

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7

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)
)
)
KNIFE RIVER MIDWEST, LLC,)
)
)
Respondent)
)
)
Proceedings under Section 309(g) of the)
Clean Water Act, 33 U.S.C. § 1319(g))
_____)

Docket No. CWA-07-2009-0102

CONSENT AGREEMENT AND
FINAL ORDER

CONSENT AGREEMENT AND FINAL ORDER

The United States Environmental Protection Agency (EPA), Region 7 (“Complainant”) and Knife River Midwest, LLC, (“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.

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 Knife River Midwest, LLC, a company registered under the laws of Delaware and authorized to do business in the State of Iowa.

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, 33 U.S.C. § 1342, 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 “pollutant” from a “point source” into a “navigable water” of the United States, as those 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 storm water. Section 402(p) of the CWA, 33 U.S.C. § 1342(p), requires, in part, that a discharge of storm water associated with an industrial activity must conform with the requirements of an NPDES permit issued pursuant to Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342.

8. Pursuant to Section 402(p) of the CWA, 33 U.S.C. § 1342(p), EPA promulgated regulations setting forth the NPDES permit requirements for storm water discharges at 40 C.F.R. § 122.26.

9. 40 C.F.R. §§ 122.26(a)(1)(ii) and 122.26(c) require dischargers of storm water associated with industrial activity to apply for an individual permit or to seek coverage under a promulgated storm water general permit.

10. 40 C.F.R. § 122.26(b)(14) defines “storm water discharge associated with industrial activity,” in part, as “the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant.” A facility classified as Standard Industrial Classification (SIC) 14 that discharges storm water contaminated by contact with, or that has come into contact with, any overburden, raw material, intermediate products, finished products, byproducts or waste products located on the site of such operations, is engaged in “industrial activity.” 40 C.F.R. § 122.26(b)(14)(iii).

11. 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, 33 U.S.C. § 1342. EPA maintains concurrent enforcement authority with authorized states for violations of the CWA.

12. The IDNR implemented a General Permit for the discharge of storm water under the NPDES Permit No. 3 on October 1, 2007. The permit governs storm water discharges associated with industrial activity for asphalt plants, concrete batch plants, crushing plants, and construction sand and gravel facilities.

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 an industrial facility engaged in the manufacturing or processing of construction sand and gravel; operation of a concrete batch plant; and operation of an asphalt plant, known as Knife River Midwest, LLC, located at 900 Montgomery Street, Decorah, Iowa (the Site), with an SIC code of 1442.

15. Storm water, snow melt, surface drainage, and runoff water that comes into contact with raw material and intermediate byproducts or finished products, such as sand, gravel, and asphalt, leave Respondent’s facility and flow into the Upper Iowa River. The runoff and drainage from Respondent’s facility is “storm water” as defined by 40 C.F.R. § 122.26(b)(13).

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

17. The Site has “storm water discharge associated with industrial activity” as defined by 40 C.F.R. § 122.26(b)(14)(iii), 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 “navigable waters” as defined by CWA Section 502, 33 U.S.C § 1362.

19. Storm water runoff from Respondent’s industrial facility 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)(iii), requires a permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

21. On or about September 12, 2007, Respondent resubmitted a Notice of Intent (NOI) for coverage under Iowa General Permit No. 3., and therefore, was subject to the permit's requirements at all times relevant to this action.

22. On August 7, 2008, EPA performed an inspection of the Site under the authority of Section 308(a) of the CWA, 33 U.S.C. § 1318(a).

Findings of Violation

Count 1

Failure to Implement Best Management Practices (BMPs)

23. Paragraphs 1-22 are incorporated by reference as if fully set forth herein.

24. General Permit No. 3, Part III, Section C, Storm Water Pollution Plans (SWPPP) requires that the SWPPP identify potential sources of pollution which may reasonably be expected to effect the quality of storm water discharges associated with industrial activity from the facility. The SWPPP shall identify and ensure implementation of practices which will be used to reduce pollutants in storm water discharges.

25. The EPA inspection referenced in Paragraph 22, above, revealed a pile of recycled asphalt adjacent to the North Pond without any management practices in place to prevent run-off of the asphalt pile.

26. The EPA inspection referenced in Paragraph 22, above, revealed a concrete washout area on the south side of the North Pond. Water was flowing from this area into the North Pond at two discharge points. The SWPPP did not describe BMPs and maintenance for the washout area and BMPs were not present.

27. Respondent's failure to properly maintain BMPs 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).

Count 2

Failure to Conduct Required Sampling

28. Paragraphs 1-22 are incorporated by reference as if fully set forth herein.

29. General Permit No. 3, Part V Monitoring and Reporting Requirements identifies the monitoring and reporting required of permit holders and the frequency of such monitoring and reporting.

30. General Permit No. 3, Part V. 1. A. states that Asphalt Plants and Rock Crushing Plants must monitor for total suspended solids (TSS) (mg/L); any pollutant limited in an effluent guideline to which the facility is subject; the date and duration (in hours) of the storm event(s) sampled; rainfall measurements or estimates (in inches) of the storm event which generated the

sampled runoff; the duration between the storm event sampled and the end of the previous measurable (greater than 0.1 inch rainfall) storm event; and provide an estimate of the total volume (in gallons) of the discharge sampled.

31. General Permit No. 3, Part V.1.B states that sampling shall be conducted at least annually (1 time per year) for each facility.

32. General Permit No. 3, Part V.1.C states that a minimum of one grab sample shall be taken and includes other requirements for sample collection.

33. The inspection referenced in Paragraph 22, above, revealed that Respondent had not collected samples for the asphalt plant and rock crushing plant for the last two years.

34. General Permit No. 3, Part V. B. 2 states that Concrete Batch Plants must monitor for TSS (mg/L); total recoverable iron (mg/L); any pollutant limited in an effluent guideline to which the facility is subject; the date and duration (in hours) of the storm event(s) sampled; rainfall measurements or estimates (in inches) of the storm event which generated the sampled runoff; the duration between the storm event sampled and the end of the previous measurable (greater than 0.1 inch rainfall) storm event; and provide an estimate of the total volume (in gallons) of the discharge sampled.

35. General Permit No. 3, Part V.1.B states that sampling shall be conducted at least annually (1 time per year) for each facility.

36. General Permit No. 3, Part V.1.C states that a minimum of one grab sample shall be taken and includes other requirements for sample collection.

37. The inspection referenced in Paragraph 22, above, revealed that Respondent had not collected samples for the concrete batch plant for the last two years.

38. The Respondent's failure to conduct sampling 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).

Count 3

Retention of Records

39. Paragraphs 1-22 are incorporated by reference as if fully set forth herein.

40. General Permit No. 3, Part V.E.1 states that the permittee shall retain a copy of the storm water pollution prevention plan, records of all monitoring information, copies of all reports required by the permit, and records of all data used to complete the NOI to be covered by this permit for the duration of the permit or for a period of at least three years from the date of the measurement, report, inspection, etc.

41. The inspection referenced in Paragraph 22, above, revealed that Respondent did

not keep required records for two years.

42. The Respondent's failure to retain records 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).

Count 4

Failure to Conduct and Record Visual Inspections

43. Paragraphs 1-22 are incorporated by reference as if fully set forth herein.

44. General Permit No. 3, Part III.C.4.C requires that qualified personnel shall inspect designated equipment and plant areas at appropriate intervals specified in the plan but no less than once a year.

45. General Permit No. 3, Part III.C.4.C (1) requires that material handling areas and other potential sources of pollution identified in the plan in accordance with Part III.C.4.A of this permit shall be inspected for evidence of, or the potential for, pollutants entering the drainage system. Structural storm water management measures, sediment and control measures, and other structural pollution prevention measures identified in the plan shall be observed to ensure that they are operating correctly. A visual inspection of equipment needed to implement the plan, such as spill response equipment, shall be made.

46. General Permit No. 3, Part III.C.4.C (3) requires that a report summarizing the scope of the inspection, personnel making the inspection, the date(s) of the inspection, major observations relating to the implementation of the SWPPP, and actions taken in accordance with Part III.C.4.C (2) of the permit shall be made and retained as part of the SWPPP for at least three years. The report shall be signed in accordance with Part VI.G of the permit.

47. The Inspection referenced in Paragraph 22, above, revealed that the Respondent failed to conduct and document visual inspections of the asphalt plant and batch plant as required by the permit for a period of at least two years.

48. The Respondent's failure to conduct and record visual inspections 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).

Count 5

Inadequate SWPPP and Failure to Update the SWPPP

49. Paragraphs 1-22 are incorporated by reference as if fully set forth herein.

50. General Permit No. 3, Part III.C.4.B states, "Each facility covered by this permit shall develop a description of storm water management controls appropriate to the facility, and implement such controls. The appropriateness and priorities of controls in a plan shall reflect

identified potential sources of pollutants at the facility. The description of storm water management controls shall address the following minimum components, including a schedule for implementing such controls. ”

51. The SWPPP available for review during the inspection contained a list of the non-structural controls and practices but did not contain documentation that the controls had been implemented.

52. General Permit No. 3, Part III.C.4.B (6) “Storm water Management” states, “The plan shall contain a narrative description of the appropriateness of traditional storm water management practices (practices other than those which control the source of pollutants). Based on an assessment of the potential of various sources at the site to contribute pollutants to storm water discharges associated with industrial activity the plan shall provide that measures determined to be reasonable and appropriate shall be implemented and maintained.”

53. The SWPPP available for review during the inspection, referenced in Paragraph 22, above, did not describe berms along the river even though the berms were present. Furthermore, the plan did not define minimum distances of stockpiles from the ponds and the inspector observed one stockpile of asphalt on the edge of the North Pond, which was not described by the SWPPP.

54. General Permit No. 3, Part III.C.4.B(7) “Sediment and Erosion Prevention” states, “The plan shall identify areas which, due to topography, activities, or other factors, have a high potential for significant soil erosion, and identify measures to limit erosion.”

55. The SWPPP available for review during the inspection, referenced in Paragraph 22, above, did not address areas on the site which have a high potential for erosion nor did it identify measures to limit erosion. The inspector observed areas on the site that have steep slopes (stockpiles) and areas adjacent to the Upper Iowa River.

56. General Permit No. 3, Part III.C.4.B.(9) “Record Keeping and Internal Reporting Procedures” states, “Incidents such as spills, or other discharges, along with other information describing the quality and quantity of storm water discharges shall be included in the records. Inspection and maintenance activities shall be documented and recorded.”

57. The SWPPP available for review and conversation with the site quality control manager during the inspection, referenced in Paragraph 22, above, revealed that the Respondent had no records of whether or where spills had occurred at the facility.

58. The Respondent’s failure maintain an adequate SWPPP and failure to update its SWPPP 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).

CONSENT AGREEMENT

59. 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.

60. 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.

61. Respondent neither admits nor denies the factual allegations set forth above.

62. 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.

63. 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.

64. 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.

65. 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.

66. 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.

67. Respondent certifies by the signing of this CAFO that to the best of its knowledge, Respondent has no obligations under Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342, with respect to the facility located at 900 Montgomery Street, Decorah, Iowa.

68. The effect of settlement described in paragraph 66 above is conditional upon the accuracy of the Respondent's representations to EPA, as memorialized in paragraph 67 above, of this CAFO.

69. Respondent agrees that, in settlement of the claims alleged in this CAFO, Respondent shall pay a penalty of Forty-Three Thousand and Eighty-Two Dollars and No Cents (\$43,082.00) as set forth in Paragraph 1 of the Final Order.

70. 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 Forty-Three Thousand and Eighty-Two Dollars and No Cents (\$43,082.00) due within thirty (30) days of the effective date of this CAFO.

2. 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-07-2009-0102.

Copies of the check shall be mailed to:

Sara Hertz
Assistant Regional Counsel
U.S. Environmental Protection Agency – Region 7
901 North 5th Street
Kansas City, Kansas 66101

and to

Kathy Robinson
Regional Hearing Clerk
U.S. Environmental Protection Agency - Region 7
901 North 5th Street
Kansas City, Kansas 66101.

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

9/24/09
Date



William A. Spratlin, Director
Water, Wetlands and Pesticides Division
U.S. Environmental Protection Agency
Region 7



Sara S. Hertz
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region 7

RESPONDENT:
KNIFE RIVER MIDWEST, LLC


8-13-09
Date

Terry Hamer

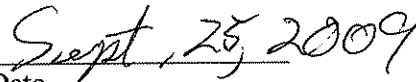
Name (Print) Terry Hamer

Title General Manager

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



Robert Patrick
Regional Judicial Officer



Date

IN THE MATTER OF Knife River Midwest, LLC, Respondent
Docket No. CAA-07-2009-0102

CERTIFICATE OF SERVICE

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

Copy hand delivered to
Attorney for Complainant:

Sara S. Hertz
Assistant Regional Counsel
Region VII
United States Environmental Protection Agency
901 N. 5th Street
Kansas City, Kansas 66101

Copy by Certified Mail Return Receipt to:

Nancy Quattlebaum Burke
Gray Plant Mooty
500 IDS Center
80 South Eighth Street
Minneapolis, Minnesota 55402

Copy by First Class Mail to:

Joe Sanfilippo
Iowa Department of Natural Resources
909 West Main Street, Suite 4
Manchester, Iowa 53057

and

Dennis Ostwinkle, Supervisor
Iowa Department of Natural Resources
Field Office 6
1023 Madison Street
Washington, Iowa 52353

Dated: 9/28/09



Kathy Robinson
Hearing Clerk, Region 7