

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:

KAG WEST, LLC

Tacoma, Washington

Respondent.

DOCKET NO. CWA-10-2021-0007

CONSENT AGREEMENT

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

I. STATUTORY AUTHORITY

1.1. This Consent Agreement is entered into under the authority vested in the Administrator of the U.S. Environmental Protection Agency (EPA) by Section 309(g) of the Clean Water Act (CWA), 33 U.S.C. § 1319(g).

1.2. Pursuant to CWA Section 309(g)(1)(A), 33 U.S.C. § 1319(g)(1)(A), the EPA is authorized to assess a civil penalty against any person that has violated CWA Section 301, 33 U.S.C. § 1311, and/or any permit condition or limitation in a permit issued under CWA Section 402, 33 U.S.C. § 1342.

1.3. CWA Section 309(g)(2)(B), 33 U.S.C. § 1319(g)(2)(B), authorizes the administrative assessment of Class II civil penalties in an amount not to exceed \$10,000 per day for each day during which the violation continues, up to a maximum penalty of \$125,000. Pursuant to 40 C.F.R. Part 19, the administrative assessment of Class II civil penalties may not exceed \$22,320 per day for each day during which the violation continues, up to a maximum

penalty of \$278,995. *See also* 85 Fed. Reg. 1751 (January 13, 2020) (2020 Civil Monetary Penalty Inflation Adjustment Rule).

1.4. Pursuant to CWA Section 309(g)(1)(A) and (g)(2)(B), 33 U.S.C. § 1319(g)(1)(A) and (g)(2)(B), and in accordance with Section 22.18 of the “Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties,” 40 C.F.R. Part 22, EPA issues, and KAG West, LLC (Respondent) agrees to issuance of, the Final Order attached to this Consent Agreement.

II. PRELIMINARY STATEMENT

2.1. In accordance with 40 C.F.R. §§ 22.13(b) and 22.18(b), execution of this Consent Agreement commences this proceeding, which will conclude when the Final Order becomes effective.

2.2. The Administrator has delegated the authority to sign consent agreements between EPA and the party against whom a penalty is proposed to be assessed pursuant to CWA Section 309(g), 33 U.S.C. § 1319(g), to the Regional Administrator of EPA Region 10, who has redelegate this authority to the Director of the Enforcement and Compliance Assurance Division, EPA Region 10 (“Complainant”).

2.3. Part III of this Consent Agreement contains a concise statement of the factual and legal basis for the alleged violations of the CWA, together with the specific provisions of the CWA and implementing regulations that Respondent is alleged to have violated.

III. ALLEGATIONS

Statutory and Regulatory Framework

3.1. As provided in CWA Section 101(a), 33 U.S.C. § 1251(a), the objective of the CWA is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”

3.2. CWA Section 301(a), 33 U.S.C. § 1311(a), prohibits the discharge of pollutants by any person from any point source into waters of the United States except, *inter alia*, as authorized by a National Pollutant Discharge Elimination System (NPDES) permit issued pursuant to CWA Section 402, 33 U.S.C. § 1342.

3.3. CWA Section 502(12), 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.”

3.4. CWA Section 502(6), 33 U.S.C. § 1362(6), defines a “pollutant” to include, *inter alia*, dredged spoil, rock, sand, chemical wastes, and industrial wastes.

3.5. CWA Section 502(14), 33 U.S.C. § 1362(14), defines “point source” to mean any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel or conduit from which pollutants are or may be discharged.

3.6. CWA Section 502(7) defines “navigable waters” as “waters of the United States, including the territorial seas.” 33 U.S.C. § 1362(7). In turn, “waters of the United States” has been defined to include, *inter alia*, all waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce; tributaries to such waters; and wetlands adjacent to the foregoing waters. 40 C.F.R. §§ 122.2 & 110.1 (2014).

3.7. CWA Section 402(p), 33 U.S.C. § 1342(p), requires a NPDES permit for any discharge of stormwater “associated with industrial activity.”

3.8. “Stormwater discharge associated with industrial activity” is defined to include the discharge from any conveyance that is used for collecting and conveying stormwater that is

directly related to manufacturing, processing, or raw materials storage areas at an industrial plant, including the discharge from facilities classified under Standard Industrial Classification code 4231 (Trucking Terminal Facilities). 40 C.F.R. § 122.26(b)(14).

3.9. The state of Washington, through the Washington Department of Ecology, is authorized pursuant to CWA Section 402(b), 33 U.S.C. § 1342(b), to administer the NPDES permitting program for stormwater discharges associated with industrial activity.

3.10. The Washington Department of Ecology issued the Industrial Stormwater General Permit for discharges of stormwater associated with industrial activity on December 3, 2014, and the permit became effective on January 2, 2015 (ISGP).

3.11. Section S1.A.1 of the ISGP requires facilities engaged in certain industrial activities, including activities covered under Standard Industrial Classification code 4231, to apply for permit coverage if the facility discharges stormwater to surface waters.

General Allegations

3.12. Respondent is a limited liability company licensed to do business in the state of Washington and a “person” under CWA Section 502(5), 33 U.S.C. § 1362(5).

3.13. At all times relevant to this action, Respondent leased and operated the KAG West, LLC Facility (Facility) located at 401 East Alexander Avenue, Tacoma, Washington.

3.14. The primary operations conducted by Respondent at the Facility include the dispatch of tractors and tanker trailers for the transport and delivery of petroleum products as well as tractor maintenance and fueling operations, which are activities categorized under Standard Industrial Classification code 4231 (Trucking Terminal Facilities).

3.15. The Facility, which was under Respondent’s operational control at all times relevant to this action, discharges stormwater into the Blair Waterway and Commencement Bay via three identified discharge points (i.e., Outfalls 1, 2, and 3). The Facility’s stormwater

discharges contain “pollutants” within the meaning of Section 502(6) and (12) of the CWA, 33 U.S.C. § 1362(6) and (12).

3.16. Outfalls 1, 2, and 3 are “point sources” as defined at CWA Section 502(14), 33 U.S.C. § 1362(14).

3.17. Blair Waterway is part of Commencement Bay in Puget Sound. Puget Sound is a water that is currently used, was used in the past, or may be susceptible to use in interstate and foreign commerce and is therefore a “navigable water” under Section 502(7) of the CWA, 33 U.S.C. § 1362(7).

3.18. At all times relevant to this Order, Respondent was authorized to discharge stormwater associated with industrial activity from the Facility by ISGP permit number WAR305116. Respondent first obtained ISGP coverage on March 2, 2017.

3.19. On March 28 and 29, 2019, EPA conducted a compliance evaluation inspection at the Facility to determine Respondent’s compliance with the ISGP and Sections 301 and 402 the CWA, 33 U.S.C. §§ 1311 and 1342.

3.20. As part of the inspection, EPA reviewed Respondent’s Stormwater Pollution Prevention Plan (SWPPP), monthly site inspection records, quarterly discharge monitoring reports (DMRs), SWPPP training records, and annual reports.

3.21. Respondent has discharged pollutants from a point source into waters of the United States at the Site, within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7).

Violations

3.22. As described below, between March 2017 and March 2019, Respondent violated CWA Section 301, 33 U.S.C. § 1311, and the conditions and/or limitations of its ISGP.

Count 1 – Failure to Use Containment Measures During Petroleum Transfer Operations

3.23. Condition S3.B.4.b.i.4.f of the ISGP requires permittees to “[u]se drip pans or equivalent containment measures during all petroleum transfer operations.”

3.24. At the time of the March 2019 inspection, the inspector observed Respondent conducting petroleum transfer operations without containment measures in place.

3.25. EPA alleges that Respondent violated Condition S3.B.4.b.i.4.f of the ISGP in March 2019 by failing to use containment measures during petroleum transfer operations. Violations of the ISGP are enforceable under Section 309(g) of the CWA, 33 U.S.C. § 1319(g).

Count 2 – Failure to Immediately Clean Up Spills

3.26. Condition S3.B.4.b.i.3.d of the ISGP requires permittees to “[i]mmediately clean up spills and leaks (e.g., using absorbents, vacuuming) to prevent the discharge of pollutants.”

3.27. At the time of the March 2019 inspection, the inspector observed stains on the pavement and a sheen under a tanker truck parked near a storm drain.

3.28. EPA alleges that Respondent violated Condition S3.B.4.b.i.3.d of the ISGP in March 2019 by failing to immediately clean up spills. Violations of the ISGP are enforceable under Section 309(g) of the CWA, 33 U.S.C. § 1319(g).

Count 3 – Failure to Use Secondary Containment

3.29. Condition S3.B.4.b.i.4.a of the ISGP requires permittees to “[s]tore all chemical liquids, fluids, and petroleum products, on an impervious surface that is surrounded with a containment berm or dike that is capable of containing 10% of the total enclosed tank volume or 110% of the volume contained in the largest tank, whichever is greater.”

3.30. At the time of the March 2019 inspection, the inspector observed a blue 55-gallon barrel, full of liquid and labelled as “windshield wash” outside, exposed to stormwater, without secondary containment.

3.31. EPA alleges that Respondent violated Condition S3.B.4.b.i.4.a of the ISGP in March 2019 by failing to use secondary containment. Violations of the ISGP are enforceable under Section 309(g) of the CWA, 33 U.S.C. § 1319(g).

Count 4 – Failure to Keep Dumpsters Under Cover

3.32. Condition S3.B.4.b.i.2.d of the ISGP requires permittees to “[k]eep all dumpsters under cover or fit with a lid that must remain closed when not in use.”

3.33. At the time of the March 2019 inspection, the inspector observed an open dumpster that was not equipped with a lid.

3.34. EPA alleges that Respondent violated Condition S3.B.4.b.i.2.d of the ISGP in March 2019 by failing to keep all dumpsters under cover. Violations of the ISGP are enforceable under Section 309(g) of the CWA, 33 U.S.C. § 1319(g).

Count 5 – Failure to Install/Maintain Best Management Practices (BMPs)

3.35. Condition S3.B.4.b.i.2 of the ISGP requires the Facility’s SWPPP to “include BMPs that define ongoing maintenance and cleanup, as appropriate, of areas which may contribute pollutants to stormwater discharges.” Condition S3.B.4.b.i.3 requires the SWPPP to “include BMPs to inspect and maintain the stormwater drainage, source controls, treatment systems (if any), and plant equipment and systems that could fail and result in contamination of stormwater.”

3.36. At the time of the March 2019 inspection, the inspector observed the following: a drain storm covered in sediment; storm drains equipped with filter inserts that showed signs of wear; sediment build-up around storm drains; and dried mud and debris deposited in the south corner of the north parking area where stormwater had previously accumulated.

3.37. EPA alleges that Respondent violated Conditions S3.B.4.b.i.2 and S3.B.4.b.i.3 of the ISGP in March 2019 by failing to install and/or maintain BMPs. Violations of the ISGP are

enforceable under Section 309(g) of the CWA, 33 U.S.C. § 1319(g).

Count 6 – Failure to Conduct Quarterly Discharge Sampling

3.38. Condition S4.B.1.a of the ISGP requires permittees to “sample the discharge from each designated location at least once per quarter.”

3.39. According to Washington Department of Ecology’s data monitoring records, at the time of the March 2019 inspection, Respondent had never submitted documentation of discharge sampling at any of the three discharge locations. At the time of the March 2019 inspection, Respondent confirmed to the inspector that discharge sampling does not occur.

3.40. EPA alleges that Respondent violated Condition S4.B.1.a of the ISGP from March 2017 through March 2019 by failing to conduct quarterly discharge sampling. Violations of the ISGP are enforceable under Section 309(g) of the CWA, 33 U.S.C. § 1319(g).

Count 7 – Failure to Submit Annual Reports

3.41. Condition S9.B.1 of the ISGP requires permittees to “submit a complete and accurate Annual Report to the Department of Ecology no later than May 15th of each year”

3.42. According to Washington Department of Ecology’s data monitoring records, at the time of the March 2019 inspection, Respondent had never submitted an annual report. At the time of the March 2019 inspection, Respondent confirmed to the inspector that it had never submitted annual reports under the ISGP.

3.43. EPA alleges that Respondent violated Condition S9.B.1 of the ISGP in 2017 and 2018 by failing to submit annual reports. Violations of the ISGP are enforceable under Section 309(g) of the CWA, 33 U.S.C. § 1319(g).

Count 8 – Failure to Conduct Annual SWPPP Training

3.44. Condition S3.B.4.b.i.5 of the ISGP requires the Facility’s SWPPP to “include BMPs to provide SWPPP training for employees who have duties in areas of industrial activities

subject to [the ISGP].” Condition S3.B.4.b.i.5.c further requires permittees to train employees annually, at a minimum.

3.45. At the time of the March 2019 inspection, Respondent was unable to confirm that the Facility conducts annual SWPPP training. Respondent was also unable to produce records of any such training at the time of the March 2019 inspection.

3.46. EPA alleges that Respondent violated Condition S3.B.4.b.i.5 of the ISGP in 2017 and 2018 by failing to conduct annual SWPPP training. Violations of the ISGP are enforceable under Section 309(g) of the CWA, 33 U.S.C. § 1319(g).

Count 9 – Failure to Maintain a Complete SWPPP Site Map

3.47. Condition S3.B.1.c of the ISGP requires the Facility’s SWPPP site map to identify “[t]he stormwater drainage and discharge structures and identify, by name, any other party other than the Permittee that owns any stormwater drainage or discharge structures.

3.48. At the time of the March 2019 inspection, the inspector observed narrow grates that looked like storm drains in the North parking area. The grates were not identified on the SWPPP Site Map.

3.49. EPA alleges that Respondent violated Condition S3.B.1.c of the ISGP in March 2019 by failing to maintain a complete SWPPP site map. Violations of the ISGP are enforceable under Section 309(g) of the CWA, 33 U.S.C. § 1319(g).

IV. TERMS OF SETTLEMENT

4.1. Respondent admits the jurisdictional allegations contained in this Consent Agreement.

4.2. Respondent neither admits nor denies the specific factual allegations contained in this Consent Agreement.

4.3. As required by CWA Section 309(g)(3), 33 U.S.C. § 1319(g)(3), the EPA has taken into account “the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require.” After considering all of these factors as they apply to this case, EPA has determined that an appropriate penalty to settle this action is \$133,225.

4.4. Respondent consents to the assessment of the civil penalty set forth in Paragraph 4.3 and agrees to pay the total civil penalty within 30 days of the effective date of the Final Order.

4.5. Payment under this Consent Agreement and the Final Order may be paid by check (mail or overnight delivery), wire transfer, ACH, or online payment. Payment instructions are available at: <http://www2.epa.gov/financial/makepayment>. Payments made by a cashier’s check or certified check must be payable to the order of “Treasurer, United States of America” and delivered to the following address:

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

Respondent must note on the check the title and docket number of this action.

4.6. Respondent must serve photocopies of the check, or proof of other payment method described in Paragraph 4.5, on the Regional Hearing Clerk and EPA Region 10 Compliance Officer at the following addresses:

Regional Hearing Clerk
U.S. Environmental Protection Agency
Region 10, Mail Stop 11-C07
1200 Sixth Avenue, Suite 155
Seattle, WA 98101
R10_RHC@epa.gov

Raymond Andrews
U.S. Environmental Protection Agency
Region 10, Mail Stop 20-C04
1200 Sixth Avenue, Suite 155
Seattle, WA 98101
Andrews.raymond@epa.gov

4.7. If Respondent fails to pay the penalty assessed by this Consent Agreement in full by its due date, the entire unpaid balance of penalty and accrued interest shall become immediately due and owing. Such failure may also subject Respondent to a civil action to collect the assessed penalty under the CWA, together with interest, fees, costs, and additional penalties described below. In any collection action, the validity, amount, and appropriateness of the penalty shall not be subject to review. R10_RHC@epa.gov

a. Interest. Pursuant to CWA Section 309(g)(9), 33 U.S.C. § 1319(g)(9), any unpaid portion of the assessed penalty shall bear interest at a rate established by the Secretary of Treasury pursuant to 31 U.S.C. § 3717(a)(1) from the effective date of the Final Order set forth in Part V, provided however, that no interest shall be payable on any portion of the assessed penalty that is paid within 30 days of the effective date of the Final Order.

b. Attorneys' Fees, Collection Costs, Nonpayment Penalty. Pursuant to CWA Section 309(g)(9), 33 U.S.C. § 1319(g)(9), if Respondent fails to pay on a timely basis the penalty set forth in Paragraph 4.3, Respondent shall pay (in addition to any assessed penalty and interest) attorneys' fees and costs for collection proceedings and a quarterly nonpayment penalty for each quarter during which such failure to pay persists. Such nonpayment penalty shall be in an amount equal to 20% of the aggregate amount of Respondent's penalties and nonpayment penalties which are unpaid as of the beginning of such quarter.

4.8. The penalty described in Paragraph 4.3, including any additional costs incurred under Paragraph 4.7, above, represents an administrative civil penalty assessed by EPA and shall not be deductible for purposes of federal taxes.

4.9. The undersigned representative of Respondent certifies that he or she is authorized to enter into the terms and conditions of this Consent Agreement and to bind Respondent to this document.

4.10. The undersigned representative of Respondent also certifies that, as of the date of Respondent's signature of this Consent Agreement, Respondent has corrected the violation(s) alleged in Part III above.

4.11. Except as described in Subparagraph 4.7.b., above, each party shall bear its own costs in bringing or defending this action.

4.12. For the purposes of this proceeding, Respondent expressly waives any affirmative defenses and the right to contest the allegations contained in the Consent Agreement and to appeal the Final Order.

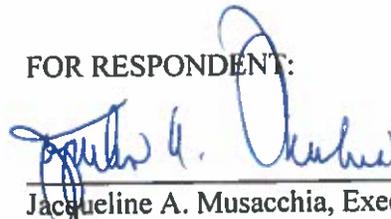
4.13. The provisions of this Consent Agreement and the Final Order shall bind Respondent and its agents, servants, employees, successors, and assigns.

4.14. The above provisions are STIPULATED AND AGREED upon by Respondent and EPA Region 10.

DATED:

11.5.2020

FOR RESPONDENT:



Jacqueline A. Musacchia, Executive Vice
President & General Counsel
KAG West, LLC

DATED:

FOR COMPLAINANT:

EDWARD J. KOWALSKI
Director
Enforcement and Compliance Assurance Division
EPA Region 10

BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:

KAG WEST, LLC

Tacoma, Washington

Respondent.

DOCKET NO. CWA-10-2021-0007

FINAL ORDER

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

1. The Administrator has delegated the authority to issue this Final Order to the Regional Administrator of the U.S. Environmental Protection Agency (EPA) Region 10, who has in turn delegated this authority to the Regional Judicial Officer in EPA Region 10.

2. The terms of the foregoing Consent Agreement are ratified and incorporated by reference into this Final Order. Respondent is ordered to comply with the terms of settlement.

3. The Consent Agreement and this Final Order constitute a settlement by EPA of all claims for civil penalties pursuant to the Clean Water Act (CWA) for the violations alleged in Part III of the Consent Agreement. In accordance with 40 C.F.R. § 22.31(a), nothing in this Final Order shall 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 does not waive, extinguish, or otherwise affect Respondent's obligations to comply with all applicable provisions of the CWA and regulations promulgated or permits issued thereunder.

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U.S. Environmental Protection Agency
1200 Sixth Avenue, Suite 155, 11-C07
Seattle, Washington 98101

4. This Final Order shall become effective upon filing.

SO ORDERED this _____ day of _____, 2020.

RICHARD MEDNICK
Regional Judicial Officer
EPA Region 10

CERTIFICATE OF SERVICE

The undersigned certifies that the original of the attached **CONSENT AGREEMENT AND FINAL ORDER** in **In the Matter of: KAG WEST, LLC, DOCKET NO.: CWA-10-2021-0007** was served on the addressees in the following manner on the date specified below:

The undersigned certifies that a true and correct copy of the document was delivered to:

Alex Fidis
Office of Regional Counsel
U.S. Environmental Protection Agency
Region 10, Mail Stop 11-C07
1200 Sixth Avenue, Suite 155
Seattle, WA 98101
206-553-4710
Fidis.alexander@epa.gov

Further, the undersigned certifies that a true and correct copy of the aforementioned document was placed in the United States mail certified/return receipt to:

Jacqueline A. Musacchia, Esq.
Executive Vice President & General Counsel
The Kenan Advantage Group, Inc.
4366 Mt. Pleasant Street
North Canton, Ohio 44720
330-409-1125
Jacqueline.Musacchia@thekag.com

DATED this _____ day of _____, 2020.

Teresa Young
Regional Hearing Clerk
EPA Region 10