



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 4
ATLANTA FEDERAL CENTER
61 FORSYTH STREET
ATLANTA, GEORGIA 30303-8960

CERTIFIED MAIL 7009 0960 0000 2366 0093
RETURN RECEIPT REQUESTED

APR 29 2010

Mr. William W. Toole
Robinson, Bradshaw, and Hinson, P.A.
101 North Tryon Street, Suite 1900
Charlotte, North Carolina 28248

Re: Consent Agreement and Final Order
Docket No. CWA-04-2010-4506(b)
Crescent Resources, LLC – City Boulevard Roadway Improvements
Charlotte, North Carolina

Dear Mr. Toole:

Enclosed please find a fully executed copy of the Consent Agreement and Final Order that has been finalized by the Environmental Protection Agency and the Regional Judicial Officer. Please make note of the provisions under Section IV. Payment.

Should you have any questions or problems, please contact Humberto Guzman at (404) 562-8942.

Sincerely,

César A. Zapata, Acting Chief
Clean Water Enforcement Branch
Water Protection Division

Enclosure

cc: North Carolina Department of Natural
Resources, Division of Water Quality
North Carolina Department of Natural
Resources, Division of Land Resources
Mr. Steven Gucciardi – City of Charlotte

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4

HEARINGS CLERK

2010 APR 23 AM 10:24

EPA REGION 4

IN THE MATTER OF:) CONSENT AGREEMENT AND
) FINAL ORDER
CRESCENT RESOURCES, LLC)
CITY BOULEVARD (US-29)/ NC-49)
ROADWAY IMPROVEMENTS)
CHARLOTTE, NORTH CAROLINA) DOCKET NO. CWA-04-2010-4506(b)
)

CONSENT AGREEMENT

I. Statutory Authority

1. This is a civil penalty proceeding pursuant to Section 309(g)(2)(A) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(g)(2)(A), and the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders and the Revocation, Termination or Suspension of Permits*, including Subpart I, published at 64 Fed. Reg. 40176 (July 23, 1999) and codified at 40 Code of Federal Regulations ("C.F.R.") Part 22.

2. The authority to take action under Section 309(g)(2)(A) of the CWA, 33 U.S.C. § 1319(g)(2)(A), is vested in the Administrator of the United States Environmental Protection Agency ("EPA"). The Administrator has delegated this authority to the Regional Administrator, Region 4, who in turn has delegated this authority to the Director of the Water Management Division, who in turn has delegated this authority to the Chief of the Water Programs Enforcement Branch of EPA, Region 4 ("Complainant").

II. Allegations

3. Crescent Resources, LLC ("Crescent"), is a limited liability company formed under the laws of the State of Georgia and, therefore, is a "person" within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

4. At all times relevant to this action, Crescent owned and/or operated a construction site known as City Boulevard (US-29)/NC-49 Roadway Improvements ("Development") in Charlotte, North Carolina.

5. 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.

6. Section 402 of the CWA, 33 U.S.C. § 1342, establishes an NPDES Permit Program authorizing EPA or authorized states to administer the NPDES Permit Program, including the issuance of NPDES permits allowing for the discharge of pollutants, including storm water, into navigable waters subject to specific terms and conditions. EPA has granted the State of North Carolina, through the Department of Environment and Natural Resources (“NCDENR”), approval to issue NPDES permits pursuant to Section 402(b) of the CWA.

7. The NCDENR issued a *General Permit to Discharge Stormwater Under the National Pollutant Discharge Elimination System*, Permit No. NCG010000 (“Permit”) in accordance with North Carolina General Statute 143-215.1 and the CWA. The Permit was effective October 1, 2001, reissued on October 3, 2006, and expired September 30, 2008. The Permit was administratively extended to June 30, 2009, or until such prior time as a new draft permit is finalized.

8. The NCDENR Division of Land Resources, Land Quality Section is responsible for the issuance, compliance and enforcement of North Carolina General Statute 113A-54.1, the rules adopted by the North Carolina Sedimentation Control Commission, and the approval of coverage under the Permit upon submission and approval of an Erosion and Sedimentation Control Plan (“Plan”) prior to commencement of construction. For Permits that are issued in Mecklenburg County NCDENR has delegated the authority to Mecklenburg County to review and approve the Plan.

9. Crescent submitted a Plan to the NCDENR and Mecklenburg County seeking approval of coverage under the Permit for its Development. Mecklenburg County issued its approval of the Plan.

10. Part I.A.2 of the Permit requires the implementation of the Plan as approved. Deviation from the approved Plan shall constitute a violation of the terms and conditions of the Permit, unless to correct an emergency or to make a minor modification, which case the deviation must be noted on the approved Plan.

11. Part I.B.1 of the Permit requires the inspection of all storm water run-off discharges at least once every seven calendar days and within 24 hours after any storm event greater than 0.5 inches of rain per 24 hour period; a rain gauge shall be maintained on the site and a record of the rainfall amounts and dates shall be kept.

12. Part I.B.2 of the Permit requires the inspection of all storm water run-off discharges at least once every seven (7) calendar days and within 24 hours after any storm event greater than 0.5 inches of rain per 24 hour period and corrective action to be taken immediately if visible sedimentation is observed leaving the disturbed limits of the site to control the discharge of sediments outside the disturbed limits.

13. Part I.B.3 of the Permit requires that visible sedimentation found outside the disturbed limits be recorded, including an explanation of measures taken to control future releases, and measures taken to clean up sediment beyond the disturbed limits of the site.

14. Part I.C.2 of the Permit requires the Permittee to provide operation and maintenance necessary to operate storm water controls at optimum efficiency.
15. Part II.B.2 of the Permit requires that all reasonable steps be taken to minimize or prevent any discharge in violation of the Permit which has a reasonable likelihood of adversely affecting human health and the environment.
16. Part II.C.1 of the Permit requires the Permittee to properly operate and maintain all facilities and systems of treatment and control which are installed or used to achieve compliance with the conditions of the Permit.
17. On December 10, 2008, representatives of EPA, in conjunction with NCDENR, performed a Compliance Storm Water Evaluation Inspection ("CSWEI") at the Development to evaluate the treatment and disposal of storm water in accordance with the CWA, the regulations promulgated thereunder at 40 Code of Federal Regulations ("C.F.R.") § 122.26, and the Permit.
18. As a result of the CSWEI, EPA, Region 4 determined that storm water associated with industrial activity was discharged from the Development within the meaning of Section 402(p) of the CWA, 33 U.S.C. § 1342(p), and its implementing regulations.
19. During the CSWEI, EPA inspectors observed the following:
 - A. Neither the approved Plan nor self-inspection reports were available for review during the CSWEI as a representative was not on-site. Therefore, compliance with Part I.A.2, Part I.B.1, Part I.B.2, and Part I.B.3 could not be verified.
 - B. Operation and maintenance problems with the erosion and soil control devices were noted: (1) silt fencing at outfall #1 had rills forming underneath due to improperly installed fencing; (2) no protection was provided at street curb inlet structures; (3) the slopes of the diversion ditches were not stabilized; (4) soils throughout the Development required stabilization. The lack of maintenance of these controls resulted in sediment being discharged in violation of Part I.B.3, Part I.C.2, Part II.B.2 and Part II.C.1 of the Permit.
 - C. Rip rap was not provided at the outfalls to slow the velocity of storm waters being discharged as required by Part II.B.2 of the Permit.
 - D. Turbid water was observed from outfalls #1, #2, and #3 into the unnamed tributaries to Doby Creek in violation of Part I.B.3 and Part II.B.2 of the Permit.

20. Therefore, EPA concluded that Crescent violated Sections 301 and 402(p) of the CWA, 33 U.S.C. §§ 1311 and 1342(p), by failing to comply with the NCDENR Permit and for discharges not authorized the Permit.

III. Stipulations and Findings

21. Complainant and Respondent have conferred for the purpose of settlement pursuant to 40 C.F.R. § 22.18 and desire to resolve this matter and settle the allegations described herein without a formal hearing. Therefore, without the taking of any evidence or testimony, the making of any argument, or the adjudication of any issue in this matter, and in accordance with 40 C.F.R. § 22.13(b), this Consent Agreement and Final Order (“CA/FO”) will simultaneously commence and conclude this matter.

22. For the purposes of this CA/FO, Respondent admits the jurisdictional allegations set out above, but Crescent neither admits nor denies the factual allegations set out above.

23. Respondent hereby waives its right to contest the allegations set out above and its right to appeal the Final Order accompanying this Consent Agreement.

24. Respondent consents to the assessment of and agrees to pay the civil penalty as set forth in this CA/FO and consents to the other conditions set forth in this CA/FO, subject to approval of the Bankruptcy Court described in Paragraph 28 below.

25. By signing this CA/FO, Respondent certifies that the information it has supplied concerning this matter was at the time of submission, and is, truthful, accurate, and complete for each such submission, response and statement. Respondent realizes that there are significant penalties for submitting false or misleading information, including the possibility of fines and/or imprisonment for knowing submission of such information.

26. EPA reserves the right to assess and collect any and all civil penalties for any violation described herein to the extent that any information or certification provided by Respondent was materially false or inaccurate at the time such information or certification was provided to EPA.

27. Complainant and Respondent agree to settle this matter by their execution of this CA/FO. The parties agree that the settlement of this matter is in the public interest and that this CA/FO is consistent with the applicable requirements of the CWA.

28. Respondent Crescent Resources, LLC has filed for protection under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Western District of Texas – Austin Division (“Bankruptcy Court”), In re Crescent Resources, LLC, et al., No. 09-11507 (CAG). This Settlement Agreement has been entered into by Respondent with EPA and is subject to the approval of the Bankruptcy Court. Within thirty (30) days of the date on which this CA/FO is filed with the Regional Hearing Clerk, Respondent shall file a motion for approval

of this CA/FO as a Settlement Agreement with the Bankruptcy Court and provide a copy of such motion to EPA.

IV. Payment

29. Pursuant to Section 309(g)(2)(A) of the CWA, 33 U.S.C. § 1319(g)(2)(A), and 40 C.F.R. Part 19, and considering the nature of the violations and other relevant factors, EPA has determined that Fifteen Thousand dollars (\$15,000) is an appropriate civil penalty to settle this action.

30. Respondent shall submit payment of the penalty specified in the preceding paragraph within thirty (30) days on the date on which the an order of the Bankruptcy Court approving this CA/FO becomes final and is not subject to any challenge or appeal by any other interested party in its bankruptcy case. Payment shall be made via a cashier's or certified check, payable to the order of "Treasurer, United States of America." The check shall reference on its face the name of Respondent and the Docket Number of this CA/FO. Such payment shall be tendered to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979007
St. Louis, Missouri 63197-9000

31. At the time of payment, Respondent shall send a separate copy of the check, and a written statement that payment has been made in accordance with this CA/FO, to the following persons at the following addresses:

Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 4
61 Forsyth Street, S.W.
Atlanta, Georgia 30303-8960

and

Ms. Mary Mattox
U.S. Environmental Protection Agency, Region 4
Water Management Division
Water Programs Enforcement Branch
Gulf Enforcement Section
61 Forsyth Street, S.W.
Atlanta, Georgia 30303-8960

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Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, Missouri 63197-9000

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Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 4
61 Forsyth Street, S.W.
Atlanta, Georgia 30303-8960

and

Ms. Mary Mattox
U.S. Environmental Protection Agency, Region 4
Water Management Division
Water Programs Enforcement Branch
Gulf Enforcement Section
61 Forsyth Street, S.W.
Atlanta, Georgia 30303-8960

32. The penalty amount specified above shall represent civil penalties assessed by EPA and shall not be deductible for purposes of federal taxes.

33. Pursuant to Section 309(g)(9) of the CWA, 33 U.S.C. § 1319(g)(9), failure by Respondent to pay the penalty assessed by the CA/FO in full by its due date may subject Respondent to a civil action to collect the assessed penalty plus interest (at currently prevailing rates from the effective date of this CA/FO), attorney's fees, 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 such penalty and nonpayment penalty which are unpaid as of the beginning of such quarter. In any such collection action, the validity, amount and appropriateness of the penalty and of this CA/FO shall not be subject to review.

V. General Provisions

34. This CA/FO shall not relieve Respondent of its obligation to comply with all applicable provisions of federal, state, or local law, nor shall it be construed to be a ruling on, or determination of, any issue related to any federal, state, or local permit. Other than as expressed herein, compliance with this CA/FO shall not be a defense to any actions subsequently commenced pursuant to federal laws and regulations administered by EPA.

35. Nothing in this CA/FO shall be construed as prohibiting, altering, or in any way limiting the ability of the United States to seek any other remedies or sanctions available by virtue of Respondent's violation of this CA/FO or of the statutes and regulations upon which this CA/FO is based, or for Respondent's violation of any federal or state statute, regulation or permit.

36. Except as otherwise set forth herein, this CA/FO constitutes a settlement by Complainant and Respondent of all claims for civil penalties pursuant to the CWA with respect to only those violations alleged in this CA/FO. Except as otherwise set forth herein, compliance with this CA/FO shall resolve the allegations of violations contained herein. Nothing in this CA/FO is intended to nor shall be construed to operate in any way to resolve any criminal liability of Respondent, or other liability resulting from violations that were not alleged in this CA/FO. Other than as expressed herein, Complainant does not waive any right to bring an enforcement action against Respondent for violation of any federal or state statute, regulation or permit, to initiate an action for imminent and substantial endangerment, or to pursue criminal enforcement.

37. Each undersigned representative of the parties to this CA/FO certifies that he or she is fully authorized to enter into the terms and conditions of this CA/FO and to execute and legally bind that party to it.

38. This CA/FO applies to and is binding upon Respondent and its officers, directors, employees, agents, successors and assigns.

39. Any change in the legal status of Respondent, including but not limited to any transfer of assets of real or personal property, shall not alter Respondent's responsibilities under this CA/FO.

40. Each party shall bear its own costs and attorneys fees in connection with the action resolved by this CA/FO.

41. In accordance with 40 C.F.R. § 22.5, the individuals below are authorized to receive service relating to this proceeding.

For Complainant:

Wilda Cobb
Associate Regional Counsel
Office of Environmental Accountability
U.S. Environmental Protection Agency, Region 4
61 Forsyth Street, S.W.
Atlanta, Georgia 30303-8960
(404) 562-9530

For Respondent:

William W. Toole
Robinson, Bradshaw and Hinson, P.A.
101 North Tryon Street, Suite 1900
Charlotte, North Carolina 28248

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


43. Pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), and 40 C.F.R. § 22.38(b), Complainant represents that both the State of North Carolina and Mecklenburg County were provided a prior opportunity to consult with Complainant regarding this matter.

V. Effective Date

44. The effective date of this CA/FO shall be the date on which an order of the Bankruptcy Court approving this CA/FO becomes final and is not subject to any challenge or appeal by any other interested party in Crescent's bankruptcy case.

AGREED AND CONSENTED TO:

For COMPLAINANT, U.S. ENVIRONMENTAL PROTECTION AGENCY:



Douglas F. Mundrick, P.E., Chief
Clean Water Enforcement Branch
Water Protection Division

Date: 2/24/10

For RESPONDENT, CRESENT RESOURCES, LLC

BY: 

NAME ERIC JACOBS

Date: 2/10/10

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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IN THE MATTER OF:)
)
CRESCENT RESOURCES, LLC) CONSENT AGREEMENT AND
CITY BOULEVARD (US-29)/NC-49) FINAL ORDER
ROADWAY IMPROVEMENTS)
CHARLOTTE, NORTH CAROLINA)
)
RESPONDENT.) DOCKET NO. CWA-04-2010-4506(b)

FINAL ORDER

In accordance with the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders and the Revocation, Termination or Suspension of Permits*, including Subpart I, 40 C.F.R. Part 22, and authorities delegated to me, the foregoing Consent Agreement is hereby approved and incorporated by reference into this Final Order. Pursuant to Section 309(g)(2)(A) of the CWA, 33 U.S.C. § 1319(g)(2)(A), Respondent is hereby ordered to comply with the terms of the foregoing Consent Agreement.

U.S. ENVIRONMENTAL PROTECTION AGENCY

Date: April 22, 2010

Susan B. Schub
Susan B. Schub
Regional Judicial Officer

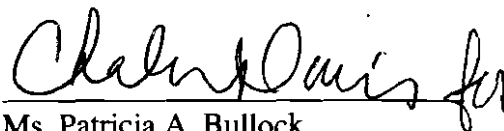
CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the attached **CONSENT AGREEMENT AND FINAL ORDER** in the matter of Cresent Resources, LLC, City Boulevard (US-29)/NC-49 Roadway Improvements, **Docket No. CWA-04-2010-4506(b)** (filed with the Regional Hearing Clerk on APR 23 2010, 2010, was served on APR 23 2010, 2010, in the manner specified to each of the persons listed below.

By hand-delivery: Wilda Cobb
Associate Regional Counsel
Office of Environmental Accountability
U.S. Environmental Protection Agency, Region 4
61 Forsyth Street, S.W.
Atlanta, Georgia 30303-8960

By certified mail,
return receipt requested: William W. Toole
Robinson, Bradshaw and Hinson, P.A.
101 North Tryon Street, Suite 1900
Charlotte, North Carolina 28248

Coleen H. Sullins
Director, Division of Water Quality
North Carolina Department of Environment and Natural Resources
1617 Mail Service Center
Raleigh, North Carolina 27699-1617



Ms. Patricia A. Bullock
Regional Hearing Clerk
Sam Nunn Federal Center
U.S. Environmental Protection Agency, Region 4
61 Forsyth Street, S.W.
Atlanta, Georgia 30303-8960
(404) 562-9511