the Construction Site, rainfall events exceeding 0.5 inches occurred more than 11 times. Based on information and belief, during these rainfall events, soil, rock, sand or cellar dirt from the Construction Site migrated into Schote Creek and the unnamed tributary to Dardenne Creek.

24. Soil, rock, sand or cellar dirt is a "pollutant" within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

25. The deposition of soil, rock, sand or cellar dirt into a water of the United States constitutes the "discharge of pollutants" within the meaning of Section 502(12) of the CWA, 33 U.S.C. § 1362(12).

26. Respondent, part of the Missouri Highways and Transportation Commission, is a "person" within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

FINDINGS OF VIOLATION

27. The facts stated in paragraphs 14 through 26 above are herein incorporated.

28. Respondent's violations of the terms and conditions of its Permit, as described in Paragraphs 14 through 26 above, are violations of Sections 301(a) and 402 of the CWA, 33 U.S.C. §§ 1311(a) and 1342, and implementing regulations.

29. Based on the foregoing Findings of Violation, and pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), EPA Region VII hereby proposes to issue a Final Order Assessing an Administrative Penalty against the Respondent for the violations cited above, in the amount of \$76,387.00.

CONSENT AGREEMENT

30. Respondent and EPA agree to the terms of this Consent Agreement/Final Order and Respondent agrees to comply with the terms of the Final Order portion of this Consent Agreement/Final Order.

31. Respondent admits the jurisdictional allegations of this 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 the Final Order portion of this Consent Agreement/Final Order.

32. Respondent neither admits nor denies the factual allegations and legal conclusions set forth in this Consent Agreement/Final Order.

33. Respondent waives its right to a judicial or administrative hearing on any issue of fact or law set forth in this Consent Agreement/Final Order.

34. Nothing contained in the Final Order portion of this Consent Agreement/Final Order shall alter or otherwise affect Respondent's obligation to comply

with applicable Federal, state and local environmental statutes and regulations and applicable permits.

35. Respondent agrees, in settlement of the claim alleged in this Consent Agreement/Final Order, to pay a penalty of \$76,387.00.

36. This Consent Agreement/Final Order constitutes a settlement by EPA of all claims for civil penalties pursuant to Section 309 of the Clean Water Act for the violations alleged herein. Nothing in this Consent Agreement/Final Order is intended to nor shall be construed to operate in any way to resolve any criminal liability of the Respondent. Compliance with this Consent Agreement/Final Order shall not be a defense to any actions subsequently commenced pursuant to Federal laws and regulations administered by EPA, and it is the responsibility of Respondent to comply with such laws and regulations.

FINAL ORDER

Pursuant to Section 309(g)(2)(B) of the Clean Water Act, 33 U.S.C. § 1319 (g)(2)(B), and according to the terms of this Consent Agreement/Final Order, IT IS HEREBY ORDERED THAT:

1. Within thirty (30) days of the Effective Date of this Consent Agreement/Final Order, defined in Paragraph 9 below, Respondent shall pay a civil penalty of seventy-six thousand three hundred eighty-seven dollars (\$76,387.00).
2. Respondent shall pay the penalty by wire transfer, remitted to:

Federal Reserve Bank of New York
ABA = 021030004
Account = 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

Respondent shall reference the name of the case, *In the Matter of the Missouri Department of Transportation* Docket Number CWA -07-2008-0043, on the wire transfer. Notification of the wire transfer shall also be transmitted to:

Mr. Naji Ahmad
U. S. Environmental Protection Agency – Region VII
901 N. 5th Street
Kansas City, KS 66101

3. Should the civil penalty not be paid as provided above, interest will be assessed at the annual rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717. The interest will be assessed on the overdue amount from the due date through the date of payment.

4. Respondent and EPA agree to conciliate this matter without the necessity of a formal hearing and to bear their respective costs and attorneys' fees.

5. This Consent Agreement/Final Order addresses all civil administrative claims for the CWA violations identified above. EPA reserves the right to take any enforcement action with respect to any other violations of the CWA or any other applicable law and to enforce the terms and conditions of this Consent Agreement/Final Order.

6. Notwithstanding any other provision of this Consent Agreement/Final Order, EPA reserves the right to enforce the terms of the Final Order by initiating a judicial or administrative action under 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.

7. This Final Order will terminate when Respondent is notified in writing by EPA.

8. This Final Order shall apply to and be binding upon Respondent and its agents, successors, and assigns.

9. This Final Order shall be entered and become effective only after the conclusion of the period of public notice and comment required pursuant to Section 309(g)(4), 33 U.S.C. § 1319(g)(4), and 40 C.F.R. § 22.45. The Effective Date shall be the date it is signed by the Regional Judicial Officer.

FOR THE U. S. ENVIRONMENTAL PROTECTION AGENCY:

03/20/08

Date

William A. Spratin
William A. Spratin, Director
Water, Wetlands and Pesticides Division
U. S. Environmental Protection Agency Region VII

3/19/08

Date

Audrey B. Asher
Audrey B. Asher
Senior Assistant Regional Counsel
U. S. Environmental Protection Agency Region VII

IT IS SO ORDERED.

May 6, 2008

Date

Robert L. Patrick
Robert L. Patrick, Esq.
Regional Judicial Officer
U. S. Environmental Protection Agency Region VII

FOR RESPONDENT MISSOURI DEPARTMENT OF TRANSPORTATION:

3/17/08
Date

David B. Neble
Name
Title **Director of Program Delivery**

03/17/08
Date

Eric M. Johnson
Name
Title Asst. Chief Counsel - Project
Development

Attest:

Patricia Harris
Secretary to the Missouri Highways
and Transportation Commission

Approved As to Form:

Michah Ray Alexander
Assistant Counsel

IN THE MATTER OF Missouri Department of Transportation, Respondent
Docket No. CWA-07-2008-0043

CERTIFICATE OF SERVICE

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

Copy hand delivered to
Attorney for Complainant:

Audrey B. Asher
Senior Assistant Regional Counsel
Region VII
United States Environmental Protection Agency
901 N. 5th Street
Kansas City, Kansas 66101

Original by Certified Mail Return Receipt to:

M. Ray Alexander, Esq.
Missouri Department of Transportation
105 West Capitol Avenue
P.O. Box 270
Jefferson City, Missouri 65102

Dated: 5/6/08


Kathy Robinson
Hearing Clerk, Region 7