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13 **UNITED STATES**
14 **ENVIRONMENTAL PROTECTION AGENCY**
15 **REGION IX**
16 **75 HAWTHORNE STREET**
17 **SAN FRANCISCO, CA 94105**

18
19 In the matter of:)
20) U.S. EPA Docket No. CAA-09-2024-0082
21 Fann Contracting, Inc.)
22) **CONSENT AGREEMENT**
23) and
24) **FINAL ORDER PURSUANT TO**
25 Respondent.) **SECTIONS 22.13 AND 22.18**
26)
27

28 **I. CONSENT AGREEMENT**

29 The United States Environmental Protection Agency (“EPA”) and Fann Contracting, Inc.,
30 (“Respondent”) agree to settle this matter and consent to the entry of this Consent Agreement
31 and Final Order (“CAFO”). This CAFO simultaneously initiates and concludes this proceeding in
32 accordance with 40 C.F.R. §§22.13(b) and 22.18(b).

33 **A. AUTHORITY AND PARTIES**

34 1. This administrative proceeding for the assessment of a civil administrative
35 penalty is initiated pursuant to Section 113(d) of the Clean Air Act (hereinafter referred to as
36 “CAA” or the “Act”), 42 U.S.C. § 7413(d), and the Consolidated Rules of Practice Governing the
37 Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of
38 Permits, 40 C.F.R. Part 22.

1 2. Complainant is the Director of the Enforcement and Compliance Assurance
2 Division, EPA Region IX, who has been duly delegated to commence and settle an enforcement
3 action in this matter.

4 3. Respondent is an Arizona corporation that does business in Arizona.

5 4. EPA and the United States Department of Justice jointly determined, pursuant to
6 42 U.S.C. § 7413(d) and 40 C.F.R. § 19.4, that this matter, although it involves an alleged
7 violation that occurred more than one year before the initiation of this proceeding, is
8 appropriate for an administrative penalty action.

9 5. On April 29, 2024, EPA notified Respondent and the Navajo Nation that EPA had
10 found that Respondent committed the alleged violation described in Part I.C. of this Consent
11 Agreement.

12 **B. STATUTORY AND REGULATORY AUTHORITIES**

13 6. Section 302(e) of the CAA, 42 U.S.C. § 7602(e), defines “person” to include “an
14 individual, corporation, partnership, association, State, municipality, political subdivision of a
15 State, and any agency, department, or instrumentality of the United States and any officer,
16 agent, or employee thereof.”

17 7. Sections 111(a)(3) and 302(z) of the CAA, 42 U.S.C. §§ 7411(a)(3), 7602(z), and 40
18 C.F.R. §§ 49.152(b) and 52.21(b)(5), define “stationary source” to mean “any building, structure,
19 facility, or installation which emits or may emit any pollutant.”

20 8. Section 111(a)(5) of the CAA, 42 U.S.C. §§ 7411(a)(5), defines “owner or
21 operator” to mean “any person who owns, leases, operates, controls, or supervises a stationary
22 source.”

23 9. The term “Indian Country” is defined in 18 U.S.C. § 1151 to mean, among other
24 things, “all land within the limits of any Indian reservation under the jurisdiction of the United
25 States government.”

26 10. Pursuant to Sections 301(a) and 301(d)(4) of the CAA, 42 U.S.C. § 7601(a) and
27 7601(d)(4), on July 1, 2011, EPA issued a Federal Implementation Plan that established a minor
28 new source review permit program applicable to sources located in Indian Country (“Tribal
29 Minor NSR Program”). The Tribal Minor NSR Program is codified at 40 C.F.R. §§ 49.151-165.

1 11. In accordance with 40 C.F.R. § 49.153(a)(1)(i)(B), the Tribal Minor NSR Program is
2 applicable to the construction of sources that have a potential to emit a regulated NSR
3 pollutant in quantities greater than or equal to the corresponding minor NSR threshold in Table
4 1 of 40 C.F.R. § 49.153, which depend on the attainment status of the reservation.

5 12. The term “potential to emit” or “PTE” is defined by 40 C.F.R. § 49.152 to mean
6 “the maximum capacity of a source to emit a pollutant under its physical and operational
7 design. Any physical or operational limitation on the capacity of the source to emit a pollutant,
8 including air pollution control equipment and restrictions on hours of operation or on the type
9 or amount of material combusted, stored or processed, shall be treated as part of its design if
10 the limitation or effect it would have on emissions is enforceable as a practical matter.”

11 13. Navajo County Arizona is in attainment or unclassifiable for all pollutants.

12 14. In accordance with 40 C.F.R. §§ 49.152(b) and 52.21(b)(50), the term “regulated
13 NSR pollutant” includes carbon monoxide (“CO”), nitrogen oxides (NO_x), sulfur dioxide (SO₂),
14 volatile organic compounds (“VOC”), coarse particulate matter (“PM-10”), and fine particulate
15 matter (“PM-2.5”).

16 15. In accordance with 40 C.F.R. § 49.151(c)(1)(ii)(A), on or after August 30, 2011, a
17 new synthetic minor source that is subject to the Tribal Minor NSR Program cannot begin
18 construction without first obtaining a permit pursuant to 40 C.F.R. §§ 49.158, 49.154 and
19 49.155 (or a general permit/permit by rule pursuant to 40 C.F.R. § 49.156, if applicable).

20 16. Synthetic minor sources are eligible to be covered under the Hot Mix Asphalt
21 Plants General Permit. 80 Fed. Reg. 25068 at 25084-25085.

22 17. At no time relevant to this Consent Agreement has the Navajo Nation
23 administered an EPA-approved minor NSR program for the Navajo Nation. See 40 C.F.R. Part 49
24 Subpart L.

25 18. Under Section 113(d) of the CAA, 42 U.S.C. § 7413(d) as amended by the Civil
26 Monetary Penalty Inflation Adjustment Rule, 40 C.F.R. Part 19, EPA may assess a civil penalty of
27 not more than \$57,617 per day of violation for violations that occur after November 2, 2015,
28 where penalties are assessed on or after December 27, 2023.
29

1 **C. COMPLAINANT’S ALLEGATIONS**

2 Complainant alleges:

3 19. Respondent is a corporation incorporated in the State of Arizona. Therefore,
4 Respondent is a person as that term is defined in Section 302(e) of the CAA, 42 U.S.C. § 7602(e).

5 20. Between September 7, 2021, and December 7, 2021, Respondent installed a hot-
6 mix asphalt plant at 36° 42’ 30.6” N, 110° 13’56.9” W, north of the Kayenta Health Center that is
7 located at 394.3 US-160, Kayenta, AZ (“Asphalt Plant”). This location, near Kayenta Arizona, is
8 within the Navajo Nation in Navajo County Arizona.

9 21. Respondent first operated the Asphalt Plant on September 15, 2021.

10 22. At all times relevant to this Consent Agreement, the rated capacity of the
11 Asphalt Plant has been 500 tons per hour.

12 23. At all times relevant to this Consent Agreement, the Asphalt Plant's potential to
13 emit CO, NOx, SO2, VOC, and PM-10 exceeded the rates listed in Table 1 to 40 C.F.R. § 49.153.

14 24. At all times relevant to this Consent Agreement, the Asphalt Plant’s uncontrolled
15 potential to emit CO exceeded the applicable major source threshold of 250 tons per year listed
16 at 40 CFR 52.21 (attainment pollutants) while the Asphalt Plant’s controlled potential to emit
17 CO has been below this applicable major source threshold.

18 25. Respondent obtained a Tribal Minor NSR Permit for the Asphalt Plant effective
19 April 27, 2022. At no time prior to April 27, 2022, did Respondent obtain a Tribal Minor NSR
20 permit to construct the Asphalt Plant in violation of 40 C.F.R. § 49.151(c)(1)(ii)(A).

21 26. Between September 7, 2021 and December 7, 2021, Respondent’s failure obtain
22 a Tribal Minor NSR permit to construct the Asphalt Plant, in violation of 40 C.F.R. §
23 49.151(c)(1)(ii)(A), subjects Respondent to the assessment of penalty under CAA Section
24 113(e), 42 U.S.C. § 7413(e).

25 **D. RESPONDENTS’ ADMISSIONS**

26 27. In accordance with 40 C.F.R. § 22.18(b)(2), and for the purpose of this
27 proceeding, Respondent (i) admits that EPA has jurisdiction over the subject matter of this
28 CAFO and over Respondent; (ii) neither admits nor denies the specific factual allegations
29 contained in Section I.C of this CAFO; (iii) consents to any and all conditions specified in this

1 CAFO, (iv) agrees to pay, and consents to the assessment of, the civil administrative penalty
2 under Section I.E of this CAFO; (v) waives any right to contest the allegations contained in
3 Section I.C of this CAFO; and (vi) waives the right to appeal the proposed final order contained
4 in this CAFO.

5 **E. CIVIL ADMINISTRATIVE PENALTY**

6 28. Respondent agrees to pay a civil penalty in the amount of **SEVENTY-TWO**
7 **THOUSAND ONE HUNDRED TWENTY-EIGHT DOLLARS (\$ 72,128) (“Assessed Penalty”)** within
8 thirty (30) days after the effective date of this CAFO as final settlement and complete
9 satisfaction of the civil claims against Respondent arising from the facts alleged in Section I.C of
10 the CAFO and under the Act.

11 a. Respondent shall pay the Assessed Penalty and any interest, fees, and other
12 charges due using any method or combination of appropriate methods as provided on the EPA
13 website: <https://www.epa.gov/financial/makepayment>. For additional instructions see:
14 <https://www.epa.gov/financial/additional-instructions-making-payments-epa>.

15 b. When making a payment, Respondent shall: (1) identify every payment with
16 the name and docket number of this Agreement; (2) Concurrently with any payment or within
17 24 hours of any payment, Respondent shall serve proof of such payment to the following
18 person(s):

19 Regional Hearing Clerk
20 U.S. EPA, Region IX
21 r9HearingClerk@epa.gov

22
23 Janice Chan
24 Enforcement and Compliance Assurance Division
25 U.S. EPA, Region IX
26 Chan.Janice@epa.gov

27
28 and

29
30 U.S. Environmental Protection Agency
31 Cincinnati Finance Center
32 Via electronic mail to:
33 CINWD_AcctsReceivable@epa.gov

34
35 “Proof of payment” means, as applicable, a copy of the check, confirmation of

1 credit card or debit card payment, or confirmation of wire or automated
2 clearinghouse transfer, and any other information required to demonstrate that
3 payment has been made according to EPA requirements, in the amount due, and
4 identified with the appropriate docket number and Respondent's name.

5
6 29. In the event that Respondent fails to pay the Assessed Penalty by the due date,
7 Respondent shall pay to EPA a stipulated penalty in the amount of **FIVE HUNDRED DOLLARS**
8 **(\$500)** for each day that payment is late in addition to the unpaid balance of the penalty
9 assessed above. Upon EPA's written demand, this stipulated penalty shall immediately become
10 due and payable.

11 30. Late Payments: Respondent's tax identification number may be used for
12 collecting or reporting any delinquent monetary obligation arising from this CAFO (see 31 U.S.C.
13 § 7701).

14 a. Interest, Charges, and Penalties on Late Payments. Pursuant to 42 U.S.C.
15 § 7413(d)(5), 31 U.S.C. § 3717, 31 C.F.R. § 901.9, and 40 C.F.R. § 13.11, if Respondent fails to
16 timely pay any portion of the Assessed Penalty per this Agreement, the entire unpaid balance
17 of the Assessed Penalty and all accrued interest shall become immediately due and owing, and
18 EPA is authorized to recover the following amounts.

19 (1). Interest. Interest begins to accrue from the Filing Date. If the Assessed
20 Penalty is paid in full within thirty (30) days, interest accrued is waived. If the
21 Assessed Penalty is not paid in full within thirty (30) days, interest will continue
22 to accrue until any unpaid portion of the Assessed Penalty as well as any
23 interest, penalties, and other charges are paid in full. Per 42 U.S.C. § 7413(d)(5),
24 interest will be assessed pursuant to 26 U.S.C. § 6621(a)(2), that is the IRS
25 standard underpayment rate, equal to the Federal short-term rate plus 3
26 percentage points.

27 (2). Handling Charges. The United States' enforcement expenses including, but
28 not limited to, attorneys' fees and costs of handling collection.

29 (3). Late Payment Penalty. A ten percent (10%) quarterly non-payment penalty.

30 b. Late Penalty Actions. In addition to the amounts described in the prior
31 Paragraph 30.a., if Respondent fails to timely pay any portion of the Assessed Penalty per this

1 Agreement, EPA may take additional actions. Such actions EPA may take include, but are not
2 limited to, the following: (1). Refer the debt to a credit reporting agency or a collection agency,
3 per 40 C.F.R. §§ 13.13 and 13.14. (2) Collect the debt by administrative offset (i.e., the
4 withholding of money payable by the United States government to, or held by the United States
5 government for, a person to satisfy the debt the person owes the United States government),
6 which includes, but is not limited to, referral to the Internal Revenue Service for offset against
7 income tax refunds, per 40 C.F.R. Part 13, Subparts C and H. (3) Suspend or revoke
8 Respondent's licenses or other privileges, or suspend or disqualify Respondent from doing
9 business with EPA or engaging in programs EPA sponsors or funds, per 40 C.F.R. § 13.17. (4)
10 Request that the Attorney General bring a civil action in the appropriate district court to
11 enforce the Final Order and recover the full remaining balance of the Assessed Penalty, in
12 addition to interest and the amounts described above, pursuant to 42 U.S.C. § 7413(d)(5). In
13 any such action, the validity, amount, and appropriateness of the Assessed Penalty and Final
14 Order shall not be subject to review.

15 c. Allocation of Payments. Pursuant to 31 C.F.R. § 901.9(f) and 40 C.F.R. §
16 13.11(d), a partial payment of debt will be applied first to outstanding handling charges, second
17 to late penalty charges, third to accrued interest, and last to the principal that is the
18 outstanding Assessed Penalty amount.

19 31. Pursuant to 26 U.S.C. § 6050X and 26 C.F.R. § 1.6050X-1, EPA is required to send
20 a completed Form 1098-F ("Fines, Penalties, and Other Amounts") to the Internal Revenue
21 Service ("IRS") annually with respect to any court order and settlement agreement (including
22 administrative settlements), that requires a payor to pay an aggregate amount that EPA
23 reasonably believes will be equal to, or in excess of, \$50,000 for the payor's violation of any law
24 or the investigation or inquiry into the payor's potential violation of any law, including amounts
25 paid for "restitution or remediation of property" or to come "into compliance with a law." EPA
26 is further required to furnish a written statement, which provides the same information
27 provided to the IRS, to each payor (for example, a copy of Form 1098-F). Failure to comply with
28 providing Form W-9 or TIN may subject Respondent to a penalty. See 26 C.F.R. § 6723, 26 C.F.R.
29 § 6724(d)(3), and 26 C.F.R. § 301.6723-1. In order to provide EPA with sufficient information to

1 enable it to fulfill these obligations, EPA herein requires, and Respondent herein agrees, that:

2 (a) Respondent shall complete a Form W-9 (“Request for Taxpayer Identification
3 Number and Certification”), which is available at [https://www.irs.gov/pub/irs-
4 pdf/fw9.pdf](https://www.irs.gov/pub/irs-pdf/fw9.pdf);

5 (b) Respondent shall therein certify that its completed Form W-9 includes
6 Respondent’s correct Tax Identification Number (“TIN”) or that Respondent has
7 applied and is waiting for issuance of a TIN;

8 (c) Respondent shall email its completed Form W-9 to EPA’s Cincinnati Finance
9 Center at **sherrer.dana@epa.gov**, on or before the date that Respondent’s initial
10 penalty payment is due, pursuant to Paragraph **28** of this Agreement, and EPA
11 recommends encrypting Form W-9 email correspondence; and

12 (d) In the event that Respondent has certified in its completed Form W-9 that it has
13 applied for a TIN and that TIN has not been issued to Respondent within 30 days
14 after the effective date defined in Paragraph **38**, then Respondent, using the
15 same email address identified in the preceding sub-paragraph, shall further:

16 (i) notify EPA’s Cincinnati Finance Center of this fact, via email,
17 within 60 days after the effective date defined in Paragraph **38**; and

18 (ii) provide EPA’s Cincinnati Finance Center with Respondent’s TIN,
19 via email, within five (5) days of Respondent’s issuance and receipt of the
20 TIN.

21 **F. RESPONDENT CERTIFICATION**

22 32. In executing this CAFO, Respondent certifies that the information it has supplied
23 concerning this matter was at the time of submission, and is at the time of signature to this
24 CAFO, truthful, accurate, and complete; and that Respondent has corrected the violations
25 alleged in Section I.C of this CAFO. Under 18 U.S.C. § 1001, submitting false or misleading
26 information can result in significant penalties, including the possibility of fines and
27 imprisonment for knowing submission of such information.

1 **G. RETENTION OF RIGHTS, BINDING EFFECT, ETC.**

2 33. This Consent Agreement constitutes the entire agreement between the
3 Respondent and EPA. Full payment of the civil penalty and any applicable interest charges or
4 late fees or penalties as set forth in this CAFO shall constitute full settlement and satisfaction of
5 civil penalty liability against Respondent for the violations alleged in Section I.C of this CAFO.

6 34. In accordance with 40 C.F.R. § 22.18(c), this CAFO only resolves Respondent’s
7 liabilities for federal civil penalties for the violations specifically alleged in Section I.C of this
8 CAFO. Nothing in this CAFO is intended to or shall be construed to resolve: (i) any civil liability
9 for violations of any provision of any federal, state, or local law, statute, regulation, rule,
10 ordinance, or permit not specifically alleged in Section I.C of this CAFO; or (ii) any criminal
11 liability. EPA specifically reserves any and all authorities, rights, and remedies available to it
12 (including, but not limited to, injunctive or other equitable relief or criminal sanctions) to
13 address any violation of this CAFO or any violation not specifically alleged in Section I.C of this
14 CAFO. This CAFO does not exempt, relieve, modify, or affect in any way Respondent’s duties to
15 comply with all applicable federal, state, and local laws, regulations, rules, ordinances, and
16 permits.

17 35. Except as set forth in Paragraph **30** above, EPA and Respondent shall each bear
18 its own fees, costs, and disbursements in this action.

19 36. Tax Treatment of Penalties. Penalties, interest, and other charges paid pursuant
20 to this Agreement shall not be deductible for purposes of federal taxes.

21 37. This CAFO constitutes an enforcement action for purposes of considering
22 Respondent’s compliance history in any subsequent enforcement action. This CAFO will be
23 available to the public and does not contain any confidential business information. Respondent
24 further consents to accept electronic service of the fully executed CAFO, by electronic mail, to
25 the following address: inquiry@fanncontracting.com. Respondent understands that this e-mail
26 address may be made public when the CAFO and Certificate of Service are filed and uploaded to
27 a searchable database.

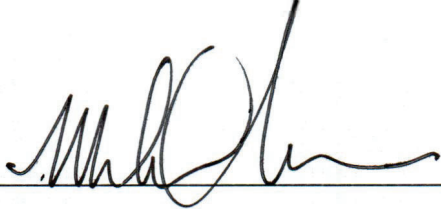
28 38. In accordance with 40 C.F.R. §§ 22.18(b)(3) and 22.31(b), the effective date of
29 this CAFO shall be the date on which the accompanying Final Order, having been signed by the

1 Regional Judicial Officer, is filed.

2 39. The provisions of this CAFO shall be binding on Respondent and on Respondent's
3 officers, directors, employees, agents, servants, authorized representatives, successors, and
4 assigns.

5 40. The undersigned representatives of each party to this Consent Agreement certify
6 that each is duly authorized by the party whom he or she represents to enter into the terms
7 and conditions of this Consent Agreement and Final Order and bind that party to it.

8
9 **FANN CONTRACTING, INC.:**

10
11 Date: 6/21/24 By: 

12
13
14 Name: MICHAEL FANN

15
16
17 Title: CEO

1 **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY:**
2

3 AMY MILLER-
4 BOWEN

Digitally signed by AMY
MILLER-BOWEN
Date: 2024.07.09
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5 By:

6 AMY C. MILLER-BOWEN Date
7 Director
8 Enforcement and Compliance Assurance Division
9 U.S. Environmental Protection Agency,
10 Region IX
11
12
13

1 **II. FINAL ORDER**

2
3 IT IS HEREBY ORDERED that this Consent Agreement and Final Order (EPA Docket No.
4 CAA-09-2024-0082) be entered and that Respondent shall pay a civil administrative penalty in
5 the amount of **SEVENTY-TWO THOUSAND ONE HUNDRED TWENTY-EIGHT DOLLARS (\$ 72,128)**
6 plus interest in accordance with the terms of this Consent Agreement and Final Order.
7
8

9
10 BEATRICE WONG  Digitally signed by
BEATRICE WONG
Date: 2024.07.10
15:31:42 -07'00'

11 Beatrice Wong Date
12 Regional Judicial Officer
13 U.S. EPA, Region IX

CERTIFICATE OF SERVICE

I hereby certify that the foregoing CONSENT AGREEMENT AND FINAL ORDER in the matter of Fann Contracting, Inc. (CAA-09-2024-0082), has been filed with the Regional Hearing Clerk, and a copy was served on the Respondent, Counsel for Respondent and Counsel for EPA, as indicated below:

RESPONDENT

Michael Fann
CEO
Fann Contracting, Inc.
inquiry@fanncontracting.com

COUNSEL FOR EPA

Margaret Alkon
Assistant Regional Counsel
alkon.margaret@epa.gov

Date Filed: _____, 2024

Grace Elam
Regional Hearing Clerk
EPA, Region 9