

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

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FILED
EPA REGION VIII
HEARING CLERK

In the Matter of:)
) Docket No. **CWA-08-2018-0011**
Graham Construction Services, Inc.)
917 20th Avenue SE)
Minot, North Dakota 58701,) **COMBINED COMPLAINT AND**
) **CONSENT AGREEMENT**
Respondent.)

The U.S. Environmental Protection Agency, Region 8 (the EPA), and Graham Construction Services, Inc. (Respondent), by their undersigned representatives, agree as follows:

I. JURISDICTIONAL ALLEGATIONS

1. This Combined Complaint and Agreement (Agreement) is issued under the authority of section 309(g) of the Clean Water Act (CWA), 33 U.S.C. § 1319(g), which authorizes the EPA to assess civil administrative penalties for, among other things, violations of section 301 of the CWA, 33 U.S.C. § 1311.
2. 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, a copy of which has been provided to Respondent.

II. STATEMENTS OF THE PARTIES

3. With this Agreement, the parties intend to commence and conclude this matter simultaneously, as authorized by 40 C.F.R. §§ 22.13(b) and 22.18(b)(2) and (3).
4. Solely for the purposes of this proceeding, Respondent admits the jurisdictional allegations in paragraphs 1 and 2 of this Agreement. Respondent consents to the assessment of the administrative civil penalty referenced in paragraph 38, below, waives any right to a hearing before any tribunal or to contest any statement of law or fact in this Agreement, and waives any right to appeal any final order approving this Agreement (Final Order). Respondent does not admit or deny any matter the EPA has alleged in paragraphs 6 through 36, below.

III. PARTIES BOUND

5. This Agreement, upon incorporation into a Final Order, applies to and is binding upon the EPA and upon Respondent, and Respondent's officers, directors, agents, successors, and assigns.

IV. GENERAL ALLEGATIONS

6. In order to restore and maintain the integrity of the Nation's waters, section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant by any person into waters of the United States unless authorized by certain other provisions of the CWA, including section 402 of the CWA, 33 U.S.C. § 1342.
7. Section 402 of the CWA, 33 U.S.C. § 1342, establishes a National Pollutant Discharge Elimination System (NPDES) program, under which the EPA and states with authorization from the EPA may permit discharges of pollutants into navigable waters, subject to specific terms and conditions.
8. Storm water discharges associated with industrial activity are subject to the permit requirement referenced in paragraph 7, above. See section 402(p)(2)(B) of the CWA, 33 U.S.C. § 1342(p)(2)(B).
9. Discharges associated with industrial activity include discharges associated with construction activity that disturbs at least five acres of total land area. Construction activity includes clearing, grading, and excavating. 40 C.F.R. § 122.26(b)(14)(x).
10. Dischargers of storm water associated with industrial activity must either apply for an individual permit or seek coverage under a promulgated general permit. 40 C.F.R. § 122.26(c)(1).
11. The EPA directly implements the NPDES program in Indian country.
12. Effective February 16, 2012, the EPA issued a general permit (2012 Permit), authorizing discharges of storm water associated with construction activities in, among other places, Indian country in North Dakota, if done in compliance with the terms and conditions of that permit. Dischargers were allowed to apply for authorization to discharge under the 2012 Permit by submitting a notice of intent (NOI) for coverage to the EPA. The 2012 Permit expired on February 16, 2017. See <https://www.epa.gov/npdes/epas-2012-construction-general-permit-cgp-and-related-documents> (last visited April 6, 2018); see also 77 Fed. Reg. 12286-12293 (February 29, 2012).
13. Effective February 16, 2017, the EPA issued a general permit (2017 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 that permit. Dischargers may apply for authorization to discharge under the 2017 Permit by submitting a notice of intent (NOI) for coverage to the EPA. The 2017 Permit is still in effect. See <https://www.epa.gov/npdes/epas-2017-construction-general-permit-cgp-and-related-documents> (last visited April 6, 2018); see also 82 Fed. Reg. 6523-6540 (January 19, 2017).

14. Part 1.4 of the 2012 Permit states, “To be covered under this Permit, you must submit to the EPA a complete and accurate NOI prior to commencing construction activities. The NOI certifies to the EPA that you are eligible for coverage according to Part 1.1 and 1.2, and provides information on your construction operation and discharge.”
15. Part 1.4 of the 2017 Permit states, “All ‘operators’ (as defined in Appendix A) associated with your construction site, who meet the Part 1.1 eligibility requirements, and who seek coverage under this permit, must submit to the EPA a complete and accurate NOI in accordance with the deadlines in Table 1 prior to commencing construction activities.”

V. SPECIFIC ALLEGATIONS

16. Respondent is a corporation organized under the laws of the State of Minnesota and authorized to do business in the State of North Dakota. Respondent’s principal office is located in Minot, North Dakota.
17. Respondent is a “person” as that term is defined in section 502(5) of the CWA, 33 U.S.C. § 1362(5), and 40 C.F.R. § 122.2.
18. Respondent has engaged in construction of the Thomas M. Johnny Bird Veterans Memorial Hall construction site (the Site) at 210 Chief Bears Avenue, New Town, North Dakota. The Site is within the external boundaries of the Fort Berthold Reservation.
19. Construction activities began at the Site on or around September 15, 2016.
20. The Site encompasses approximately 7.5 acres.
21. According to precipitation data recorded approximately 16 miles from the Site at the Keene 3S, North Dakota weather station and obtained from the National Oceanic and Atmospheric Administration website, 26 precipitation events occurred between September 15, 2016, and December 21, 2017, during each of which at least 0.25 inches of precipitation fell.
22. Respondent has engaged in construction activities at the Site at all times relevant to this action and, therefore, has engaged in an “industrial activity” as defined at 40 C.F.R. § 122.26(b)(14).

VI. DESCRIPTION OF VIOLATIONS

23. On August 25, 2017, inspectors from the EPA conducted a NPDES storm water inspection of the Site.
24. The construction project referenced in paragraph 18, above, consisted of two phases. Bird Industries, Inc. (Bird) was responsible for Phase I, and Respondent was responsible for Phase II. On August 14, 2015, Bird submitted an NOI to be covered under the 2012 Permit for Phase I of the project. Bird was assigned permit number NDR12AC0I. Bird’s coverage under

the 2012 Permit began on August 28, 2015. Respondent commenced Phase II on September 15, 2016 and did not seek to transfer the permit coverage obtained by Bird.

25. At the time of the EPA's inspection, Respondent had neither sought nor obtained authorization from the EPA to discharge storm water from the Site under any CWA permit.
26. On December 7, 2017, Respondent submitted an NOI for the Site to be covered under the 2017 Permit. Coverage became effective December 21, 2017.
27. Respondent did not have authorization from the EPA to discharge storm water from the Site under any permit from the start of its construction activities at the Site on September 15, 2016, through December 20, 2017.
28. During the EPA's inspection, the inspectors observed evidence of previous storm water sediment discharges such as: sediment accumulation in drainage ways and the lack of installation and maintenance of best management practices (BMPs) for storm water flows to the storm water drain inlets.
29. Storm water runoff, snow melt runoff and/or drainage water have left the Site and have flowed to Lake Sakakawea, which is a navigable-in-fact waterway.
30. The runoff and drainage from the Site is "storm water," as defined in 40 C.F.R. § 122.26(b)(13).
31. Storm water contains "pollutants" as defined by section 502(6) of the CWA, 33 U.S.C. § 1362(6).
32. Each storm water discharge from the Site is a "discharge of a pollutant" as defined by section 502(12) of the CWA, 33 U.S.C. § 1362(12), and 40 C.F.R. § 122.2.
33. Each storm water discharge from the Site is a discharge from a "point source" as that term is defined in section 502(14) of the CWA, 33 U.S.C. § 1362(14), and 40 C.F.R. § 122.2.
34. Lake Sakakawea is a "navigable water" as defined by section 502(7) of the CWA, 33 U.S.C. § 1362(7).
35. Respondent discharged storm water from the Site to Lake Sakakawea without authorization by any permit issued under the CWA from September 15, 2016, to December 21, 2017.
36. Respondent's discharge without permit authorization is a violation of section 301(a) of the CWA, 33 U.S.C. § 1311(a), for each day in which a discharge occurred.

VII. CIVIL PENALTY

37. Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), and 40 C.F.R. part 19 authorize the EPA to assess a civil administrative Class II penalty of up to \$21,393 for each day during which a discharge without a permit continues, for violations occurring after November 2, 2015, up to a total of \$267,415. (85 Fed. Reg. 1190-1194 (January 10, 2018).)
38. After consideration of the facts of this case as they relate to the factors set forth in section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3), the EPA has determined that a civil penalty of **\$63,000** is appropriate to settle this matter.
39. Respondent consents and agrees to pay a civil penalty in the amount stated in paragraph 38, above, in the manner described below:
- a. Payment shall be in a single payment in the full amount stated in paragraph 38, above, due no later than 30 calendar days from the date of the Final Order. If the due date for the payment falls on a weekend or federal holiday, then the due date is the next business day. The date the payment is made is considered to be the date processed by U.S. Bank, as described below. Payment must be received by 11:00 a.m. Eastern Standard Time to be considered as received that day.
 - b. Payment shall be made by any method provided on the website <https://www.epa.gov/financial/makepayment>, following the instructions under the heading “Civil Penalties.”
 - c. Copies of the check or record of payment shall be sent to:

Emilio Llamozas
U.S. Environmental Protection Agency (8ENF-W-NP)
1595 Wynkoop Street
Denver, Colorado 80202-1129

and

Melissa Haniewicz
Regional Hearing Clerk
U.S. Environmental Protection Agency (8RC)
1595 Wynkoop Street
Denver, Colorado 80202-1129

A transmittal letter identifying the case title and docket number must accompany the remittance and copies of the check.

40. Respondent agrees that the civil penalty referenced above shall never be claimed as a federal or other tax deduction or credit.

VIII. PUBLIC NOTICE

41. As required by section 309(g)(4)(A) of the CWA, 33 U.S.C. §1319(g)(4)(A), and 40 C.F.R. § 22.45, prior to submitting this Agreement to EPA Region 8's Regional Judicial Officer for approval, the EPA will provide the public notice of this Agreement and a reasonable opportunity to comment on the agreed-upon penalty. The EPA may modify or withdraw its consent to this Agreement if comments received disclose facts or considerations indicating this Agreement is inappropriate, improper, or inadequate.

42. The EPA has consulted with the North Dakota Department of Health or its successor agency regarding this Agreement.

IX. GENERAL PROVISIONS

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

44. Any failure by 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.

45. 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 Respondent to comply with this Agreement.

46. The undersigned representative of Respondent certifies that he or she has authority to bind Respondent to this Agreement.

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

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION 8

Date: 7/30/18

By: 

Suzanne J. Bohan
Assistant Regional Administrator
Office of Enforcement, Compliance
and Environmental Justice
Complainant

**GRAHAM CONSTRUCTION SERVICES, INC.
Respondent**

Date: 6/22/2018

By: 

Matthew Dekkers
Vice President Midwest US
Graham Construction Services, Inc.
917 20th Avenue SE
Minot, North Dakota 58701