

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

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EPA REGION VIII
HEARING CLERK

In the Matter of:)
)
Comstock Construction, Inc.) **COMBINED**
280 South 11th Street) **COMPLAINT AND**
Wahpeton, North Dakota, 58074) **CONSENT AGREEMENT**
)
Respondent.) Docket No. **CWA-08-2015-0005**

Complainant, United States Environmental Protection Agency, Region 8 (EPA), and Respondent, Comstock Construction, Inc. (Respondent), by their undersigned representatives, hereby agree as follows:

AUTHORITY

1. This proceeding is subject to the EPA's "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits," 40 C.F.R. part 22. This Combined Complaint and Consent Agreement (Agreement) is entered into by the parties for the purpose of simultaneously commencing and concluding this matter, as authorized by 40 C.F.R. § 22.13(b), and is executed pursuant to 40 C.F.R. § 22.18(b)(2) and (3).
2. Complainant has jurisdiction over this matter pursuant to sections 308 and 309(g) of the Clean Water Act (Act), 33 U.S.C. §§ 1318 and 1319(g), which authorizes the EPA to make findings and to assess civil penalties for violations of sections 301, 302, 306, 307, 308, 318, and 405 of the Act, 33 U.S.C. §§ 1311, 1312, 1316, 1317, 1318, 1328, and 1345, or any permit condition or limitation implementing any such sections of the Act in a permit issued by the Administrator under section 402 of the Act.

GENERAL ALLEGATIONS

3. Respondent is a corporation organized under the laws of the State of North Dakota and authorized to do business in the State of North Dakota. Respondent's principal office is located in Wahpeton, North Dakota.
4. Respondent is a "person" as that term is defined in section 502(5) of the Act, 33 U.S.C. § 1362(5), and 40 C.F.R. § 122.2.
5. In order to restore and to maintain the integrity of the nation's waters, section 301(a) of the Act, 33 U.S.C. § 1311(a), among other things, prohibits the discharge of any pollutant by any person into waters of the United States except in compliance with a permit issued pursuant to section 402 of the Act, 33 U.S.C. § 1342.
6. Section 402 of the Act, 33 U.S.C. § 1342, establishes the National Pollutant Discharge Elimination System (NPDES) program, under which the EPA and, upon receiving authorization, states may permit discharges of pollutants into navigable waters, subject to specific terms and conditions. "Navigable waters" means the waters of the United States. 33 U.S.C. § 1362(7).
7. Section 402(p) of the Act, 33 U.S.C. § 1342(p), requires an NPDES permit for storm water discharges associated with industrial activities.
8. Any discharge from construction activity that disturbs greater than or equal to one acre of land (or that disturbs a piece of land that is less than one acre but is part of a larger common plan of development ultimately disturbing greater than or equal to one acre) constitutes a storm water discharge associated with industrial activity. 40 C.F.R. §122.26(b)(15)(i).
9. Each person discharging storm water associated with industrial activity must seek and obtain authorization to do so under either an individual NPDES permit or a promulgated NPDES

general permit. See, 40 C.F.R. §122.26(c) and sections 301(a), 308, and 402(p) of the Act, 33 U.S.C. §§1311(a), 1318, and 1342(p).

10. The EPA directly implements the NPDES program in Indian Country.

11. Effective February 16, 2012, the EPA issued a general permit (NPDES Permit No. NDR12-000I, referenced as the Permit) authorizing discharges of storm water associated with construction activities in Indian Country in North Dakota, if done in compliance with the terms and conditions of the Permit. Dischargers may apply for authorization to discharge under the Permit by submitting a notice of intent (NOI) for coverage to the EPA. The Permit has been in effect at all times relevant to this action.

12. Part 1.4 of the Permit states, “[t]o be covered under this Permit, you must submit to EPA a complete and accurate NOI prior to commencing construction activities. The NOI certifies to EPA that you are eligible for coverage according to Part 1.1 and 1.2, and provides information on your construction operation and discharge.”

13. Part 7.1.1 of the Permit states, “[a]ll operators associated with a construction project to be covered under this Permit must develop a [storm water pollution prevention plan] SWPPP. You are required to develop your Site’s SWPPP prior to submitting your NOI. At a minimum, your SWPPP must include the information required in Part 7.2 and as specified in other parts of the Permit. You must also update the SWPPP as required in Part 7.4.”

SPECIFIC ALLEGATIONS

14. Respondent was engaged in the construction of the New Town High School Gymnasium located at 700 Eagle Drive, New Town, North Dakota (Site), within the exterior boundaries of the Fort Berthold Reservation, and is subject to regulation under the NPDES program as defined in the regulations. 40 C.F.R. § 122.2.
15. Respondent was engaged in an “industrial activity” and was required to obtain a permit to allow discharges from storm water events. 40 C.F.R. § 122.26 (b)(14).
16. Construction activities (which includes but is not limited to clearing, grading, and excavating) began at the Site on or around June 17, 2013.
17. The Site encompasses approximately 1.29 acres.
18. According to precipitation data recorded approximately 20 miles from the Site at the Stanley 1.0 SE, North Dakota weather station, the National Oceanic and Atmospheric Administration (NOAA) website identifies the following eight precipitation events that occurred between June 17th and August 23, 2014, where at least 0.25 inches of rain fell: June 20, 2013, at 0.88 inches, June 23, 2013, at 1.80 inches, July 5, 2013, at 1.23 inches, July 8, 2013, at 0.28 inches, July 16, 2013, at 0.75 inches, July 20, 2013, at 0.36 inches, July 30, 2013, at 0.35 inches, and August 7, 2013, at 0.54 inches.
19. On August 8, 2013, inspectors from the EPA conducted an NPDES storm water inspection of the Site.
20. At the time of the inspection, Respondent had not obtained authorization from the EPA to discharge storm water from the Site under the applicable permit or any individual permit.

21. The Respondent was required to have obtained NPDES permit authorization from the EPA for its discharges of storm water from the Site. 40 C.F.R. §122.21(c).
22. The Site did not have authorization from the EPA to discharge storm water from the Site under the applicable permit or any individual permit from the start of the initial land disturbance on June 17, 2013, to and including August 22, 2013, the day before the NOI became effective on August 23, 2013. (Part 1.4.2 of the permit.)
23. During the inspection of the site, the inspectors observed evidence of previous storm water sediment discharges such as: sediment track-out in the street from vehicles exiting the construction site at two access points along W. Central Ave; sediment from vehicle track-out on 3rd Street along the gutter; and the lack of the installation of best management practices (BMPs) for storm water flows to the inlet on 3rd Street N, which is approximately 1,000 feet from the site, and discharges to Lake Sakakawea.
24. Lake Sakakawea is a “navigable water” as defined by section 502(7) of the Act, 33 U.S.C. § 1362(7), and a “water of the United States” as defined by 40 C.F.R. § 122.2.
25. The runoff and drainage from the Site are “storm water” as defined in 40 C.F.R. § 122.26(b)(13).
26. Storm water contains “pollutants” as defined by section 502(6) of the Act, 33 U.S.C. § 1362(6).
27. The storm water discharge from the Site is a “discharge of a pollutant” as defined by section 502(12) of the Act, 33 U.S.C. § 1362(12), and 40 C.F.R. § 122.2.
28. The storm water discharge from the Site is a discharge from a “point source” as that term is defined in section 502(14) of the Act, 33 U.S.C. § 1362(14), and 40 C.F.R. § 122.2.

29. On August 9, 2013, Respondent submitted an NOI to the EPA indicating Respondent's intent to have storm water construction discharged from the Site covered by the Permit.
30. The Site did not have a SWPPP from June 17, 2013 until August 9, 2013.
31. Had Respondent obtained authorization to discharge under the Permit prior to construction, it would have been required by the Permit to complete a SWPPP prior to beginning construction at the Site.
32. The Permit requires that the SWPPP for the Site include, among other things: the total area of soil disturbance, a proposed timetable of activities disturbing soils for major portions of the Site, a complete Site map, a description of good housekeeping and preventative maintenance practices, an identification of when each erosion and sediment control measure would be implemented, and a maintenance or clean-out interval for sediment controls.
33. Storm water BMPs were installed at the Site on October 20, 2013.
34. Respondent did not perform storm water inspections at the Site from August 23, 2013 to October 14, 2013.

COUNT 1

35. Respondent has discharged storm water into waters of the United States from the Site to the Lake Sakakawea via the inlet on 3rd Street N via the City of New Town's MS4 without authorization by any permit issued under the Act from June 17, 2013 through August 23, 2013.
36. Respondent's discharge without permit authorization constitutes a violation of sections 301(a) and 402(p) of the Act, 33 U.S.C. §§1311(a) and 1342(p), for each day in which a discharge has occurred.

COUNT 2

37. Respondent failed to perform BMPs from August 23, 2013 through October 20, 2013, as required by Part 2.3.2 of the Permit.
38. Respondent's failure to perform BMPs from August 23, 2013 through October 20, 2013, is a violation of the Permit.

COUNT 3

39. Respondent did not perform inspections at the Site from August 23, 2013 to October 14, 2013, as required by Part 4 of the Permit.
40. Respondent's failure to perform inspections from August 23, 2013 through October 14, 2013, is a violation of the Permit.

CIVIL PENALTY

41. Section 309(g)(2)(A) of the Act, 33 U.S.C. § 1319(g)(2)(A), authorizes the EPA to assess a civil administrative penalty for any violation of various provisions of the Act, including but not limited to section 301 of the Act, 33 U.S.C. §§ 1311, and for any violation of a condition or limitation of a permit issued under section 402 of the Act, 33 U.S.C. § 1342. The amount of the penalty that the EPA can assess is up to \$16,000 per day for each day after January 12, 2009, during which a violation continues. For the violations at issue in this matter that occurred after January 12, 2009, the maximum amount of penalty is \$177,500. These amounts have been adjusted for inflation by 40 C.F.R. part 19.
42. Section 309(g)(3) of the Act, 33 U.S.C. § 1319(g)(3), requires the EPA to take into account the following factors in assessing a civil administrative penalty: the nature, circumstances, extent and gravity of the violation(s) and, with respect to the violator, ability to

pay, any prior history of such violations, degree of culpability, any economic benefit or savings gained from the violation, and such other factors that justice may require.

43. Based on the factors listed in paragraph 42, the EPA proposes a civil penalty of fourteen thousand five hundred (\$14,500) to settle this action.

44. Respondent consents, for the purpose of settlement, to the issuance of a final order in this matter and agrees to pay the civil penalty cited in paragraph 43 above as follows:

- a. Payment is due within thirty (30) calendar days from the date written on the Final Order, issued by the Regional Judicial Officer that adopts this Consent Agreement. If the due date falls on a weekend or legal federal holiday, then the due date becomes the next business day. The date the payment is made is considered to be the date processed by U.S. Bank described below. Payments received by 11:00 AM EST are processed on the same day, those received after 11:00 AM are processed on the next business day.
- b. The payment shall be made by remitting a cashier's or certified check, referencing the name and docket number of this case, for this amount, payable to "**Treasurer, United States of America,**" as follows:

If sent by regular U.S. mail: U.S. EPA Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000

If sent by any commercial overnight carrier: U.S. Bank
Government Lockbox 979077
1005 Convention Plaza
Mail Station SL-MO-C2-GL
St. Louis, MO 63101

If sent by transfer:

Federal Reserve Bank of New York
ABA = 021030004
Account = 68010727
SWIFT address = FRNYUS33
33 Liberty Street
New York NY 10045
Field Tag 4200 of the Fedwire message
should read "D 68010727 Environmental
Protection Agency "

On Line Payment:

WWW.PAY.GOV
Enter sfo 1.1 in the form search field
Open form and complete required fields.

Copies of the check or wire transfer shall be simultaneously sent to:

Emilio Llamozas
U.S. EPA Region 8 (8ENF-W-NP)
1595 Wynkoop Street
Denver, CO 80202-1129

Tina Artemis, Regional Hearing Clerk
U.S. EPA Region 8 (8RC)
1595 Wynkoop Street
Denver, CO 80202-1129

- c. In the event payment is not received by the specified due date, interest accrues from the date of the Final Order, not the due date, at a rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717, and will continue to accrue until the payment is received in full (i.e., on the 1st late day, 30 days of interest accrues).
- d. A handling charge of fifteen dollars (\$15) shall be assessed on the 31st day from the date of the Final Order, and each subsequent 30-day period that the debt, or any portion thereof, remains unpaid. In addition, a six percent (6%) per annum penalty shall be assessed on any unpaid principal amount if the penalty payment is not received within ninety (90) days of the due date (i.e., the 121st day from the date the final order is signed). Payments are first applied to outstanding handling

charges, second to penalty assessments, third to accrued interest, and then to the outstanding principal amount.

- e. Respondent agrees that the penalty shall never be claimed as a federal or other tax deduction or credit.

PUBLIC NOTICE

45. As required by section 309(g)(4)(A) of the Act, 33 U.S.C. §1319(g)(4)(A), prior to requesting that the Regional Judicial Officer (RJO) issue a final order incorporating this Agreement and assessed penalty, the EPA will provide the public notice of and reasonable opportunity to comment on the penalty agreed to herein.

GENERAL PROVISIONS

46. Nothing in this Agreement shall relieve the Respondent of the duty to comply with the Act and any regulation, order, or permit issued pursuant to the Act.

47. Any failure by the Respondent to comply with this Agreement shall constitute a breach of this Agreement and may result in referral of the matter to the United States Department of Justice for enforcement of this Agreement and such other relief as may be appropriate.

48. Nothing in this Agreement shall be construed as a waiver by the EPA or any other federal entity of its authority to seek costs or any appropriate penalty associated with any collection action instituted as any failure by the Respondent to comply with this Agreement.

49. Respondent admits the jurisdictional allegations in this Agreement and neither admits nor denies the specific factual allegations contained herein.

50. Respondent waives its rights to a hearing before any tribunal, to contest any issue of law or fact set forth in this Agreement.

51. Complainant asserts that settlement of this matter is in the public interest, and Complainant and Respondent agree that entry of this Agreement and Final Order without further litigation and without adjudication of any issue of fact or law, is the most appropriate means of resolving this matter.

52. The undersigned representative of the Respondent certifies that he/she is fully authorized to enter into and bind the Respondent to this Agreement.

53. The parties agree to submit this Agreement to the Regional Judicial Officer (RJO) with a request that it be incorporated into a final order following provision of public notice pursuant to section 309(g)(4) of the Act, 33 U.S.C. § 1319(g)(4) and 40 C.F.R. § 22.45.

54. Each party shall bear its own costs and attorney's fees in connection with this matter.

55. This Agreement, upon incorporation into a final order and full satisfaction by the parties, shall be a complete and full resolution of the Respondent's liability for federal civil penalties for the violations and facts alleged above.

**UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, REGION 8,
Complainant.**

Date: NOV 19 2014

By:



James H. Eppers, Supervisory Attorney
Legal Enforcement Program
Office of Enforcement, Compliance,
and Environmental Justice
U.S. EPA Region 8
Denver, Colorado 80202-1129

Date:

11/20/14

By:



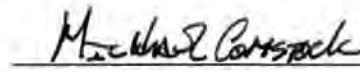
Gwenette C. Campbell, Unit Chief
NPDES Enforcement Program
Office of Enforcement, Compliance,
and Environmental Justice
U.S. EPA Region 8
1595 Wynkoop St.
Denver, Colorado 80202-1129

**COMSTOCK CONSTRUCTION, INC.,
Respondent.**

Date:

11/12/2014

By:



Michael Comstock
Comstock Construction, Inc.
280 South 11th Street
Wahpeton, North Dakota 58074

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY REGION 8
1595 Wynkoop Street, Denver, CO 80202-1129**

**PUBLIC NOTICE OF PROPOSED COMBINED COMPLAINT AND CONSENT
AGREEMENT AND OPPORTUNITY TO COMMENT**

Action: The EPA is providing notice of the opportunity to comment on a proposed Combined Complaint and Consent Agreement (CCCA). The agreement relates to alleged storm water violations of the Clean Water Act (CWA) at the New Town High School Gymnasium in New Town, North Dakota which was constructed by Comstock Construction, Inc. (Comstock). The corporate address of Comstock is 280 South 11th Street, Wahpeton, North Dakota, 58074.

Summary: The EPA is authorized by section 309(g)(2) of the CWA, 33 U.S.C. § 1319(g)(2), and by 40 C.F.R. §§ 22.13(b) and 22.38, to issue an order assessing a civil administrative penalty for violations of certain CWA requirements, after providing (1) an opportunity for the person to be assessed the penalty (Respondent) to request a hearing to contest the penalty, and (2) notification to the public of its rights to submit written comments and to participate in any hearing. The deadline for the public to submit comments is thirty days after issuance of this notice.

The EPA and Comstock have agreed to enter into a CCCA to resolve the EPA's alleged violations of the requirements listed below. Comstock has agreed to pay a civil penalty of \$14,500.00 to resolve its civil penalty liability for these claims. Pursuant to section 309(g)(4) of the CWA, the EPA hereby notifies the public of the opportunity to comment on this proposed penalty assessment.

EPA Docket Number for proposed expedited settlement: **CWA-08-2015-0005**

Alleged violations: (1) Respondent has discharged storm water into waters of the United States from its site without authorization by any permit issued under the CWA from June 17, 2013 through August 23, 2013; (2) Respondent failed to install best management practices (BMPs) from August 23, 2013 through October 20, 2013 (Permit NDR12-000I); and (3) Respondent did not perform storm water inspections at the site from August 23, 2013 to October 14, 2013 (Permit NDR12-000I).

PUBLIC COMMENTS

Written comments on the expedited settlement agreement are encouraged and will be accepted at the address listed below for a period of thirty (30) days after the publication of this notice. Written comments submitted by the public as well as information submitted by Respondent will be available for public review, subject to the provisions of law restricting the disclosure of confidential information. Any person submitting written comments has a right to participate in a hearing, if one is held. The complaint is available for review between 9:00 a.m. and 4:00 p.m. at the address listed below and on the internet at: <http://yosemite.epa.gov/oa/rhc/epaadmin.nsf>.

Please submit written comments to:

Tina Artemis (8RC)
Regional Hearing Clerk
U.S. EPA, Region 8
1595 Wynkoop Street
Denver, CO 80202-1129
Telephone: (303) 312-6765

FOR FURTHER INFORMATION: Persons wishing to receive a copy of the expedited settlement agreement or other documents in this proceeding (such as the regulations in 40 C.F.R. part 22, which establish procedures for the hearing), or to comment upon the proposed penalty assessment or upon any other aspect of the matter, should contact the Regional Hearing Clerk identified above.