

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7
11201 RENNER BLVD.
LENEXA, KANSAS 66219

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)	
)	Docket No. CWA-07-2020-0136
Swain Construction, Inc.)	
)	COMPLAINT AND
Respondent)	CONSENT AGREEMENT /
)	FINAL ORDER
Proceedings under Section 309(g) of the)	
Clean Water Act, 33 U.S.C. § 1319(g))	
_____)	

COMPLAINT

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 (“Consolidated Rules”), 40 C.F.R. Part 22.

2. Complainant, the U.S. Environmental Protection Agency Region 7 (“EPA”) and Respondent, Swain Construction, Inc., 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) and (3) of the Consolidated Rules, 40 C.F.R. §§ 22.13(b) and 22.18(b)(2) and (3).

3. This Complaint and Consent Agreement/Final Order serves as notice that the EPA has reason to believe that the Respondent has violated Sections 301 and 404 of the CWA, 33 U.S.C. §§ 1311, 1344, and regulations promulgated thereunder.

Parties

4. The authority to take action under Section 309(g) of the CWA, 33 U.S.C. § 1319(g), is vested in the Administrator of the EPA. The Administrator has delegated this authority to the Regional Administrator, EPA Region 7, who in turn has delegated the authority under Section 309(g) to the Director of the Enforcement and Compliance Assurance Division of EPA Region 7 (collectively referred to as the “Complainant”).

5. Respondent is and was at all relevant times a corporation under the laws of the state of Nebraska.

Statutory and Regulatory Framework

6. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants, except in compliance with, *inter alia*, Sections 402 and 404 of the CWA, 33 U.S.C. §§ 1342, 1344.

7. 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.

8. Section 404 of the CWA, 33 U.S.C. § 1344, specifically requires a person to obtain a permit from the Secretary of the Army acting through the Chief of Engineers, commonly referred to as the United States Army Corps of Engineers (hereinafter “Corps”), for any discharge of “dredged or fill material” into the “navigable waters” of the United States.

9. 40 C.F.R. § 232.2 defines “discharge of fill material” as “the addition of fill material into waters of the United States.”

10. 40 C.F.R. § 232.2 defines “fill material” as material that “replaces any portion of the waters of the United States with dry land” or which “changes the bottom elevation of a water of the United States.”

11. Section 402 of the CWA provides that pollutants may be discharged in accordance with the terms of a National Pollutant Discharge Elimination System (“NPDES”) permit issued pursuant to that Section.

12. 40 C.F.R. § 122.2 defines “process wastewater” to mean “any water which, during manufacturing or processing, comes into direct contact with or results from the production or use of any raw material, intermediate product, finished product, byproduct, or waste product.”

13. 40 C.F.R. § 122.21(a) requires dischargers of process wastewater from industrial facilities to apply for an NPDES permit.

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

15. 40 C.F.R. §§ 122.26(a)(1)(ii) and 122.26(c) require dischargers of stormwater associated with industrial activity to apply for an individual permit or to seek coverage under a promulgated stormwater general permit.

16. 40 C.F.R. § 122.26(b)(14) defines “stormwater discharge associated with industrial activity,” 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 material storage areas at an industrial plant,” and includes “storm water discharges from industrial plant yards; immediate access roads and rail lines used or traveled by carriers of raw materials, manufactured products, waste material, or by-products used or created by the facility; material handling sites; refuse sites; sites used for the application or disposal of process waste waters (as defined at part 401 of this chapter); sites used for the storage and maintenance of material handling equipment; sites used for residual treatment, storage, or disposal; shipping and receiving areas; manufacturing buildings; storage areas (including tank farms) for raw materials, and intermediate and final products; and areas where industrial activity has taken place in the past and significant materials remain and are exposed to storm water.” Further, 40 C.F.R. § 122.26(b)(14) defines “material handling activities” to “include storage, loading and unloading, transportation, or conveyance of any raw material, intermediate product, final product, by-product or waste product.”

17. Included in the categories of facilities considered to be engaging in “industrial activity” are facilities under Standard Industrial Classifications (“SIC”) Code 1422. *See* 40 C.F.R. § 122.26(b)(14)(iii). SIC code 1422 specifically includes establishments primarily engaged in mining or quarrying crushed and broken limestone, including related rocks, such as dolomite, cement rock, marl, travertine, and calcareous tufa, and in the grinding or pulverizing of limestone.

18. The Nebraska Department of Environment and Energy (“NDEE”), formerly NDEQ, is the state agency within the state of Nebraska that has been authorized by the EPA to administer the federal NPDES program pursuant to Section 402 of the CWA, 33 U.S.C. § 1342, and applicable implementing regulations.

19. Pursuant to Section 402(i) of the CWA, 33 U.S.C. § 1342(i), the EPA retains concurrent enforcement authority with authorized states for violations of the CWA.

EPA’s General Allegations

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

21. At all times relevant for this action, Respondent is and was the owner and/or operator of property consisting of 13 acres located at 6002 North 89th Circle, Omaha, Nebraska, and a facility engaged in recycled concrete crushing, aggregate and sand storage, loading and unloading of material, and diesel fuel storage (“Facility”).

22. The Facility is bordered by Thomas Creek, which runs along the west and south perimeters of the Facility, and Little Papillion Creek, which runs along the east perimeter of the Facility.

23. Stormwater, snow melt, surface drainage and runoff water leave Respondent's Facility at its borders with Thomas Creek and Little Papillion Creek or flow to the municipal separate storm sewer system ("MS4") inlet on North 87th Circle and into Little Papillion Creek.

24. Thomas Creek and Little Papillion Creek are "navigable waters" as defined by Section 502(7) of the CWA, 33 U.S.C § 1362(7).

25. Thomas Creek is on the 303d list as impaired for aquatic life without an EPA-approved total maximum daily load ("TMDL") and Little Papillion Creek is on the 303d list as impaired for recreation with an EPA-approved TMDL for *E. coli*.

26. Earth moving and other mechanized equipment including front loaders and trucks constitute a "point source" within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

27. Concrete, cement, rock, and asphalt or similar material constitute "fill material" and its placement or release in Thomas Creek and Little Papillion Creek constitutes the "discharge of fill material" as defined by 40 C.F.R. § 232.2.

28. The Facility is an industrial facility that requires an NPDES permit to authorize discharges of process wastewater pursuant to 40 C.F.R. §122.21, and is a "point source" as defined by Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

29. The Facility's activities to suppress dust resulted in pollutants washing off in process wastewater.

30. Stormwater from the site contains "pollutants" as defined by Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

31. The Facility has alleged "stormwater discharges associated with industrial activity" as defined by 40 C.F.R. § 122.26(b)(14).

32. Stormwater discharges associated with industrial activity are "point sources" as defined by Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

33. Process wastewater and stormwater runoff from industrial activity at Respondent's above referenced 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).

34. Respondent's discharge of pollutants, including discharges of stormwater 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.

35. On May 16, 2019, the Corps of Engineers, Omaha District performed an onsite investigation (“Corps Investigation”) and determined that an unauthorized discharge of fill material occurred in Thomas Creek due to moving, placing and/or pushing crushed rock and cement rubble over the bank with mechanized equipment, impacting approximately 950 linear feet of the stream channel and 0.043 acres of abutting wetlands.

36. On June 11, 2019, the Corps issued a Notice of Violation and Cease and Desist Order to Respondent.

37. On July 16 and 17, 2019, the EPA performed an Industrial Stormwater Inspection (“EPA Stormwater Inspection”) of Respondent’s site under the authority of Section 308(a) of the CWA, 33 U.S.C. § 1318(a), to evaluate Respondent’s compliance with the CWA.

38. During the EPA Stormwater Inspection, the EPA inspector toured the Facility, observed discharge locations, photographed various stormwater-related areas, and observed and documented unauthorized discharges and fill material in Thomas Creek and Little Papillion Creek.

39. A Notice of Potential Violation (“NOPV”) was issued by the EPA inspector at the conclusion of the Stormwater Inspection.

40. A copy of the Stormwater Inspection report was sent to Respondent by the EPA by letter dated August 15, 2019.

41. On July 24, 2019, the EPA performed an inspection to confirm the extent to which waters of the United States were impacted by Respondent’s fill activities (“EPA 404 Inspection”).

42. During the EPA 404 Inspection, the inspector toured the Facility, conducted an assessment of Thomas Creek and Little Papillion Creek, and photographed various areas of the Facility and bordering creeks. The inspector observed and documented unauthorized discharges and fill material in Thomas Creek and Little Papillion Creek, including within approximately 950 linear feet of Thomas Creek, crushed concrete lining the majority of the left descending bank of Thomas Creek, and approximately 353 linear feet of the right descending bank of Little Papillion Creek, along the perimeter of Respondent’s facility. The inspector also observed the unauthorized discharge of process wastewater from the facility into Thomas Creek.

43. A copy of the 404 Inspection report was delivered to Respondent on January 6, 2020.

44. By letter dated October 23, 2019, Respondent provided information in response to the Corps’ NOV and EPA’s Stormwater Inspection NOPV (hereinafter “NOPV Response”).

45. At all times relevant herein, Respondent did not have or obtain a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, or an NPDES permit for the discharge of

process wastewater or industrial stormwater pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

46. Following the inspections and events described above, on December 4, 2019, Respondent submitted a Notice of Intent for coverage under the Nebraska General Permit for discharges of stormwater runoff to Thomas and Little Papillion Creeks, subject to compliance with conditions and limitations set forth in the permit, and NDEE granted authorization to the Facility on December 11, 2019, pursuant to NPDES Permit NER910903.

EPA's Findings of Violation

Count 1 Unauthorized Fill

47. The facts stated above are re-alleged and incorporated herein by reference.

48. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of fill material, unless such discharge is in compliance with a CWA Section 404 permit.

49. Based on the evidence collected and observations made during the Corps Investigation, EPA Stormwater Inspection, and EPA 404 Inspection, Respondent has moved, placed, and/or pushed significant amounts of crushed rocks, concrete rubble, crushed concrete, brick, asphalt, construction debris and/or similar material into Thomas Creek and Little Papillion Creek along the perimeter of Respondent's Facility using front loaders and trucks or other mechanized equipment on multiple occasions.

50. Respondent's alleged discharges of fill material into Thomas Creek and Little Papillion Creek are not authorized by a permit issued pursuant to Section 404 of the CWA in violation of Section 301 of the CWA, 33 U.S.C. § 1311.

Count 2 Unauthorized Process Wastewater Discharges

51. The facts stated above are re-alleged and incorporated herein by reference.

52. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants, unless such discharge is in compliance with a CWA Section 402 NPDES permit.

53. Respondent discharged sediment-laden water into Thomas Creek on July 24, 2019, as observed by the inspector during the EPA 404 Inspection, and described by the Facility representative as water used for dust suppression. Respondent had no permit authorizing such discharge.

54. Respondent's alleged unauthorized discharge of process wastewater are in violation of Section 301 of the CWA, 33 U.S.C. § 1311.

**Count 3
Unauthorized Stormwater Discharges**

55. The facts stated above are re-alleged and incorporated herein by reference.

56. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants, unless such discharge is in compliance with a CWA Section 402 NPDES permit.

57. During the EPA Stormwater Inspection, the inspector confirmed that the Facility did not have an NPDES permit to authorize discharges of stormwater associated with industrial activity.

58. During the EPA Stormwater Inspection, the inspector observed and documented flow from the MS4 outfall into Little Papillion Creek, a lack of structural controls or other best management practices at the Facility to prevent or reduce pollutants in stormwater, and evidence that runoff leaves the site at the Facility's borders on Thomas Creek and Little Papillion Creek.

59. Based on observations and information collected from the EPA Stormwater Inspection and evidence that past process wastewater discharges from the Facility reached Thomas Creek and Little Papillion Creek, EPA alleges that, during significant precipitation events, stormwater from the Facility discharges pollutants into Thomas Creek and Little Papillion Creek.

60. Respondent's alleged unauthorized discharges of stormwater pollutants are in violation of Section 301 of the CWA, 33 U.S.C. § 1311.

Penalty

61. As alleged by EPA above, and pursuant to Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), as adjusted pursuant to 40 C.F.R. § 19.4, for violations that occurred after November 2, 2015, where penalties are assessed on or after January 13, 2020, Respondent is liable for civil penalties of up to \$22,320 per day for each day during which the violation continues, up to a maximum of \$278,995.

CONSENT AGREEMENT

62. Respondent and EPA agree to the terms of this Consent Agreement/Final Order.

63. Respondent admits the jurisdictional allegations of this Complaint and 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 this Consent Agreement/Final Order.

64. Respondent neither admits nor denies the factual allegations and legal conclusions asserted by the EPA in this Complaint and Consent Agreement/Final Order.

65. Respondent waives its right to contest any issue of fact or law set forth above, and its right to appeal this Consent Agreement/Final Order.

66. Respondent and Complainant agree to conciliate the matters set forth in this Consent Agreement/Final Order 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.

67. Respondent consents to receive service of the filed Consent Agreement and Final Order electronically at the following email address: annette@swainomaha.com.

68. The undersigned representative of Respondent certifies that they are fully authorized to enter the terms and conditions of this Consent Agreement/Final Order and to execute and legally bind Respondent to it.

69. Respondent understands and agrees that this Consent Agreement/Final Order 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 Consent Agreement/Final Order.

70. Respondent certifies by the signing of this Consent Agreement/Final Order that the Facility is in current compliance with its NPDES Permit and Sections 301, 402 and 404 of the CWA, 33 U.S.C. §§ 1311, 1342 and 1344, and applicable regulations.

Penalty Payment

71. Respondent agrees that, in settlement of the claims alleged in this Consent Agreement/Final Order, Respondent shall pay a civil penalty of **One Hundred and Fifty Thousand Dollars (\$150,000)** pursuant to the authority of Section 309(g) of the CWA, 33 U.S.C. § 1319(g), to be paid with interest pursuant to the schedule set forth below.

72. By signing this Order, Respondent certifies that it cannot pay the penalty within 30 days of the effective date without experiencing an undue financial hardship. In addition to this statement, Respondent has submitted a signed and certified statement to EPA of its current financial condition articulating a basis for its contention that it cannot pay the penalty within 30 days of the effective date without experiencing an undue financial hardship.

73. EPA has considered the appropriateness of the penalty pursuant to Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3), and has determined that based on Respondent's signed, certified statement to EPA as described in the paragraph above and EPA's best interests, the appropriate penalty for the violations is One Hundred and Fifty Thousand Dollars (\$150,000) plus interest of Two Hundred and Fifty Dollars (\$250), to be paid in two installments as follows:

- a. Payment #1 shall be made for Seventy-Five Thousand Dollars (\$75,000) within 30 days of the effective date of this Order; and

- b. Payment #2 shall be made for Seventy-Five Thousand Two Hundred and Fifty Dollars (\$75,250) within 120 days of the effective date of this Order.

74. Each penalty payment shall identify Respondent by name and docket number "CWA-07-2020-0136," shall be by certified or cashier's check made payable to "Treasurer, United States of America," and sent to:

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

or by alternate payment method described at <http://www.epa.gov/financial/makepayment>.

75. A copy of the check or other information confirming payment shall simultaneously be emailed to the following:

Regional Hearing Clerk
R7_Hearing_Clerk_Filings@epa.gov; and

Shane McCoin, Attorney
mccoin.shane@epa.gov

76. Respondent agrees that no portion of the civil penalty or interest paid by Respondent pursuant to the requirements of this Consent Agreement/Final Order shall be claimed by Respondent as a deduction for federal, state, or local income tax purposes.

77. Interest on any late payment will be assessed at the annual interest 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 or interest.

Effect of Settlement and Reservation of Rights

78. Respondent's payment of the entire civil penalty pursuant to this Consent Agreement/Final Order resolves all civil and administrative claims pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), for alleged violations identified in this Complaint and Consent Agreement/Final Order. Complainant reserves the right to take any enforcement action with respect to any other violations of the CWA or any other applicable law.

79. The effect of settlement described above is conditional upon the accuracy of the Respondent's representations to the EPA, as memorialized in this Consent Agreement/Final Order.

80. Nothing contained in this Consent Agreement/Final Order shall alter or otherwise affect Respondent's obligation to comply with all applicable federal, state and local environmental statutes and regulations and applicable permits.

81. Notwithstanding any other provision of this Consent Agreement/Final Order, the EPA reserves the right to enforce the terms of this Consent Agreement/Final Order 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.

82. With respect to matters not addressed in this Consent Agreement/Final Order, the EPA reserves the right to take any enforcement action pursuant to the CWA and its implementing regulations, or any other available legal authority, including without limitation, the right to seek injunctive relief, penalties and damages.

General Provisions

83. The Parties acknowledge that this Consent Agreement/Final Order is subject to the 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.

84. Pursuant to 40 C.F.R. § 22.31(b), this Consent Agreement/Final Order shall be effective after signature by the authorized regional official and upon filing with the Regional Hearing Clerk, U.S. Environmental Protection Agency, 11201 Renner Boulevard, Lenexa, Kansas 66219. All time periods herein shall be calculated therefrom in calendar days unless otherwise provided in this Consent Agreement/Final Order.

85. The state of Nebraska has been provided an opportunity to consult with Complainant regarding this matter in accordance with the requirements of 40 C.F.R. § 22.38(b) and Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1).

86. The headings in this Consent Agreement/Final Order are for convenience of reference only and shall not affect interpretation of this Consent Agreement/Final Order.

87. Respondent and Complainant agree that this Consent Agreement/Final Order may be signed electronically in part and counterpart.

For the Complainant, United States Environmental Protection Agency Region 7:

David Cozad
Director
Enforcement and Compliance Assurance Division

Shane E. C. McCain
Office of Regional Counsel

For the Respondent, Swain Construction, Inc.:



Signature _____ Date 12/15/2020

Greg Armstrong
Name

owner - President
Title

FINAL ORDER

Pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), and 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, the foregoing Consent Agreement resolving this matter is hereby ratified and incorporated by reference into this Final Order.

The Respondent is ORDERED to comply with all of the terms of the Consent Agreement. In accordance with 40 C.F.R. § 22.31(b), the effective date of the foregoing Consent Agreement and this Final Order is the date on which this Final Order is filed with the Regional Hearing Clerk.

IT IS SO ORDERED.

Date

Karina Borromeo
Regional Judicial Officer

Certificate of Service

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

Copy by email to representatives for Respondent:

Greg Armstrong, Registered Agent
annette@swainomaha.com

Michael J. Linder, attorney for Swain Construction, Inc.
Michael.Linder@koleyjessen.com

Copy by email to representatives for Complainant:

Mark Aaron, Enforcement and Compliance Assurance Division
aaron.mark@epa.gov

Shane McCoin, Office of Regional Counsel
mccoin.shane@epa.gov

Copy by email to Nebraska Department of Environment and Energy:

Mr. Reuel Andersen, NPDES Permits and Compliance Unit
reuel.andersen@nebraska.gov

Date

Signature