

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4

In the Matter of:

**Archer Western Construction, LLC
Spartanburg, South Carolina,**

Respondent.

Docket No. **CWA-04-2020-0310(b)**

CONSENT AGREEMENT

I. NATURE OF ACTION

1. This is an administrative penalty assessment proceeding brought under Section 309(g)(2)(B) of the Clean Water Act, 33 U.S.C. § 1319(g)(2)(B), (CWA or the Act) and Sections 22.13(b) and 22.18 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (Consolidated Rules), as codified at Title 40 of the Code of Federal Regulations (C.F.R.) Part 22.
2. This Consent Agreement and the attached Final Order shall collectively be referred to as the CAFO.
3. Having found that settlement is consistent with the provisions and objectives of the Act and applicable regulations, the Parties have agreed to settle this action pursuant to 40 C.F.R. § 22.18 and consent to the entry of this CAFO without adjudication of any issues of law or fact herein.

II. PARTIES

4. Complainant is the Director of the Enforcement and Compliance Assurance Division of the United States Environmental Protection Agency, Region 4, who has been delegated the authority on behalf of the Administrator of the EPA to enter into this CAFO pursuant to 40 C.F.R. Part 22 and Section 309(g)(2)(B) of the CWA.
5. Respondent is Archer Western Construction, LLC (Respondent), a limited liability corporation formed under the laws of the State of Illinois doing business in the State of South Carolina. This proceeding pertains to Respondent's facility located at 475 Simuel Road, Spartanburg, South Carolina (Facility).

III. GOVERNING LAW

6. To accomplish the objective of the CWA, defined in Section 101(a) of the CWA, 33 U.S.C. § 1251(a), to restore and maintain the chemical, physical and biological integrity of the nation's waters, Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants by any person into waters of the United States except as in compliance with a National Pollutant Discharge Elimination System (NPDES) permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.
7. Section 402 of the CWA, 33 U.S.C. § 1342, establishes an NPDES Permit Program authorizing the EPA or authorized states to administer the NPDES Permit Program, including the issuance of NPDES permits allowing for the discharge of pollutants, including stormwater, into navigable waters subject to specific terms and conditions. The EPA has granted the State of South Carolina, through the South Carolina Department of Health and Environmental Control (SCDHEC), approval to issue NPDES permits pursuant to Section 402(b) of the CWA.
8. Section 502(12) of the CWA, 33 U.S.C. § 1362(12), defines a "discharge of pollutants" as "[a]ny addition of any pollutant to navigable waters from any point source. . . ."
9. Section 502(14) of the CWA, 33 U.S.C. § 1362(14), defines "point source" as "[a]ny discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit [or] discrete fissure . . . from which pollutants are or may be discharged."
10. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines "navigable waters" as "[t]he waters of the United States, including the territorial seas."
11. Pursuant to Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1), and 40 C.F.R. § 22.38(b), Complainant represents that the State of South Carolina was provided a prior opportunity to consult with Complainant regarding this matter.
12. Pursuant to Section 309(g)(4)(A) of the CWA, 33 U.S.C. § 1319(g)(4)(A), and 40 C.F.R. § 22.45, Complainant will provide public notice of and reasonable opportunity to comment on the proposed issuance of this CAFO prior to issuance of the Final Order.

IV. EPA'S FINDINGS OF FACT

13. The SCDHEC issued a NPDES General Permit for Storm Water Discharges Associated with Industrial Activities, Permit No. SCR000000 (Permit). The Permit became effective October 1, 2016, and expires on September 30, 2021. Coverage under the Permit for eligible owners and operators is obtained by submitting a Notice of Intent (NOI) to SCDHEC.
14. The Permit is a South Carolina statewide NPDES general permit governing stormwater point source discharges associated with industrial activities. To be eligible to discharge under the Permit, you must (1) have a stormwater discharge associated with an industrial activity from your primary industrial activity, as defined in Appendix A of the Permit, provided your primary industrial activity is included in Appendix D of the Permit, or (2) be notified by the SCDHEC that you are eligible for coverage under Sector AD of the Permit. The Permit also authorizes stormwater discharges from any industrial activity designated by the Department where the

designation is based on the potential for contribution to a violation of a water quality standard or for significant contribution of pollutants to Waters of the State.

15. From October 2017 to November 2019, Respondent owned and/or operated the Facility, a concrete mixing facility identified by Standard Industrial Classification (SIC) Code 3273, located at 475 Simuel Road, Spartanburg, South Carolina, at latitude 34°58'40.00" N and longitude 81°58'43.08" W.
16. The Facility has an office, a concrete batch plant for road construction and maintenance work, and an area for equipment staging. The Facility itself was 3 acres, co-located on a 92-acre site with Concrete Supply Company.
17. On December 13, 2018, the EPA performed a Compliance Stormwater Evaluation Inspection (CSWEI) to evaluate Respondent's treatment and disposal of stormwater at the Facility and assess compliance with the CWA, the regulations promulgated thereunder at 40 C.F.R. § 122.26, and the Permit.
18. During the CSWEI of the Facility, the EPA's inspectors observed and concluded the following:
 - a. The Facility has several industrial areas with exposure to stormwater runoff, including unconsolidated materials such as aggregate, sand, and broken dry concrete being stored outside in mounds without cover; a material staging area; and liquid storage with secondary containment.
 - b. Inspectors inquired as to the type of operations conducted at the Facility and observed the operations on site. The Facility's primary operation, identified by SIC Code 3273, is listed in Appendix A of the Permit.
 - c. Inspectors requested a copy of permit coverage during the inspection. The Facility was unable provide proof of permit coverage. Therefore, the EPA concluded the Facility operated without submitting an NOI for coverage under the Permit for its operations or had not obtained an alternative No Exposure Certification.
19. As a result of the CSWEI, the EPA has determined that stormwater associated with industrial activities discharged without proper authorization under the Permit. The EPA anticipates potential discharges from an industrial site to occur with rain events greater than 0.1 inch. According to the rain data available from a local weather station, twenty-six(26) months during the period of October 2017 to November 2019 have had one or more daily rain events greater than 0.5 inches. Due to the hydrology of the Facility, which flows southwest and northwest depending on the location, the EPA has determined that from October 2017 to November 2019, discharges occurred to the City of Spartanburg's Municipal Separate Storm Sewer System and the Fairforest Creek through a point source at the southwest side of the Facility and from the northwest side of the Facility. Fairforest Creek is a tributary to the Tyger River, a traditionally navigable water of the United States as defined by Section 502(7) of the CWA, 33 U.S.C. § 1362(7) and its implementing regulations at 40 C.F.R. § 122.2.

V. ALLEGED VIOLATIONS

20. At all times relevant to this action, Respondent is a “person” within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).
21. At all times relevant to this action, Respondent owned and/or operated the Facility with primary operations identified by SIC Code 3273.
22. The Fairforest River is a traditionally navigable water of the United States as defined by Section 502(7) of the CWA, 33 U.S.C. § 1362(7), and its implementing regulations at 40 C.F.R. § 122.
23. As a result of the CSWEI, the EPA has determined that stormwater associated with industrial activity was discharged from the Facility within the meaning of Section 402(p) of the CWA, 33 U.S.C. § 1342(p), and its implementing regulations into waters of the United States.
24. Based on the CSWEI and review of additional information provided by Respondent, Respondent has violated Section 301 of the CWA, 33 U.S.C. § 1311, due to discharges not authorized by a NPDES permit. Specifically, the EPA alleges the following violations:
 - a. The Facility operated a concrete mixing facility, identified by primary SIC Code 3273, without submitting an NOI for coverage under the Permit or obtaining a No Exposure Certification in violation of Section 301 of the CWA, 33 U.S.C. § 1311.
 - b. Facility activities resulted in unpermitted discharges of stormwater. Industrial activities with the potential to contribute to these unpermitted discharges included storage of unconsolidated materials such as aggregate, sand, and broken dry concrete outside in mounds without cover; material staging area; and liquid storage with secondary containment.

VI. STIPULATIONS

25. The issuance of this CAFO simultaneously commences and concludes this proceeding. 40 C.F.R. § 22.13(b).
26. For the purpose of this proceeding, as required by 40 C.F.R. § 22.18(b)(2), Respondent:
 - a. admits that EPA has jurisdiction over the subject matter alleged in this CAFO;
 - b. neither admits nor denies the factual allegations set forth in Section IV (Findings of Fact) of this CAFO;
 - c. consents to the assessment of a civil penalty as stated below;
 - d. consents to the conditions specified in this CAFO;
 - e. waives any right to contest the allegations set forth in Section V (Alleged Violations) of this CAFO; and
 - f. waives its rights to appeal the Final Order accompanying this CAFO.

27. For the purpose of this proceeding, Respondent:

- a. agrees that this CAFO states a claim upon which relief may be granted against Respondent;
- b. acknowledges that this CAFO constitutes an enforcement action for purposes of considering Respondent's compliance history in any subsequent enforcement actions;
- c. waives any rights it may possess at law or in equity to challenge the authority of EPA to bring a civil action in a United States District Court to compel compliance with the CAFO, and to seek an additional penalty for such noncompliance, and agrees that federal law shall govern in any such civil action;
- d. waives any right it may have pursuant to 40 C.F.R. § 22.8 to be present during any discussions with, or to be served with and reply to, any memorandum or communication addressed to EPA officials where the purpose of such discussion, memorandum, or communication is to persuade such official to accept and issue this CAFO; and
- e. agrees to comply with the terms of this CAFO.

28. In accordance with 40 C.F.R. § 22.5, the individuals named in the certificate of service are authorized to receive service related to this proceeding and the parties agree to receive service by electronic means at the following valid email addresses: Houda.Tara@epa.gov for the EPA and edubose@walshgroup.com for the Respondent.

29. The parties acknowledge and agree that this CAFO is subject to the requirements of 40 C.F.R. § 22.45(c)(4), which provides a right to petition to set aside a proposed CAFO based on comments received during the public comment period.

VII. TERMS OF PAYMENT

30. Based on the Respondent's substantiated ability to pay claim, Respondent consents to the payment of a civil penalty, which was calculated in accordance with the Act, in the amount of **\$90,500.00**, which is to be paid within thirty (30) calendar days of the Effective Date of this CAFO.

31. Payment(s) shall be made by cashier's check, certified check, by electronic funds transfer (EFT), or by Automated Clearing House (ACH) (also known as REX or remittance express). If paying by check, the check shall be payable to: Treasurer, United States of America, and the Facility name and docket number for this matter shall be referenced on the face of the check. If Respondent sends payment by the U.S. Postal Service, the payment shall be addressed to:

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

If Respondent sends payment by non-U.S. Postal express mail delivery, the payment shall be sent to:

U.S. Bank
Government Lockbox 979077
U.S. EPA Fines & Penalties
1005 Convention Plaza
Mail Station: SL-MO-C2-GL
St. Louis, Missouri 63101
Contact Number: (314) 425-1819

If paying by EFT, Respondent shall transfer the payment to:

Federal Reserve Bank of New York
ABA: 021030004
Account Number: 68010727
SWIFT address: FRNYUS33
33 Liberty Street
New York, New York 10045
Field Tag 4200 of the Fedwire message should read:
“D 68010727 Environmental Protection Agency”

If paying by ACH, Respondent shall remit payment to:

US Treasury REX / Cashlink ACH Receiver
ABA: 051036706
Account Number: 310006, Environmental Protection Agency
CTX Format Transaction Code 22 – checking
Physical location of US Treasury facility:
5700 Rivertech Court
Riverdale, Maryland 20737
Contact: Craig Steffen, (513) 487-2091
REX (Remittance Express): 1-866-234-5681

32. Respondent shall send proof of payment via email, within 24 hours of payment of the civil penalty, to:

a. Regional Hearing Clerk
U.S. EPA Region 4
61 Forsyth Street, S.W.
Atlanta, Georgia 30303-8960
R4_Regional_Hearing_Clerk@epa.gov

and

b. Tara L. Houda, Enforcement and Compliance Assurance Division
Clean Water Enforcement Branch
U.S. EPA Region 4

61 Forsyth Street, S.W.
Atlanta, Georgia 30303-8960
Houda.Tara@epa.gov

33. “Proof of payment” means, as applicable, a copy of the check, confirmation of credit card or debit card payment, confirmation of wire or automated clearinghouse transfer, and any other information required to demonstrate that payment has been made according to EPA requirements, in the amount due, and identified with the Facility name and “Docket No. CWA-04-2020-0310(b).”
34. Pursuant to 33 U.S.C. § 1319(g)(9), if Respondent fails to timely pay any portion of the penalty assessed under this CAFO, EPA may recover, in addition to the amount of the unpaid penalty assessed, the following amounts on any portion overdue:
- a. Interest. Interest will begin to accrue on the civil penalty from the Effective Date of this CAFO. If the civil penalty is paid within 30 days of the Effective Date of this CAFO, Interest is waived. However, if the civil penalty is not paid in full within 30 days of the Effective Date of this CAFO, Interest will continue to accrue on any unpaid portion until the unpaid portion of the civil penalty and accrued Interest are paid. Interest will be assessed currently prevailing rates.
 - b. Non-Payment Penalty. A 20 percent quarterly nonpayment penalty pursuant to 33 U.S.C. § 1319(g)(9); and
 - c. Attorneys’ Fees and Costs of Collection. The United States’ attorneys’ fees and costs of collection.
35. In addition to what is stated in the prior Paragraph, if Respondent fails to timely pay any portion of the penalty assessed under this CAFO, EPA may:
- a. refer the debt to a credit reporting agency or a collection agency, 40 C.F.R. §§ 13.13 and 13.14;
 - b. collect the debt by administrative offset (i.e., the withholding of money payable by the United States to, or held by the United States for, a person to satisfy the debt the person owes the Government), which includes, but is not limited to, referral to the Internal Revenue Service for offset against income tax refunds, 40 C.F.R. Part 13, Subparts C and H;
 - c. suspend or revoke Respondent’s licenses or other privileges, or suspend or disqualify Respondent from doing business with EPA or engaging in programs EPA sponsors or funds, 40 C.F.R. § 13.17; and/or
 - d. request that the Attorney General bring a civil action in the appropriate district court to recover the amount assessed, in addition to the amounts described above, pursuant to 33 U.S.C. § 1319(g)(9). In any such judicial action, the validity, amount, and appropriateness of the penalty and of this CAFO shall not be subject to review.

36. Penalties paid pursuant to this CAFO shall not be deductible for purposes of federal taxes.
37. Effective upon signature of this CAFO by the Respondent, the Respondent agrees that the time period commencing on the date of its signature and ending on the Effective Date shall not be included in computing the running of any statute of limitations potentially applicable to any action brought by EPA related to the matters addressed in this CAFO and that, in any action brought by EPA related to the matters addressed, the Respondent will not assert, and may not maintain, any defense or claim based upon principles of statute of limitations, waiver, laches, estoppel, or other defense based on the passage of time during such period.

VIII. EFFECT OF CAFO

38. In accordance with 40 C.F.R. § 22.18(c), Respondent's full compliance with this CAFO shall only resolve Respondent's liability for federal civil penalties for the violations and facts specifically alleged above.
39. Full payment of the civil penalty, as provided in Section VII (Terms of Payment), shall not in any case 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. 40 C.F.R. § 22.18(c).
40. Nothing in this CAFO shall relieve Respondent of the duty to comply with all applicable provisions of the Act and other federal, state, or local laws or statutes, nor shall it restrict EPA's authority to seek compliance with any applicable laws or regulations, nor shall it be construed to be a ruling on, or determination of, any issue related to any federal, state, or local permit, except as expressly provided herein.
41. Nothing herein shall be construed to limit the power of EPA to undertake any action against Respondent or any person in response to conditions that may present an imminent and substantial endangerment as provided under the Act.
42. The terms, conditions, and compliance requirements of this CAFO may not be modified or amended except upon the written agreement of both Parties, and approval of the Regional Administrator.
43. The provisions of this CAFO shall apply to and be binding upon Respondent and its successors and assigns.
44. Any change in the legal status of the Respondent, or change in ownership, partnership, corporate or legal status relating to the Facility, will not in any way alter Respondent's obligations and responsibilities under this CAFO.
45. By signing this Consent Agreement, Respondent acknowledges that this CAFO will be available to the public and agrees that this CAFO does not contain any confidential business information or personally identifiable information.
46. By signing this Consent Agreement, Complainant and the undersigned representative of Respondent each certify that he or she is fully authorized to execute and enter into the terms and

conditions of this CAFO and has the legal capacity to bind the party he or she represents to this CAFO.

47. By signing this Consent Agreement, both Parties agree that each party's obligations under this CAFO constitute sufficient consideration for the other party's obligations.
48. By signing this Consent Agreement, Respondent certifies that the information it has supplied concerning this matter was at the time of submission, and continues to be, true, accurate, and complete for each such submission, response, and statement. Respondent acknowledges that there are significant penalties for submitting false or misleading information, including the possibility of fines and imprisonment for knowing submission of such information, under 18 U.S.C. § 1001.
49. EPA also reserves the right to revoke this CAFO and settlement penalty if and to the extent that EPA finds, after signing this CAFO, that any information provided by Respondent was materially false or inaccurate at the time such information was provided to EPA. If such false or inaccurate material was provided, EPA reserves the right to assess and collect any and all civil penalties for any violation described herein. EPA shall give Respondent notice of its intent to revoke, which shall not be effective until received by Respondent in writing.
50. Unless specifically stated otherwise in this CAFO, each party shall bear its own attorney's fees, costs, and disbursements incurred in this proceeding.
51. It is the intent of the parties that the provisions of this CAFO are severable. If any provision or authority of this CAFO or the application of this CAFO to any party or circumstances is held by any judicial or administrative authority to be invalid or unenforceable, the application of such provisions to other parties or circumstances and the remainder of the CAFO shall remain in force and shall not be affected thereby.

IX. EFFECTIVE DATE

52. This CAFO shall become effective after execution of the Final Order by the Regional Administrator, on the date of filing with the Hearing Clerk.

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Complainant and Respondent will Each Sign on Separate Pages.

The foregoing Consent Agreement In the Matter of Archer Western Construction, LLC, Docket No. CWA-04-2020-0310(b), is Hereby Stipulated, Agreed, and Approved for Entry.

FOR RESPONDENT:


Signature

10/21/2020
Date

Printed Name: Erin H DuBose

Title: Corporate Counsel

Address: 929 W Adams St Chicago, IL 60607

The foregoing Consent Agreement In the Matter of Archer Western Construction, LLC, Docket No. CWA-04-2020-0310(b), is Hereby Stipulated, Agreed, and Approved for Entry.

FOR COMPLAINANT:

Carol L. Kemker
Director
Enforcement and Compliance Assurance Division
U.S. Environmental Protection Agency, Region 4

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 4

In the Matter of:

**Archer Western Construction, LLC
Spartanburg, South Carolina,**

Respondent.

Docket No. **CWA-04-2020-0310(b)**

FINAL ORDER

The Regional Administrator is authorized to ratify this Consent Agreement which memorializes a settlement between Complainant and Respondent. 40 C.F.R. § 22.18(b)(3). The foregoing Consent Agreement is, therefore, hereby approved, ratified and incorporated by reference into this Final Order 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.

The Respondent is hereby ORDERED to comply with all of the terms of the foregoing Consent Agreement effective immediately upon filing of this Consent Agreement and Final Order with the Regional Hearing Clerk. This Final Order disposes of this matter pursuant to 40 C.F.R. §§ 22.18 and 22.31.

BEING AGREED, IT IS SO ORDERED.

Mary S. Walker
Regional Administrator

CERTIFICATE OF SERVICE

I certify that the foregoing “Consent Agreement” and “Final Order,” in the Matter of Archer Western Construction, LLC, Docket No. CWA-04-2020-0310(b), were filed and copies of the same were emailed to the parties as indicated below.

Via email to all parties:

To Respondent:

Erin H. DuBose
Corporate Counsel
The Walsh Group, Ltd.
929 W. Adams St
Chicago, Illinois 60607
(312) 492-1580
edubose@walshgroup.com

To EPA:

Ms. Tara Houda
Surface Water and Groundwater Section
Enforcement and Compliance Assurance Division
U.S. EPA Region 4
61 Forsyth Street, S.W.
Atlanta, Georgia 30303
(404) 562-9762
Houda.Tara@epa.gov

Mr. Stephen P. Smith
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U.S. EPA Region 4
61 Forsyth Street, S.W.
Atlanta, Georgia 30303
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Smith.Stephen@epa.gov

Saundi Wilson, Regional Hearing Clerk
U.S. EPA Region 4
61 Forsyth Street, S.W.
Atlanta, Georgia 30303-8960

