

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7

2014 FEB -7 AM 9:38

11201 RENNER BOULEVARD
LENEXA, KANSAS 66219

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
Kugler Oil Company)
)
Respondent)
)
Proceedings under Section 309(g) of the)
Clean Water Act, 33 U.S.C. § 1319(g))
_____)

Docket No. CWA-07-2013-0059

CONSENT AGREEMENT/
FINAL ORDER

The United States Environmental Protection Agency (EPA), Region 7 (Complainant) and Kugler Oil Company (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) 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), 40 C.F.R. §§ 22.13(b) and 22.18(b)(2).

ALLEGATIONS

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, 40 C.F.R. Part 22.

2. This Consent Agreement and Final Order (CAFO) serves as notice that EPA has reason to believe that Respondent has violated Sections 301 and 402 of the CWA, 33 U.S.C. § 1311 and § 1342, and regulations promulgated thereunder.

Parties

3. The authority to take action under Section 309(g) of the CWA, 33 U.S.C. § 1319(g), is vested in the Administrator of EPA. The Administrator has delegated this authority to the Regional Administrator, EPA Region 7, who in turn has delegated it to the Director of the Water, Wetlands and Pesticides Division of EPA, Region 7 (Complainant).

4. Respondent is Kugler Oil Company, Inc., a corporation incorporated under the laws of Nebraska and authorized to conduct business in the state of Nebraska.

Statutory and Regulatory Framework

5. 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 only in accordance with the terms of a National Pollutant Discharge Elimination System (NPDES) permit issued pursuant to that Section.

6. 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 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 conform with the requirements of an NPDES permit issued pursuant to Sections 301 and 402 of the CWA.

8. Pursuant to Section 402(p) of the CWA, EPA promulgated regulations setting forth the NPDES permit requirements for stormwater discharges at 40 C.F.R. § 122.26.

9. 40 C.F.R. § 122.26(a)(1)(ii) and 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.

10. 40 C.F.R. § 122.26(b)(14)(ii) defines “stormwater discharge associated with industrial activity”, in part, as facilities classified as Standard Industrial Classification 2875 (Agricultural Chemicals).

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

12. NDEQ implemented a General Permit for the discharge of stormwater under the NPDES, effective on July 1, 2011. The permit governs stormwater discharges associated with industrial activity.

Factual Background

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

14. At all times relevant to this action, Respondent was the owner and/or operator of a facility known as Kugler Company located at 71748 Railroad Street, Culbertson, Nebraska (the Facility), operating under SIC code 2875.

15. Stormwater, snow melt, surface drainage and runoff water leaves Respondent’s facility and flows into the Frenchman River. The runoff and drainage from Respondent’s facility is “stormwater” as defined by 40 C.F.R. § 122.26(b)(13).

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

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

18. Respondent discharged pollutants into the Frenchman River, a “navigable water” as defined by CWA Section 502, 33 U.S.C § 1362.

19. Stormwater runoff from Respondent’s industrial activity 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).

20. Respondent’s discharge of pollutants associated with an industrial activity, as defined by 40 C.F.R. § 122.26(b)(14)(ii), requires a permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

21. Respondent applied for and was issued NPDES permit coverage under the general permit described in Paragraph 12 above.

22. Respondent’s NPDES Permit requires sampling of sector specific benchmark parameters. Benchmark monitoring for Nitrate, Iron, Lead, Phosphorus, and Zinc must be conducted at least once per quarter. After collection of four quarterly samples, if the average of the four monitoring values for any parameter does not exceed the benchmark, the monitoring requirements have been fulfilled. However, if the average of the four monitoring values for any parameter exceeds the benchmark, then appropriate site modifications must be made to meet benchmark standards.

23. Based on a May 22, 2013, letter from Kugler to NDEQ, Respondent exceeded the benchmark standard for Nitrate, Iron, Phosphorus and Zinc.

24. On September 17, 2012, EPA performed an inspection of the Site under the authority of Section 308(a) of the CWA, 33 U.S.C. § 1318(a). The purpose of the inspection was to evaluate the management of stormwater at the Site in accordance with the CWA. During the inspection, the EPA inspector observed, among other things: (1) trash and debris in the ditch that leads to Frenchman River; (2) ground discoloration around containers in the bone yard, maintenance area and railyard loading dock; (3) unmarked containers throughout the facility; and (4) thirty 275 gallon totes containing fertilizer stored without secondary containment.

Alleged Violations

Count 1

Failure to Implement Spill Prevention and Response Procedures

25. The facts stated in Paragraphs 13 through 24 above are herein incorporated.

26. Section 2 of Respondent's Permit requires Respondent to at a minimum "implement procedures for expeditiously stopping, containing, and cleaning-up leaks, spills and other releases . . ."

27. During the EPA inspection referenced in Paragraph 24 above, the EPA inspector observed a significant amount of ground discoloration around containers at the bone yard, directly under the oil drums outside the maintenance shop and at the rail yard loading dock.

28. Respondent's failure to properly implement controls is a violation of Respondent's permit, and as such, is a violation of Sections 301(a) and 402(p) of the CWA, 33 U.S.C. §§ 1311(a) and 1342(p), and implementing regulations.

29. Respondent's failure to properly implement controls is a violation of Respondent's permit, and as such, is a violation of Sections 301(a) and 402(p) of the CWA, 33 U.S.C. §§ 1311(a) and 1342(p), and implementing regulations.

Count 2

Failure to Properly Implement Good housekeeping

30. The facts stated in Paragraphs 13 through 24 above are herein incorporated.

31. Section 2 of Respondent's Permit requires respondent to keep clean all exposed areas that are potential sources of pollutants, using such measures as keeping materials orderly and labeled, and ensuring that waste, garbage, and floatable debris are not discharged to

receiving waters by keeping exposed areas free of such materials or by intercepting them before they are discharged.

32. During the EPA inspection referenced in Paragraph 24 above, the EPA inspector observed a significant amount of floatable debris in the ditch that leads to Frenchman River and noted various containers that were not labeled.

33. Respondent's failure to properly implement controls is a violation of Respondent's permit, and as such, is a violation of Sections 301(a) and 402(p) of the CWA, 33 U.S.C. §§ 1311(a) and 1342(p), and implementing regulations.

CONSENT AGREEMENT

34. Respondent and EPA agree to the terms of this CAFO and Respondent agrees to comply with the terms of the Final Order portion of this CAFO.

35. Respondent admits the jurisdictional allegations of this CAFO and agrees not to contest EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of the Final Order portion of this CAFO.

36. Respondent neither admits nor denies the factual allegations and legal conclusions asserted by EPA in the Factual Background and Alleged Violation sections set forth above.

37. Respondent waives its right to a judicial or administrative hearing on any issue of fact or law set forth above, and its right to appeal the Final Order portion of this CAFO.

38. Respondent and Complainant agree to conciliate the matters set forth in this CAFO 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.

39. The undersigned representative of Respondent certifies that he or she is fully authorized to enter the terms and conditions of this CAFO and to execute and legally bind Respondent to it.

40. Nothing contained in the Final Order portion of this CAFO shall alter or otherwise affect Respondent's obligation to comply with all applicable federal, state and local environmental statutes and regulations and applicable permits.

41. This CAFO addresses all civil and administrative claims for the CWA violations identified above. Complainant reserves the right to take any enforcement action with respect to any other violations of the CWA or any other applicable law.

42. Respondent certifies by the signing of this CAFO that to the best of its knowledge, Respondent's facility is in compliance with all requirements of Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342.

43. The effect of settlement described in Paragraph 41 above is conditional upon the accuracy of the Respondent's representations to EPA, as memorialized in Paragraph 42 above, of this CAFO.

44. Respondent agrees that, in settlement of the claims alleged in this CAFO, Respondent shall pay a penalty of \$9,000 as set forth in Paragraph 1 of the Final Order.

45. Respondent understands that failure to pay any portion of the civil penalty on the date the same is due may result in the commencement of a civil action in Federal District Court to collect said penalty, along with interest thereon at the applicable statutory rate.

FINAL ORDER

Payment Procedures

Pursuant to the authority of Section 309(g) of the CWA, 33 U.S.C. § 1319(g), and according to terms of this CAFO, IT IS HEREBY ORDERED THAT:

1. Respondent shall pay a civil penalty of \$9,000 to be paid in full no later than 30 days after the effective date of this CAFO.
2. Pursuant to 40 C.F.R. § 13.18, failure to make any payment according to the above schedule will automatically accelerate the debt which will become due and owing in full, immediately. Interest on any late payment 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 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 and interest.
3. Payment of the penalty shall be by cashier or certified check made payable to the "United States Treasury" and remitted to:

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

This payment shall reference docket number CWA-07-2013-0059

Copies of the check shall be mailed to:

Elizabeth Huston
Assistant Regional Counsel

U.S. Environmental Protection Agency – Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219

and to

Kathy Robinson
Regional Hearing Clerk
U.S. Environmental Protection Agency - Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219.

4. No portion of the civil penalty or interest paid by Respondent pursuant to the requirements of this CAFO shall be claimed by Respondent as a deduction for federal, state, or local income tax purposes.

Parties Bound

5. This Final Order portion of this CAFO 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 CAFO.

General Provisions

6. Notwithstanding any other provision of this CAFO, EPA reserves the right to enforce the terms of the Final Order portion of this CAFO 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.

7. Complainant reserves the right to take enforcement action against Respondent for any future violations of the CWA and its implementing regulations and to enforce the terms and conditions of this CAFO.

8. This 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) of the CWA, 33 U.S.C. § 1319(g)(4), and 40 C.F.R. § 22.45. Unless otherwise stated, all time periods stated herein shall be calculated in calendar days from such date.

9. Respondent and Complainant shall bear their respective costs and attorney's fees.

10. The headings in this CAFO are for convenience of reference only and shall not affect interpretation of this CAFO.

COMPLAINANT:
U.S. ENVIRONMENTAL PROTECTION AGENCY

1/27/14
Date


Karen A. Flourney
Karen A. Flourney
Director
Water, Wetlands and Pesticides Division

1/27/2014
Date

E. Houston
Elizabeth Houston
Assistant Regional Counsel

RESPONDENT:
KUGLER OIL COMPANY

November 7th, 2013
Date



Name (Print) Mike Gapp

Title Safety Director

IT IS SO ORDERED. This Final Order shall become effective immediately.

Karina Borromeo
Karina Borromeo
Regional Judicial Officer

2-3-2014
Date

IN THE MATTER OF Kugler Oil Company, Respondent
Docket No. CWA-07-2013-0059

CERTIFICATE OF SERVICE

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

Copy by email to Attorney for Complainant:

huston.liz@epa.gov

Copy by First Class Mail to:

Mike Gapp
Kugler Oil Company
PO Box 1748
McCook, Nebraska 69001

Dated: 2/7/14



Kathy Robinson
Kathy Robinson
Hearing Clerk, Region 7