

UNITED STATES
ENVIRONMENTAL PROTECTION
AGENCY-REGION 7
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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7
11201 RENNER BOULEVARD
LENEXA, KANSAS 66219

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)	
)	
Nebraska Corn Processing, LLC)	Docket No. CWA-07-2014-0079
107 Potter Street)	
Cambridge, Nebraska 69022)	CONSENT AGREEMENT/ FINAL ORDER
Respondent)	
)	
Proceedings under Section 309(g) of the)	
Clean Water Act, 33 U.S.C. § 1319(g))	
_____)	

The United States Environmental Protection Agency (“EPA”), Region 7 (“Complainant”) and Nebraska Corn Processing, 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 of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation, Termination or Suspension of Permits, 40 C.F.R. Part 22.

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

Parties

3. The authority to take action under Section 309(g) of 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.

4. Respondent is Nebraska Corn Processing, LLC, a limited liability corporation under the laws of Delaware and authorized to conduct business in the State of Nebraska. Respondent has a registered office located at Suite 400, 2711 Centerville Road, Wilmington, Delaware, 19808, and an ethanol production facility located at 107 Potter Street, Cambridge, Nebraska 69022.

Statutory and Regulatory Framework

5. Section 301(a) of CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants, unless such discharge is in compliance with, *inter alia*, Section 402 of the CWA, 33 U.S.C. § 1342, which provides that pollutants may be discharged only in accordance with the terms of a National Pollutant Discharge Elimination System (“NPDES”) permit.

6. 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 CWA, 33 U.S.C. § 1362.

7. Section 402(p) of CWA, 33 U.S.C. § 1342(p), sets forth requirements for the issuance of NPDES permits for the discharge of stormwater. Section 402(p) of CWA requires, in part, that a discharge of stormwater associated with an industrial activity must comply with the requirements of an NPDES permit issued pursuant to Sections 301 and 402 of CWA.

8. 40 C.F.R. § 122.26(b)(14) defines a stormwater discharge that is “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 materials storage areas at an industrial plant.” Included in the categories of facilities considers to be engaging in “industrial activity” are facilities under Standard Industrial Classifications 28, which includes chemical and allied products. *See* 40 C.F.R. § 122.26(b) (14)(xi).

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

10. 40 C.F.R. §§ 122.26(a)(1)(ii), 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.

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

12. NDEQ implemented a General Permit for the discharge of stormwater under the NPDES, on July 11, 2011. The permit governs stormwater discharges associated with industrial activity.

FACTUAL BACKGROUND

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

14. At all times relevant to this action, Respondent was the owner and operator of a facility that produced ethanol ("Site"), located at 107 Potter Street, Cambridge, Nebraska 69022.

15. Stormwater, snow melt, surface drainage and runoff water leaves Respondent's facility and flows into Medicine Creek. The runoff and drainage from Respondent's facility is "stormwater" as defined by 40 C.F.R. § 122.26(b)(13).

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

17. The Site has "storm water discharge associated with industrial activity", specifically discharges associated with "facilities classified as Standard Industrial Classifications ... 28" as defined by 40 C.F.R. § 122.26(b)(14)(ii) and is a "point source" as defined by Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

18. The EPA alleges that Respondent discharged pollutants into Medicine Creek, which EPA alleges falls within the definition of "navigable waters" as defined by CWA Section 502, 33 U.S.C § 1362.

19. EPA alleges that stormwater runoff from Respondent's industrial activity results in the addition of pollutants from a point source to navigable waters, and thus is the "discharge of a pollutant" as defined by CWA Section 502(12), 33 U.S.C. § 1362(12).

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

21. NDEQ issued the Respondent NPDES Permit No. NER900380, which became effective on July 1, 2011, and expires June 30, 2016. The permit governs stormwater discharges associated with industrial activity.

22. On or about August 20-21, 2013, EPA performed an inspection of the Site under the authority of Section 308(a) of the CWA, 33 U.S.C. § 1318(a). The purpose of the inspection was to evaluate the management of stormwater at the Site in accordance with the CWA.

ALLEGED VIOLATIONS

Count 1

Inadequate Stormwater Pollution Prevention Plan

23. The facts stated in Paragraphs 13 through 22 above are herein incorporated.

24. Section 5.1.2 of Respondent's NPDES permit, "Site Description", requires the permittee to develop a site map that includes, among other requirements, the size of the property in acres, approximate outline of areas draining to each outfall, and location and descriptions of all non-stormwater discharge points.

25. During the EPA inspection referenced in Paragraph 22, the inspector noted Respondent's SWPPP did not have a site map showing the size of the property in acres, the approximately outline of areas draining to each outfall, and the location and descriptions of all non-stormwater discharge points.

26. Respondent's alleged failure to develop an adequate SWPPP is a violation of the NPDES permit, and as such, is a violation of Sections 301(a) and 402(p) of CWA, 33 U.S.C. §§ 1311(a), 1342(p).

Count 2

Failure to Implement Control Measures

27. The facts stated in Paragraphs 13 through 22 above are herein incorporated.

28. Section 2.1.2.5 of Respondent's NPDES permit, "Erosion and Sediment Controls", requires the permittee to stabilize exposed areas and contain runoff using structural and or non-structural control measures to minimize onsite erosion and sedimentation, and the resulting discharge of pollutants.

29. During the EPA inspection referenced in Paragraph 22, the inspector noted two areas of Respondent's facility with disturbed soils where Respondent failed to either stabilize the areas or install an appropriate structural control measure to prevent migration of sediment toward the receiving water body. The inspector noted the accumulation of sediment in drainage channels on-site. Respondent's quarterly facility inspections note the need for stabilization around a new grain bin beginning in January 2012 and on June 28, 2012, September 17, 2012, November 21, 2012, and March 29, 2013. Respondent has stated Respondent previously attempted to plant grass in the exposed areas.

30. Section 2.1.2.6 of Respondent's NPDES Permit, "Management of Runoff", requires the permittee to divert, reuse, contain, or otherwise reduce stormwater runoff to minimize pollutants in the facility's discharges.

31. During the EPA inspection referenced in Paragraph 22, the inspector noted wet cake matter and grain particles had migrated away from the wet cake loading area, scale, and wet cake containment area. The inspector also observed these materials in the drainage channel that collects and conveys stormwater from these areas toward Outfall 001.

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

Count 3

Unauthorized Discharge

33. The facts stated in Paragraphs 13 through 22 above are herein incorporated.

34. Respondent's NPDES permit authorizes the discharge of industrial stormwater from Respondent's facility. Certain non-stormwater discharges are allowable pursuant to Section 1.1.3 of Respondent's NPDES permit. The list of allowable non-stormwater discharges does not include ethanol.

35. On March 2, 2014, Respondent discharged pure ethanol into Medicine Creek, a tributary of the Republican River. Respondent has stated that the discharge would have been contained by a retention structure designed to stop any such discharges, but the valve on the structure was stuck in a partially open position at the time.

36. Respondent's alleged unauthorized discharge is a violation of Respondent's NPDES permit, and as such, is a violation of Sections 301(a) and 402(p) of CWA, 33 U.S.C. §§ 1311(a) and 1342(p), and implementing regulations.

CONSENT AGREEMENT

37. Respondent and EPA agree to the terms of this CA/FO and Respondent agrees to comply with the terms of the Final Order portion of this CA/FO.

38. Respondent admits the jurisdictional allegations of this CA/FO 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 CA/FO.

39. Respondent neither admits nor denies the factual allegations and legal conclusions set forth above.

40. 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 CA/FO.

41. Respondent and Complainant agree to conciliate the matters set forth in this CA/FO

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.

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

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

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

45. Respondent certifies by the signing of this CA/FO that to the best of its knowledge, Respondent's Site is in compliance with Sections 301 and 402 of CWA, 33 U.S.C. §§ 1311, 1342, and regulations promulgated thereunder.

46. The effect of the settlement described in Paragraph 44 above is conditional upon the accuracy of Respondent's representations to EPA, as memorialized in Paragraph 45 of this CA/FO.

47. Respondent agrees that, in settlement of the claims alleged in this CA/FO, Respondent shall pay a penalty of \$10,000 as set forth in Paragraph 1 of the Final Order.

48. Respondent understands that failure to pay any portion of the civil penalty on the proper due date 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 Section 309(g) of CWA, 33 U.S.C. § 1319(g), and according to the terms of this CA/FO, IT IS HEREBY ORDERED THAT:

1. Respondent shall pay a mitigated civil penalty of Ten Thousand Dollars (\$10,000) within thirty (30) days of the effective date of this Final Order.

2. 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-07-2014-0079.

Copies of the check shall be mailed to:

Kristen Nazar
Assistant Regional Counsel
U.S. Environmental Protection Agency - Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219

and to

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

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

Parties Bound

4. This Final Order portion of this CA/FO shall apply to and be binding upon Respondent and Respondent's agents, successors, 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 CA/FO.

General Provisions

5. Notwithstanding any other provision of this CA/FO, EPA reserves the right to enforce the terms of the Final Order portion of this CA/FO by initiating a judicial or administrative action pursuant to Section 309 of CWA, 33 U.S.C. § 1319, and to seek penalties against Respondent or to seek any other remedy allowed by law.

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

7. 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 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.

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

9. The headings in this CA/FO are for convenience of reference only and shall not affect interpretation of this CA/FO.

COMPLAINANT:

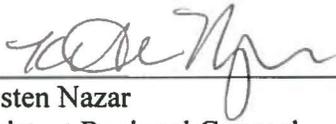
U.S. ENVIRONMENTAL PROTECTION AGENCY

4/22/15
Date



Karen A. Flourney
Director
Water, Wetlands and Pesticides Division

4/21/15
Date



Kristen Nazar
Assistant Regional Counsel
Office of Regional Counsel

RESPONDENT:
NEBRASKA CORN PROCESSING, LLC



Date

Name (Print) Eric Meewsey

Title General Manager

Date

Michael S. Mostek #18134
MOSTEK LAW LLC
1111 North 13th Street
Omaha, NE 68102
Attorney for Respondent

RESPONDENT:
NEBRASKA CORN PROCESSING, LLC



Date

Name (Print) Eric Meeuwse

Title General Manager



3-5-15
Date

Michael S. Mostek #18134
MOSTEK LAW LLC
1111 North 13th Street
Omaha, NE 68102
Attorney for Respondent

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

Karina Borromeo
Karina Borromeo
Regional Judicial Officer

4-27-15
Date

IN THE MATTER OF Nebraska Corn Processing, LLC, Respondent
Docket No. CWA-07-2014-0079

CERTIFICATE OF SERVICE

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

Copy by email to Attorney for Complainant:

nazar.kristen@epa.gov

Copy by First Class Mail to:

Michael S. Mostek
MOSTEK LAW LLC
111 North 13th Street
Omaha, Nebraska 68102

Dated: 4/23/15



Kathy Robinson
Kathy Robinson
Hearing Clerk, Region 7