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

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
) Docket No. CWA-07-2017-0203
Deffenbaugh Industries, Inc.)
d/b/a Johnny on the Spot)
Edwardsville, Kansas)
)
Respondent) COMPLAINT AND
) CONSENT AGREEMENT/
) FINAL ORDER
Proceedings under Section 309(g) of the)
Clean Water Act, 33 U.S.C. § 1319(g))
_____)

COMPLAINT

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 ("Consolidated Rules"), 40 C.F.R. Part 22.

2. Complainant, the U.S. Environmental Protection Agency, Region 7 ("EPA") and Respondent, Deffenbaugh Industries, Inc., d/b/a Johnny-On-The-Spot or JOHNNY-ON-THE-SPOT ("Respondent" or "JOTS"), 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) and (3) of the Consolidated Rules, 40 C.F.R. §§ 22.13(b) and 22.18(b)(2) and (3).

3. This Complaint and Consent Agreement/Final Order ("CA/FO") alleges that the EPA has reason to believe that the Respondent, JOTS, violated Section 402 of the CWA, 33 U.S.C. § 1342, and regulations promulgated thereunder.

Parties

4. The authority to take action under Section 309(g) of the CWA, 33 U.S.C. § 1319(g), is vested in the Administrator of the EPA. The Administrator has delegated this authority to the Regional Administrator, EPA, Region 7, who in turn has delegated the authority under Section

309(g) to the Director of the Water, Wetlands and Pesticides Division of EPA, Region 7 (collectively referred to as the “Complainant”).

5. Respondent is and was at all relevant times a corporation under the laws of the state of Missouri and registered in the state of Kansas.

Statutory and Regulatory Framework

6. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants, except in compliance with, *inter alia*, Section 402 of the CWA, 33 U.S.C. § 1342. Section 402 of the CWA, provides that pollutants may be discharged in accordance with the terms of a National Pollutant Discharge Elimination System (“NPDES”) permit issued pursuant to that Section.

7. The 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 the CWA, 33 U.S.C. § 1362.

8. Section 402(p) of the 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 the 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 the CWA.

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

10. 40 C.F.R. §§ 122.26(a)(1)(ii) and 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. 40 C.F.R. § 122.26(b)(14) defines “stormwater discharge 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 material storage areas at an industrial plant.” Included in the categories of facilities considered to be engaging in “industrial activity” are transportation facilities under Standard Industrial Classifications (“SIC”) 42. *See* 40 C.F.R. §122.26(b)(14)(viii). SIC code 4212 specifically includes establishments primarily engaged in furnishing trucking or transfer services without storage for freight generally weighing more than 100 pounds, in a single municipality, contiguous municipalities, or a municipality and its suburban areas.

12. The Kansas Department of Health and Environment (“KDHE”) is the state agency within the state of Kansas that has been authorized by the EPA to administer the federal NPDES program pursuant to Section 402 of the CWA, 33 U.S.C. § 1342, and applicable implementing regulations.

13. Pursuant to Section 402(i) of the CWA, 33 U.S.C. § 1342(i), the EPA retains

concurrent enforcement authority with authorized states for violations of the CWA.

EPA's General Allegations

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

15. At all times relevant for this action, Respondent was the owner and/or operator of a portable toilet service and maintenance facility (the "Site"), operating under SIC code 4212, comprised of approximately five and one-half acres located at 10011 Woodend Road, Edwardsville, in Wyandotte County, Kansas. Respondent has ceased processing portable toilets at the Site.

16. The Site was a portable toilet processing facility that processed and cleaned portable toilets and used a diluted blue-colored formaldehyde-based liquid (trade name "Destroyer x600") in the waste tanks of the portable toilets. Formaldehyde is listed as a hazardous substance in 40 C.F.R. § 116.4. Respondent conducted certain portable toilet processing activities outdoors at the Site including, but not limited to:

- a. Loading and unloading portable toilets containing sanitary waste mixed with Destroyer x600 or Destroyer x600 alone in waste tanks;
- b. Pumping out sanitary waste mixed with diluted Destroyer x600 from portable toilet waste tanks into vacuum trucks;
- c. Filling portable toilet waste tanks with diluted Destroyer x600; and
- d. Power-washing the interior and exterior of approximately five percent of all portable toilets processed at the Site outside of the operations building.

17. The Site is bounded approximately 75 yards to the south by the Kansas River and approximately 30 yards to the east by Betts Creek. Stormwater, snow melt, surface drainage and runoff water left the Site and discharged either east to Betts Creek, which flows to the Kansas River, or south to the Kansas River.

18. Stormwater runoff from discharges associated with industrial activities contains "pollutants" as defined by Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

19. Respondent's facility was in the category of facilities considered to be engaging in industrial activity under 40 C.F.R. § 122.26(b)(14)(viii) and to have "stormwater discharges associated with industrial activity" as defined by 40 C.F.R. § 122.26(b)(14).

20. Stormwater discharges associated with industrial activity are "point sources" as defined by Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

21. Betts Creek and the Kansas River identified in Paragraph 17, above, are "navigable waters" as defined by Section 502(7) of the CWA, 33 U.S.C § 1362(7).

22. Stormwater runoff from industrial activity at Respondent's above referenced facility resulted in the addition of pollutants from a point source to navigable waters, and thus the "discharge of a pollutant" as defined by CWA Section 502(12), 33 U.S.C. § 1362(12), requiring a permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

23. On September 2, 2014, KDHE granted authorization under a 2011 general NPDES Permit No. KSR000941, effective from November 1, 2011 to October 31, 2016, to the Site for discharges of stormwater runoff to Betts Creek and the Kansas River, subject to compliance with conditions and limitations set forth in the applicable NPDES Permit. KDHE renewed the general permit in 2016, effective from November 1, 2016 to October 31, 2021, and the Site's authorization automatically continued under the 2016 Permit. For purposes of this action, the provisions of the 2011 and 2016 Permits are significantly similar (hereinafter "NPDES Permit").

24. On October 3 and October 7, 2016, the EPA performed an Industrial Stormwater Inspection ("Inspection") of the Site under the authority of Section 308(a) of the CWA, 33 U.S.C. § 1318(a), to evaluate Respondent's compliance with its Permit and the CWA.

25. During the Inspection, the EPA inspector reviewed the Respondent's records and obtained copies of Respondent's documents related to the Permit, including, but not limited to, the Site's stormwater pollution prevention plan dated February 2013 (hereafter "SWPPP"), SWPPP inspection records, annual report records, and wastewater haul bills. The EPA inspector also toured the Site, observed discharge locations and photographed various stormwater-related areas.

26. A Notice of Potential Violation ("NOPV") was issued by the EPA inspector at the conclusion of the Inspection.

27. By letter dated October 17, 2016, the Respondent submitted information to the EPA inspector, "Requested Response to the October 7, 2016 Notice of Potential Permit Violations" (hereinafter "Response").

28. A copy of the Inspection report was sent to Respondent by the EPA by letter dated January 11, 2017.

EPA's Specific Allegations

Count 1

Failure to Implement SWPPP / Failure to Implement Adequate Best Management Practices

29. The allegations stated in Paragraphs 1 through 28 above are re-alleged and incorporated herein by reference.

30. Respondent's NPDES Permit for the Site authorized the discharge of stormwater runoff from industrial activity on the Site in accordance with the limitations and conditions set forth in the Permit and associated SWPPP. Part 2 of Respondent's NPDES Permit required the

development of a SWPPP that must include, among other things, stormwater management controls and Best Management Practices (“BMPs”). Part 2.1 of Respondent’s NPDES Permit required the permittee to fully implement the SWPPP.

31. Section 6, Table 4 of Respondent’s SWPPP provides a list of BMPs for the Site, including, but not limited to:

- a. Use designated wash bay for portable toilet washing;
- b. Provide barriers such as dikes to contain spills;
- c. Clean up spills or leaks using absorbent materials and dispose of properly; and
- d. Use spill and overflow protection.

32. During the EPA Inspection, the inspector observed portable toilets being washed outdoors. Respondent’s personnel interviewed during the inspection described this as a repeated practice, suggesting that the BMPs in the SWPPP were not being implemented.

33. During the EPA Inspection, the inspector observed puddles he believed to be sanitary wastewater in the toilet processing area, indicating that the BMPs in the SWPPP were not being implemented or were inadequate. Personnel interviewed during the inspection stated that the puddles would be vacuumed up later by a pumper truck, which is not a BMP in the SWPPP and may not be an adequate BMP.

34. Monthly and quarterly visual examination reports indicate that blue stains outside the operations building and in the parking area were frequently observed and occasionally cleaned up, if at all, by power-washing, indicating that the BMPs in the SWPPP may not have been consistently implemented or were inadequate.

35. Respondent’s alleged failure to consistently implement portions of the SWPPP, implement control measures and/or install BMPs is a violation of the conditions of Respondent’s NPDES Permit, and as such, is a violation of Section 402(p) of the CWA, 33 U.S.C. § 1342(p).

**Count 2
Failure to Adequately Document Corrective Actions**

36. The allegations stated in Paragraphs 1 through 35 above are re-alleged and incorporated herein by reference.

37. Part 2.4.3 (d) of Respondent’s NPDES Permit for the Site required Respondent to conduct and document SWPPP site inspections at a minimum of once per quarter and to track follow-up procedures to ensure appropriate actions be taken to resolve deficiencies. The inspection report shall also include completion dates for correction of all deficiencies.

38. A review of quarterly site inspection records provided by the Site during the EPA inspection indicated that follow-up procedures or corrective actions in response to deficiencies found during site evaluations were not always documented, not clear, nor did the reports contain the dates of when deficiencies were corrected.

39. Respondent's alleged failure to adequately document corrective actions resulting from site inspections is a violation of the conditions of Respondent's NPDES Permit, and as such, is a violation of Section 402(p) of the CWA, 33 U.S.C. § 1342(p).

**Count 3
Failure to Conduct Employee Training**

40. The allegations stated in Paragraphs 1 through 39 above are re-alleged and incorporated herein by reference.

41. Part 2.4.3 (e) of Respondent's NPDES Permit for the Site required Respondent to include in its SWPPP a training program for new and existing staff to inform personnel responsible for implementing activities identified in the SWPPP or otherwise responsible for stormwater management, at all levels of responsibility, of the components and goals of the SWPPP.

42. Section 8.2 of Respondent's SWPPP for the Site stated that, among other things, the annual compliance site evaluation shall include documentation of employee training. Further, Sections 2.2 and 2.3 of Respondent's SWPPP identified pollution prevention team members, and stated that employees responsible for implementing the SWPPP receive training. A blank form that listed general areas of training was attached to the SWPPP at Appendix 1B.

43. During the EPA Inspection, the inspector noted that the Site failed to complete records of employee training for all employees responsible for implementing activities identified in the SWPPP or all SWPPP team members identified in the SWPPP.

44. Respondent's alleged failure to retain records of employee training is a violation of the conditions of Respondent's NPDES Permit, and as such, is a violation of Section 402(p) of the CWA, 33 U.S.C. § 1342(p).

**Count 4
Failure to Conduct Comprehensive Site Compliance Evaluations**

45. The allegations stated in Paragraphs 1 through 44 above are re-alleged and incorporated herein by reference.

46. Part 2.4.4 of Respondent's NPDES Permit for the Site required Respondent to conduct and document a comprehensive site compliance evaluation at least once a year and keep a report of the evaluation on site.

47. During the Inspection, the EPA inspector noted that the Site did not have a record of a comprehensive site compliance evaluation performed for 2014. Further, personnel interviewed during the Inspection stated that evaluations had not been performed for 2014.

48. Respondent's alleged failure to conduct annual comprehensive site compliance evaluations is a violation of the conditions of Respondent's NPDES Permit, and as such, is a violation of Section 402(p) of the CWA, 33 U.S.C. § 1342(p).

Count 5

Failure to Perform Visual Stormwater Quality Discharge Examinations

49. The allegations stated in Paragraphs 1 through 48 above are re-alleged and incorporated herein by reference.

50. Part 2.4.5 of Respondent's NPDES Permit required the Site to perform and document a visual examination of stormwater discharge at least once per year. This examination was to include visual examination and documentation of a stormwater discharge from the Site's outfalls during a precipitation event, to observe quality of stormwater discharge including any presence of color, odor, clarity, floating solids, suspended solids, foam, oil sheen, or other indicators of stormwater pollution. Visual examination reports and records were to be maintained onsite and be made available for KDHE and EPA inspection.

51. During the EPA Inspection, the inspector determined that the Site did not have records of stormwater quality discharge examinations performed for 2014 or 2015. The inspector noted that the 2015 comprehensive site evaluations records stated that the stormwater quality discharge examination was not conducted for that year. Further, personnel interviewed during the Inspection indicated that these examinations had not been conducted in 2014 or 2015.

52. Respondent's alleged failure to conduct annual stormwater quality discharge examinations is a violation of the conditions of Respondent's NPDES Permit, and as such, is a violation of Section 402(p) of the CWA, 33 U.S.C. § 1342(p).

Penalty

53. As alleged in the preceding Counts, and pursuant to Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), as adjusted pursuant to 40 C.F.R. § 19.4, Respondent is potentially liable for civil penalties of up to \$20,965 per day for each day during which the violation continues up to a total statutory maximum civil penalty of \$262,066.

CONSENT AGREEMENT

54. Respondent and the EPA agree to the terms of this CA/FO.

55. Respondent admits the jurisdictional allegations of this CA/FO and agrees not to contest the EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of this CA/FO.

56. Respondent neither admits nor denies the factual allegations and legal conclusions asserted by the EPA in this Complaint and CA/FO.

57. Respondent waives its right to contest the allegations and its right to appeal this CA/FO.

58. 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.

59. The undersigned representative(s) 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.

60. Respondent understands and agrees that this CA/FO shall apply to and be binding upon Respondent and Respondent' agents, successors and/or assigns in the event of a change of ownership before the expiration of payment of the penalty as set forth below. 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.

61. Respondent certifies by the signing of this CA/FO that Respondent's portable toilet service and maintenance operations at the Site are in compliance with the Clean Water Act because it has ceased its operations at the Site and is no longer operating under NPDES Permit No. KSR000941.

Penalty Payment

62. Respondent agrees that, in settlement of the claims alleged in this Consent Agreement/Final Order, Respondent shall pay a civil penalty of **Twenty-Two Thousand Dollars (\$22,000)** pursuant to the authority of Section 309(g) of the CWA, 33 U.S.C. § 1319(g), to be paid in full no later than thirty (30) days after the effective date of this CA/FO as set forth in Paragraph 73 below.

63. The payment of penalties must reference docket number "CWA-07-2017-0203" and be remitted using one of the payment methods specified in Appendix A to this Order.

64. Copies of the checks or verification of another payment method for the penalty payments remitted as directed by above, shall be mailed to:

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

and

Shane E. C. McCoin
U.S. Environmental Protection Agency – Region 7

11201 Renner Boulevard
Lenexa, Kansas 66219.

65. Respondent agrees that 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.

66. Respondent understands that, pursuant to 40 C.F.R. § 13.18, interest on any late payment will be assessed at the annual interest rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717. The interest will be assessed on any overdue amount from the due date through the date of payment. Failure to pay the civil penalty when due may result in the commencement of a civil action in Federal District Court to collect said penalty, together with costs or interest.

Effect of Settlement and Reservation of Rights

67. Respondent's payment of the entire civil penalty pursuant to this CA/FO resolves all civil and administrative claims pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), for alleged violations identified in this Complaint and Consent Agreement/Final Order. Complainant reserves the right to take any enforcement action with respect to any other violations of the CWA or any other applicable law.

68. The effect of settlement described above is conditional upon the accuracy of the Respondent's representations to the EPA, as memorialized in Paragraph 61 of this Consent Agreement/Final Order.

69. Nothing contained in 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.

70. Notwithstanding any other provision of this CA/FO, the EPA reserves the right to enforce the terms of this CA/FO by initiating a judicial or administrative action pursuant to Section 309 of the CWA, 33 U.S.C. § 1319, and to seek penalties against Respondent or to seek any other remedy allowed by law if Respondent fails to comply with its obligations under this CA/FO.

71. With respect to matters not addressed in this Consent Agreement/Final Order, the EPA reserves the right to take any enforcement action pursuant to the CWA and its implementing regulations, or any other available legal authority, including without limitation, the right to seek injunctive relief, penalties and damages.

General Provisions

72. The Parties acknowledge that this CA/FO is subject to the public notice and comment required pursuant to Section 309(g)(4) of the CWA, 33 U.S.C. § 1319(g)(4), and 40 C.F.R. § 22.45.

73. Pursuant to 40 C.F.R. § 22.31(b), this CA/FO shall be effective after signature by the authorized regional official and upon filing with the Regional Hearing Clerk, U.S. Environmental Protection Agency, 11201 Renner Boulevard, Lenexa, Kansas 66219. All time periods herein shall be calculated therefrom in calendar days unless otherwise provided in this Consent Agreement/Final Order. The EPA agrees to provide notice to Respondent by email when this CA/FO is filed with the Regional Hearing Clerk. Further, pursuant to 40 C.F.R. § 22.5(b), upon filing, this CA/FO shall be served on Respondent.

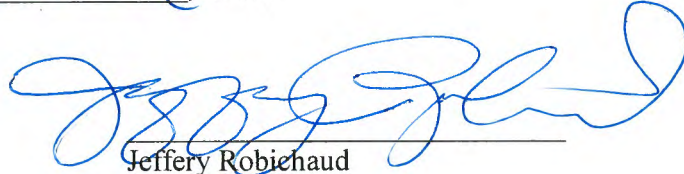
74. The state of Kansas has been provided an opportunity to consult with Complainant regarding this matter in accordance with the requirements of 40 C.F.R. § 22.38(b) and Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1).

75. The headings in this CA/FO are for convenience of reference only and shall not affect interpretation of this Consent Agreement/Final Order.

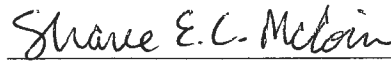
76. Respondent and Complainant agree that this CA/FO may be signed in part and counterpart.

For the Complainant, U.S. Environmental Protection Agency:

Issued this 10TH day of OCTOBER, 2017.



Jeffery Robichaud
Acting Director
Water, Wetlands and Pesticides Division



Shane E. C. McCain
Assistant Regional Counsel
Office of Regional Counsel

For the Respondent, Deffenbaugh Industries, Inc., d/b/a Johnny on the Spot:



Signature

8/17/17

Date

Michael J. Watson

Name

President - Deffenbaugh Industries

Title

FINAL ORDER

Pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), and 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 foregoing Consent Agreement resolving this matter is hereby ratified and incorporated by reference into this Final Order.

The Respondent is ORDERED to comply with all of the terms of the Consent Agreement. In accordance with 40 C.F.R. § 22.31(b), the effective date of the foregoing Consent Agreement and this Final Order is the date on which this Final Order is filed with the Regional Hearing Clerk.

IT IS SO ORDERED.

Oct. 11, 2017
Date

Karina Baroneo
Regional Judicial Officer

**APPENDIX A
PENALTY PAYMENT INFORMATION**

CHECK PAYMENTS:

US Environmental Protection Agency
Fines and Penalties - CFC
PO Box 979077
St. Louis, MO 63197-9000

WIRE TRANSFERS:

Wire transfers should be directed to the Federal Reserve Bank of New York

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"

OVERNIGHT MAIL:

U.S. Bank
1005 Convention Plaza
Mail Station SL-MO-C2GL
ATTN Box 979077
St. Louis, MO 63101
Contact: Natalie Pearson 314-418-4087

ACH (also known as REX or remittance express):

Automated Clearinghouse (ACH) for receiving US currency

PNC Bank
808 17th Street, NW
Washington, DC 20074
Contact: Jesse White 301-887-6548
ABA = 051036706
Transaction Code 22 - checking
Environmental Protection Agency
Account 310006
CTX Format

ONLINE PAYMENT:

There is now an On Line Payment Option, available through the Dept. of Treasury.
This payment option can be accessed from the information below:

WWW.PAY.GOV
Enter "SFO 1.1" in the search field

Open form and complete required fields.