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EPA--REGION 10

BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:

GARY MERLINO
CONSTRUCTION COMPANY,
Seattle, Washington

Respondent.

DOCKET NO. CWA-10-2013-0079

**CONSENT AGREEMENT AND
FINAL ORDER**

I. STATUTORY AUTHORITY

1.1. This Consent Agreement and Final Order (CAFO) is issued under the authority vested in the Administrator of the U.S. Environmental Protection Agency (EPA) by Section 309(g)(2)(B) of the Clean Water Act (CWA), 33 U.S.C. § 1319(g)(2)(B).

1.2. The Administrator has delegated the authority to issue the Final Order contained in Part V of this CAFO to the Regional Administrator of EPA Region 10, who has redelegated this authority to the Regional Judicial Officer in EPA Region 10.

1.3. Pursuant to Section 309(g)(1) and (g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(1) and (g)(2)(B), and in accordance with the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties," 40 C.F.R. Part 22, EPA issues, and Gary Merlino Construction Company (Respondent) agrees to issuance of, the Final Order contained in Part V of this CAFO.

II. PRELIMINARY STATEMENT

2.1. In accordance with 40 C.F.R. §§ 22.13(b) and 22.45(b), issuance of this CAFO commences this proceeding, which will conclude when the Final Order contained in Part V of this CAFO becomes effective.

2.2. The Director of the Office of Compliance and Enforcement, EPA Region 10 has been delegated the authority to sign consent agreements between EPA and the parties against whom Class II penalties pursuant to CWA Section 309(g), 33 U.S.C. § 1319(g), are proposed to be assessed.

2.3. Part III of this CAFO contains a concise statement of the factual and legal basis for the alleged violations of the CWA, together with the specific provisions of the CWA and implementing regulations that Respondent is alleged to have violated.

III. ALLEGATIONS

3.1. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the “discharge of a pollutant” by any person into navigable waters of the United States, except, *inter alia*, as authorized by a National Pollutant Discharge Elimination System (“NPDES”) permit issued pursuant to Section 402 of the Act, 33 U.S.C. § 1342. Section 402(a) of the CWA, 33 U.S.C. § 1342(a), provides that a state with an approved NPDES program may issue permits for the discharge of pollutants into waters of the United States upon such specific terms and conditions as the state may prescribe.

3.2. Section 502(12) of the CWA, 33 U.S.C. § 1362(12), defines “discharge of a pollutant” to include “any addition of any pollutant to navigable waters from any point source.” Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines “navigable waters” as “waters of the United States.” EPA’s regulations define “waters of the United States” to include waters that are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce; all interstate waters; and tributaries to those waters. 40 C.F.R. § 122.2.

3.3. Section 502(6) of the CWA, 33 U.S.C. § 1362(6), defines “pollutant” to include, *inter alia*, dredged spoil, rock, sand, chemical wastes and industrial waste.

3.4. Section 502(14) of the Clean Water Act, 33 U.S.C. § 1362(14), defines the term “point source” to include any “pipe, ditch, channel, tunnel, or conduit... from which pollutants are or may be discharged.”

3.5. Section 402(p) of the Act, 33 U.S.C. § 1342(p), specifies that an NPDES permit is required for any storm water discharge “associated with industrial activity.”

3.6. The State of Washington has a federally approved NPDES program administered by the Washington Department of Ecology (Ecology).

3.7. In October 2009, Ecology reissued the Washington Industrial Stormwater General Permit (“Storm Water GP”) pursuant to Section 402 of the CWA, 33 U.S.C. § 1342. The Storm Water GP became effective on January 1, 2010 and authorizes certain discharges of storm water associated with industrial activity at permitted facilities. Permittees are required to comply with the conditions and requirements set forth in the Storm Water GP.

3.8. Respondent is a corporation duly organized under the laws of the State of Washington and is therefore a “person” as defined under Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

3.9. At all times relevant to this action, Respondent was the owner and/or operator of the construction storage yard and maintenance facility (“Facility”) located in Seattle, Washington. At all times relevant to these allegations, the Facility had coverage under the Storm Water GP.

3.10. The Facility, which was under Respondent’s control at all times relevant to this action, discharges storm water into a storm water drainage system that flows into an unnamed creek that flows approximately one quarter mile into the Duwamish River. The Facility’s storm

water discharges contain “pollutants,” including but not limited to turbidity, within the meaning of Section 502(6) and (12) of the CWA, 33 U.S.C. § 1362(6) and (12).

3.11. The Duwamish River is currently used, was used in the past, or may be susceptible to use in interstate and foreign commerce, and thus the Duwamish River is a “navigable water” as defined in Section 502(7) of the CWA, 33 U.S.C. § 1362(7), and a “water of the United States” as defined in 40 C.F.R. § 122.2. As a tributary to the Duwamish River, the unnamed creek to which the Facility discharges storm water is a “navigable water” as defined in Section 502(7) of the CWA, 33 U.S.C. § 1362(7), and a “water of the United States” as defined in 40 C.F.R. § 122.2.

3.12. The Facility is a point source within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14), and 40 C.F.R. § 122.2. In the alternative, the Facility contains point sources.

3.13. On or about October 21, 2009, Respondent was authorized to operate the Facility under the Storm Water GP and assigned permit no. WAR003120.

Count 1: Violation of Condition S8.D of the Storm Water GP

3.14. Condition S4. and S5. of the Storm Water GP require the permittee to sample the storm water discharge from each designated location at least once per quarter as specified in the benchmark and sampling requirements in Table 2 of the permit. Table 2 includes benchmark values and sampling requirements for certain parameters, including turbidity and zinc. If a discharge exceeds a benchmark listed in Table 2, Condition S5.A.3. requires the permittee to take the actions specified in Condition S8. of the permit.

3.15. Condition S8.D. of the Storm Water GP requires a permittee to complete a Level Three Corrective Action whenever it exceeds an applicable benchmark value for any three quarters during a calendar year. A Level Three Corrective Action includes: review of the storm water pollution prevention plan (SWPPP) to ensure permit compliance; revision of the SWPPP

to include additional treatment best management practices (BMPs) with the goal of achieving the applicable benchmark value(s) in future discharges; signature and certification of the revised SWPPP in accordance with permit conditions; design and stamping of the portion of the SWPPP that addresses storm water treatment structures or processes by a licensed professional engineer, geologist, hydrogeologist, or Certified Professional in Storm Water Quality; summary of the Level Three Corrective Action (planned or taken) in the annual report; and full implementation of the revised SWPPP, including installation of necessary treatment BMPs, as soon as possible but no later than September 30th the year following that in which the Level Three Corrective Action was triggered.

3.16. Condition S9. of the Storm Water GP requires a permittee to submit sampling results to Ecology.

3.17. Respondent's sampling data shows exceedances of applicable Table 2 benchmark values during at least three (3) quarters during calendar year 2010. Specifically, storm water discharge samples from the Facility exceeded the benchmark value for zinc all four (4) quarters of 2010 and that for turbidity during three (3) quarters in 2010. Therefore, under the Storm Water GP, Respondent was required to complete a Level Three Corrective Action for both zinc and turbidity as soon as possible, but no later than September 30, 2011.

3.18. Respondent failed to complete the Level Three Corrective Action requirements for zinc by September 30, 2011, in violation of Condition S8.D. of the Storm Water GP.

3.19. Respondent failed to complete the Level Three Corrective Action requirements for turbidity by September 30, 2011, in violation of Condition S8.D of the Storm Water GP.

Count 2: Violation of Condition S3.B.4.b.i.2 of the Storm Water GP

3.20. Condition S3.B.4.b.i.2. of the Storm Water GP requires that a permittee keep all dumpsters under cover or fit with a lid that must remain closed when not in use.

3.21. During an EPA inspection of the Facility on March 21, 2012, the EPA observed two dumpsters at the Facility that were not under cover and did not have lids.

3.22. Respondent failed to keep all dumpsters under cover or fit with a lid in violation of Condition S3.B.4.b.i.2. of the Storm Water GP.

3.23. Under Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1), EPA may assess an administrative penalty when EPA finds that “any person has violated any permit condition or limitation ... in a permit issued” pursuant to Section 402 of the CWA, 33 U.S.C. § 1342. Consequently, under Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), and 40 C.F.R. Part 19, Respondent is liable for the administrative assessment of civil penalties for violations at the Facility in an amount not to exceed \$16,000 per day for each day during which the violation continues, up to a maximum of \$177,500.

IV. CONSENT AGREEMENT

4.1. Respondent admits the jurisdictional allegations contained in Part III of this CAFO.

4.2. Respondent neither admits nor denies the specific factual allegations contained in Part III of this CAFO.

4.3. As required by Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3), EPA has taken into account the nature, circumstances, extent, and gravity of the alleged violations as well as Respondent’s economic benefit of noncompliance, ability to pay, and other relevant factors. After considering all of these factors, EPA has determined and Respondent agrees that an appropriate penalty to settle this action is THIRTY-SIX THOUSAND DOLLARS (\$36,000).

4.4. Respondent agrees to pay the total civil penalty set forth in Paragraph 4.3 within thirty (30) days of the effective date of the Final Order.

4.5. Payment under this CAFO must be made by cashier's check or certified check payable to the order of "Treasurer, United States of America" and delivered via United States mail to the following address:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000

Respondent must note on the check the title and docket number of this action.

4.6. Respondent must deliver via United States mail a photocopy of the check described in Paragraph 4.5 to the Regional Hearing Clerk and EPA Region 10 at the following addresses:

Regional Hearing Clerk
U.S. Environmental Protection Agency
Region 10, Mail Stop ORC-158
1200 Sixth Avenue, Suite 900
Seattle, WA 98101

Chae Park
U.S. Environmental Protection Agency
Region 10, Mail Stop OCE-133
1200 Sixth Avenue, Suite 900
Seattle, WA 98101

4.7. If Respondent fails to pay the penalty assessed by this CAFO in full by the due date set forth in Paragraph 4.4, the entire unpaid balance of penalty and accrued interest shall become immediately due and owing. Such failure may also subject Respondent to a civil action to collect the assessed penalty under the CWA, together with interest, fees, costs, and additional penalties described below. In any collection action, the validity, amount, and appropriateness of the penalty shall not be subject to review.

4.7.1. Interest. Pursuant to Section 309(g)(9) of the CWA, 33 U.S.C.

§ 1319(g)(9), any unpaid portion of the assessed penalty shall bear interest at a rate

established by the Secretary of Treasury pursuant to 31 U.S.C. § 3717(a)(1) from the effective date of the Final Order set forth in Part V, provided however, that no interest shall be payable on any portion of the assessed penalty that is paid within thirty (30) days of the effective date of the Final Order.

4.7.2. Attorneys Fees, Collection Costs, Nonpayment Penalty. Pursuant to Section 309(g)(9) of the CWA, 33 U.S.C. § 1319(g)(9), if Respondent fails to pay on a timely basis the penalty set forth in Paragraph 4.3, Respondent shall pay (in addition to any assessed penalty and interest) attorneys fees and costs for collection proceedings and a quarterly nonpayment penalty for each quarter during which such failure to pay persists. Such nonpayment penalty shall be in an amount equal to twenty percent (20%) of the aggregate amount of Respondent's penalties and nonpayment penalties which are unpaid as of the beginning of such quarter.

4.8. The penalty described in Paragraph 4.3, including any additional costs incurred under Paragraph 4.7, above, represents an administrative civil penalty assessed by EPA and shall not be deductible for purposes of federal taxes.

4.9. The undersigned representative of Respondent certifies that he or she is authorized to enter into the terms and conditions of this CAFO and to bind Respondent to this document.

4.10. Except as described in Subparagraph 4.7.2, above, each party shall bear its own fees and costs in bringing or defending this action.

4.11. Respondent expressly waives any right to contest the allegations and waives any right to appeal the Final Order set forth in Part V.

4.12. The provisions of this CAFO shall bind Respondent and its agents, servants, employees, successors, and assigns.

4.13. The above provisions are STIPULATED AND AGREED upon by Respondent and EPA Region 10.

DATED:

3/19/2013

FOR GARY MERLINO CONSTRUCTION CO.:



Name: *Gary Merlino*
Title: *President*

DATED:

3/28/2013

FOR U.S. ENVIRONMENTAL PROTECTION AGENCY:



EDWARD J. KOWALSKI
Director
Office of Compliance and Enforcement

V. FINAL ORDER

5.1. The terms of the foregoing Parts I-IV are ratified and incorporated by reference into this Final Order. Respondent is ordered to comply with the terms of settlement.

5.2. This CAFO constitutes a settlement by EPA of all claims for civil penalties pursuant to the CWA for the violations alleged in Part III. In accordance with 40 C.F.R. § 22.31(a), nothing in this CAFO shall 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. This CAFO does not waive, extinguish or otherwise affect Respondent's obligations to comply with all applicable provisions of the CWA and regulations promulgated or permits issued thereunder.

5.3. In accordance with Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1), and 40 C.F.R. § 22.38(b), the Washington Department of Ecology has been given the opportunity to consult with EPA regarding the assessment of the administrative civil penalty against Respondent.

5.4. 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(b), EPA has issued public notice of and provided reasonable opportunity to comment on its intent to assess an administrative penalty against Respondent. More than 40 days have elapsed since issuance of this public notice and EPA has received no petition to set aside the Consent Agreement contained herein.

5.5. This Final Order shall become effective upon filing.

SO ORDERED this 7th day of May, 2013.



THOMAS M. JAHNKE
Regional Judicial Officer, U.S. Environmental Protection Agency, Region 10

Certificate of Service

The undersigned certifies that the original of the attached **CONSENT AGREEMENT AND FINAL ORDER, In the Matter of : Gary Merlino Construction Company, Docket No.: CWA-10-2013-0079**, was filed with the Regional Hearing Clerk and served on the addressees in the following manner on the date specified below:


The undersigned certifies that a true and correct copy of the document was delivered to:

Endre M. Szalay
U.S. Environmental Protection Agency
Office of Regional Counsel
1200 Sixth Avenue, ORC-158
Suite 900
Seattle, Washington 98101

Further, the undersigned certifies that a true and correct copy of the aforementioned document was placed in the United States mail certified/return receipt to:

Jimmy Blais
Environmental Manager
Gary Merlino Construction Company
9125 - 10th Avenue South
Seattle, Washington 98108

DATED this 13th day of May, 2013


Signature

Candace H. Smith
Regional Hearing Clerk
EPA Region 10