

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

2013 NOV -1 AM 8:19

Docket No. CWA-08-2014-0004

FILED
EPA REGION VIII
HEARING CLERK

In the Matter of:)
)
Nelcon, Inc.) ADMINISTRATIVE ORDER
304 Jellison Road) FOR COMPLIANCE ON CONSENT
Kalispell, Mt. 59903,)
)
Respondent.)

INTRODUCTION

1. This Administrative Order for Compliance on Consent (Consent Order) is entered into voluntarily by Nelcon, Inc. (Respondent) and the United States Environmental Protection Agency (EPA). The EPA has authority to issue this Consent Order pursuant to section 309(a) of the Clean Water Act (Act), 33 U.S.C. § 1319(a), which authorizes the Administrator of the EPA to issue an order requiring compliance by a person found to be in violation of, *inter alia*, section 301(a) of the Act. This authority has been properly delegated to the undersigned EPA official.
2. The Findings in paragraph numbers 7 through 44 below are made solely by the EPA. In signing this Consent Order, and for that limited purpose only, Respondent neither admits nor denies the Findings.
3. Without any admission of liability, Respondent consents to issuance of this Consent Order and agrees to abide by all of its conditions. Respondent waives any and all remedies, claims for relief, and otherwise available rights to judicial or administrative review that Respondent may have with respect to any issue of fact or law set forth in this Consent Order, including any right of judicial review of this Consent Order under the Administrative Procedure

Act, 5 U.S.C. §§ 701-706. Respondent further agrees not to challenge the jurisdiction of the EPA or the Findings in any proceeding to enforce this Consent Order or in any action under this Consent Order.

4. On July 1, 2013, EPA filed a First Amended Complaint and Notice of Opportunity for Hearing (Amended Complaint), alleging that Respondent discharged pollutants to a waters of the United States without a permit in violation of section 301(a) of the Act, 33 U.S.C. § 1311(a). The Amended Complaint proposed that Respondent pay an administrative civil penalty for the violations set forth therein, pursuant to section 309(g) of the Clean Water Act (the Act), 33 U.S.C. § 1319(g). (Docket No. CWA-08-2012-0025).

5. On September 23, 2013, EPA and Respondent filed a consent agreement with the Regional Judicial Officer for EPA Region 8 (Consent Agreement) requesting that the Regional Judicial Officer issue a final order approving the terms of settlement contained in the Consent Agreement. The Consent Agreement reflected that the parties had agreed that Respondent would pay a civil penalty and take certain specified actions to remedy the violations at the Site.

6. On September 30, 2013, the Regional Judicial Officer for EPA Region 8 issued a final order (Final Order) approving certain terms in the Consent Agreement, including Respondent's payment of a civil penalty. In the Final Order, the Regional Judicial Officer directed EPA and Nelcon to enter into an administrative order on consent that incorporates the compliance and corrective action provisions in the consent agreement, and to file the administrative order on consent by October 30, 2013. This Consent Order is made solely for that purpose.

FINDINGS

The following findings apply to all times relevant to this action:

7. Nelcon, Inc. (Respondent) is a corporation incorporated under the laws of the State of Montana, with its principal place of business at 304 Jellison Road, and a mailing address of PO Box 5370, Kalispell, Montana 59903.
8. Respondent is a “person” as defined in section 502(5) of the Act, 33 U.S.C. § 1362(5), and 40 C.F.R. § 122.2.
9. Respondent has constructed a drinking water pipeline from the new Blackfeet Community Water Treatment Plant near East Glacier, Montana, to the Town of Browning. The pipeline crosses Montana Highway 49 and the Two Medicine River just south of the MT Highway 49 bridge, which runs across the Two Medicine River. The pipeline also crosses Willow Creek just west of the Spotted Robe siding on the BNSF railroad where Spotted Robe Trail crosses the railroad right-of-way.
10. For the purposes of this Consent Order, Respondent’s construction activities in the vicinity of the MT Highway 49 bridge and the Two Medicine River, and in the vicinity of Willow Creek described above, comprise the construction site (Site).
11. Respondent’s construction activity at the Site is a “point source” as defined in section 502(14) of the Act, 33 U.S.C. § 1362(14), and 40 C.F.R. § 122.2.
12. The Two Medicine River joins with Cut Bank Creek southeast of the Town of Cut Bank, Montana, to form the Marias River, which is a tributary to the Missouri River, a navigable water and as such is a water of the United States as defined at 40 C.F.R. § 122.2. Willow Creek is a

tributary to Cut Bank Creek, which also is tributary to the Missouri River and as such is a water of the United States as defined at 40 C.F.R. § 122.2.

13. The Site is located within the exterior boundary of the Blackfeet Reservation and, thus, is within Indian Country.

14. Section 301(a) of the Act, 33 U.S.C. § 1311(a), among other things, prohibits the discharge of any pollutant into waters of the United States except in compliance with a permit issued pursuant to section 402 of the Act.

15. Section 402 of the Act establishes the National Pollutant Discharge Elimination System (NPDES) program, under which EPA, and upon receiving authorization from EPA, states, may permit discharges of pollutants into navigable waters, subject to specific terms and conditions.

16. Section 402(p) of the Act, 33 U.S.C. § 1342(p), requires a permit for storm water discharges associated with industrial activity.

17. The Federal NPDES program is effective in Indian Country.

18. 40 C.F.R. § 122.26(b)(15)(I) defines the term “storm water discharge associated with small construction activity” to include storm water discharges from construction activities (such as clearing, grading, and excavation) that result in a disturbance of equal to or greater than one acre and less than five acres. Construction activity also includes the disturbance of less than one acre that is part of a larger common plan of development or sale if the larger common plan will ultimately disturb equal to or greater than one acre.

19. 40 C.F.R. § 122.26(c)(1) requires dischargers of storm water associated with small construction activity to apply for an individual NPDES permit, or seek coverage under a promulgated storm water general permit.

20. In 1992, EPA promulgated a Final NPDES General Permit for Storm Water Discharges for Construction Activities (Federal CGP). 57 FR 41176 (Sept. 9, 1992). EPA has modified and re-promulgated the Federal CGP a number of times. *See* 63 FR 7858 (Feb. 17, 1998); 63 FR 36490 (July 6, 1998); 65 FR 25122 (Apr. 28, 2000); 68 FR 39087 (July 1, 2003); 73 FR 40338 (July 14, 2008) and 77 FR 12286 (February 29, 2012).

21. The storm water permit requirements applicable to Respondent's construction activities at the Site prior to February 16, 2012, are set forth in detail in the Federal CGP effective June 30, 2008. (73 FR 40338, July 14, 2008) The storm water permit requirements for Respondent's construction activities at the Site after February 15, 2012, are set forth in detail in the Federal CGP effective February 16, 2012 (77 FR 12286, February 29, 2012).

22. Respondent did not apply for, or obtain, a NPDES permit prior to initiating construction activities at the Site.

23. 40 C.F.R. § 122.28(b)(2) requires dischargers to submit a written notice of intent to be covered by a general permit.

24. As late as May 29, 2012, Respondent had not submitted a notice of intent to be covered under the 2008 Federal CGP. As late as June 8, 2012, Respondent had not submitted a notice of intent to be covered under the 2012 Federal CGP.

25. Pursuant to the both the 2008 and 2012 versions of the Federal CGP, permittees are required, among other things, to develop a storm water pollution prevention plan (SWPPP).

26. The SWPPP must describe, among other things all best management practices (BMPs) to be used to meet the effluent limits set forth in the Federal CGP. Federal CGP Parts 5.1 and 5.3.A.

27. BMPs must be installed and maintained in effective operating condition, Federal CGP Part 3.6, and in accordance with good engineering practices, Federal CGP Part 3.
28. On May 24, 2011, EPA received a copy of a letter dated May 23, 2011 (May 23rd letter), from the Montana Department of Transportation (MDT) to the Respondent, regarding construction by the Respondent at the Two Medicine River portion of the Site.
29. The May 23rd letter confirmed that verbal permission had been granted to the Respondent for encroachment within the MDT Right-of-Way for the pipeline work at the Two Medicine River portion of the Site.
30. The May 23rd letter informed the Respondent that erosion and sediment control at the Two Medicine River portion of the Site were inadequate, and that Federal CGP coverage for work at the Two Medicine River portion of the Site could not be found on the EPA website. In the letter, MDT informed the Respondent that MDT encroachment permits require all applicable authorizations, including the "NPDES Construction Stormwater General Permit" be obtained.
31. The May 23rd letter informed the Respondent that the Two Medicine River portion of the Site had been discharging stormwater runoff to the Two Medicine River from the disturbed MDT Right-of-Way.
32. The May 23rd letter informed the Respondent that Respondent must immediately implement proper erosion and sediment controls to minimize the discharge of pollutants to surface waters, and that such corrective action must be completed by May 27, 2011.
33. On August 30, 2011, an EPA inspector went to the Two Medicine River portion of the Site to view and document the site conditions. During this inspection, the EPA inspector

observed that erosion controls consisted of straw rolls along both banks of the Two Medicine River, at the bottoms of bare, disturbed slopes. The inspector also observed a discharge of pollutants from the disturbed area of the Two Medicine River portion of the Site which clearly was of sediment flowing over the straw roll erosion controls into the Two Medicine River.

34. On August 30, 2011, the EPA inspector followed the pipeline route north from the Two Medicine River portion of the Site to the top of a fairly steep hill. The portion of the pipeline route observed by the EPA inspector consisted of bare, disturbed ground with no erosion controls in place.

35. On October 28, 2011, EPA received additional photos of the Two Medicine River portion of the Site by email from MDT (October 2011 MDT photos).

36. The October 2011 MDT photos showed no additional erosion controls had been installed at the Two Medicine River portion of the Site and that the existing erosion controls had not prevented sediment from eroding from the bare slope on the north side of the Two Medicine River and entering the Two Medicine River.

37. On March 29, 2012, an EPA inspector went to the Two Medicine River portion of the Site to view and document the site conditions. During this inspection, the EPA inspector observed that no additional erosion controls had been installed and a discharge of sediment laden water into the Two Medicine River. The discharge caused a visible sediment plume along the north bank.

38. On at least one date in 2011, prior to the May 23rd letter, MDT personnel observed a discharge to the Two Medicine River from Respondent's construction activities at the Site.

39. On March 29, 2012, EPA personnel observed a discharge to the Two Medicine River from Respondent's construction activities at the Site.
40. On June 7 and 9, 2011, July 21, 2011, September 3, 2011, October 8 and 25, 2011, April 5, 2012, and June 6, 2012, the National Weather Service's East Glacier, Montana Cooperative Weather Station rain gauge recorded that more than one half inch of rain fell in the vicinity of the Site.
41. On October 9, 2012, and November 20, 2012, an EPA inspector went to the Willow Creek portion of the Site to view and document site conditions. During these inspections, the EPA inspector observed that inadequate erosion controls were in place.
42. On June 7 and 9, 2011, October 8, 2011, and April 5, 2012, the National Weather Service's East Glacier, Montana Cooperative Weather Station rain gauge recorded that more than one inch of rain fell in the vicinity of the Willow Creek portion of the Site.
43. The EPA has not issued an NPDES permit nor issued an authorization for coverage under either the 2008 Federal CGP or the 2012 Federal CGP for Respondent's construction activities at the Site.
44. Respondent has discharged pollutants from the Site without authorization by the Permit, any other applicable general permit, or any individual permit, in violation of section 301(a) of the Act, 33 U.S.C. § 1311(a).

ORDER

45. Respondent consents and agrees to undertake additional stabilization efforts at the Willow Creek crossing depicted in the photograph attached as Exhibit A (Willow Creek) and the portion of the Two Medicine crossing depicted in the photograph attached as Exhibit B

(Two Medicine) that are consistent with the Criteria for Stabilization section of the National Pollutant Discharge Elimination System General Permit for Discharges from Construction Activities, effective February 16, 2012 (*See*, 77 Fed. Reg. 12286, February 29, 2012; *also see*, http://www.epa.gov/npdes/pubs/cgp2012_finalpermit.pdf) (2012 CGP). In particular, for Willow Creek and Two Medicine Respondent agrees to take measures consistent with section 2.2.2 of the 2012 CGP, and that final stabilization, as defined in section 2.2.2.1(a)(ii) of the 2012 CGP is achieved as quickly as practicable, but in no event later than August 30, 2014.

46. To meet the objectives in paragraph 45 above, Respondent shall:

- a. within thirty (30) days of Respondent's receipt of the Consent Order, submit a stabilization analysis of Willow Creek and Two Medicine to EPA for EPA review, comment and approval (or approval with modifications). The stabilization analysis shall include a detailed description of the status of presently existing stabilization efforts including dated photographs; a description of additional measures to be taken to ensure the objectives in paragraph 45 are met; and any other related information;
- b. submit an interim stabilization report to EPA within sixty (60) days of EPA's receipt of the stabilization analysis detailing all stabilization work conducted to that date and the status of Respondent's stabilization efforts; and
- c. thereafter, Respondent shall submit reports to EPA on a quarterly basis until EPA provides written notice to the Respondent that EPA accepts Respondent's report that final stabilization has been achieved at Willow Creek and Two Medicine. The first quarterly report shall cover the remainder of the month in which the interim stabilization report is submitted and the following three calendar months, and shall be due on the 10th day of

the following month. Subsequent reports shall be due on the 10th day of the month following each quarter.

47. Each quarterly report shall, at a minimum, contain: narrative descriptions of Site conditions at the end of the quarter; stabilization work performed at Willow Creek and Two Medicine in the quarter; work Respondent expects to perform at Willow Creek and Two Medicine in the following quarter; other information necessary for EPA to determine whether stabilization is being maintained, or final stabilization has been achieved; and thorough photographic documentation of all of the foregoing.

48. If Respondent observes at any time, or should observe, that stabilization at Willow Creek and Two Medicine is not achieved, or maintained, or that final stabilization may not be achieved by August 31, 2014, Respondent must inform EPA of such observations no later than the next quarterly report. The parties recognize that Respondent's previous stabilization efforts at Two Medicine have been affected by a third-party's pipeline failure, and that it is possible that third party activity or other unforeseen events again may affect Respondent's ability to reasonably meet the August 31, 2014, deadline, particularly at Two Medicine. EPA encourages Respondent to report such observations as early as possible so that EPA and Respondent may attempt to address the issue as quickly as possible.

49. Respondent shall send all written notices, documentation, and reports required by this Consent Order to:

David Rise
Environmental Protection Specialist (8MO)
U.S. EPA Region 8, Montana Office
10 W. 15th Street, Suite 3200
Helena, Montana 59626

50. If Respondent asserts a business confidentiality claim for information required to be submitted under this Consent Order, Respondent shall adhere to the procedures in 40 C.F.R. Part 2, subpart B. The EPA will determine if the information the Respondent has designated meets the criteria in 40 C.F.R. § 2.208 for being treated as confidential. Unless the Respondent asserts a confidentiality claim at the time the information is submitted, the EPA may make the information available to the public without further notice to Respondent.

51. Any failure to comply with the requirements of this Consent Order shall constitute a violation of this Consent Order and may subject Respondent to penalties as provided under the Act. 33 U.S.C. § 1319.

52. This Consent Order does not constitute a waiver or modification of the terms and conditions of the Federal CGP, which remains in full force and effect.

53. This Consent Order does not constitute a waiver of or election by the EPA to forego any civil or criminal action to seek penalties, fines or other relief under the Act. EPA acknowledges that the reservation of rights contained in this paragraph is limited by and to the extent of the terms the Final Order, which, by its terms constitutes a complete and full civil settlement of the United States' claims for civil penalties for the violations alleged in the Amended Complaint.

54. Nothing in this Consent Order shall be construed to prevent the EPA from instituting further action under section 309 of the Act for the violations cited in this Consent Order or to relieve Respondent from responsibilities, liabilities, or penalties pursuant to any applicable federal, state, or local law or regulation. EPA acknowledges that the reservation of rights contained in this paragraph also is limited by and to the extent of the terms the Final Order.

55. The undersigned representative of Respondent certifies that he is fully authorized to enter into the terms and conditions of this Consent Order and to bind Respondent to the terms and conditions of this Consent Order.

56. This Consent Order shall be effective immediately upon Respondent's receipt of a fully executed copy of this Consent Order.

**United States Environmental Protection
Agency Region 8,
Complainant.**

Date: 10/31/13

By: *Eddie A. Seena*
for Andrew M. Gaydosh
Assistant Regional Administrator
Office of Enforcement, Compliance, and
Environmental Justice

**Nelcon, Inc.,
Respondent.**

Date: 10/29/13

By: *M. P. White*
Mike P. White
President

Address the area inside the line



EXHIBIT A



Address this area

This area excluded

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the original and one true and correct copy of the foregoing administrative order for compliance on consent was hand-carried to the Regional Hearing Clerk:

Tina Artemis, Region 8 Hearing Clerk
United States Environmental Protection Agency, Region 8
1595 Wynkoop Street
Denver, Colorado 80202-1129
By Hand Delivery – Original and one true copy

and that a true copy of the same was sent via United States Postal Service, certified mail, return receipt requested no. 7009 3410 0000 2598 4860 to:

Rebecca L. Sommerville
Datsopoulos, MacDonald & Lind, P.C.
Central Square Building
201 West Main Street, Suite 201
Missoula, MT 59802

Date: November 1, 2013

By: Dayle Aldinger
Dayle Aldinger