

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 6

FILED  
2011 FEB 15 AM 9:06

In the Matter of  
CIMCO, LLC,  
a Delaware Corporation,

Respondent

NPDES Facility No. NMU001658

§ Docket No. CWA-06-2011-1706  
§  
§ Proceeding to Assess a Class I  
§ Civil Penalty under Section 309(g)  
§ of the Clean Water Act  
§  
§ ADMINISTRATIVE COMPLAINT  
§

REGIONAL HEARING CLERK  
EPA REGION VI

I. Statutory Authority

This Complaint is issued under the authority vested in the Administrator of the United States Environmental Protection Agency (“EPA”) by Section 309(g) of the Clean Water Act (“Act”), 33 U.S.C. § 1319(g). The Administrator of EPA delegated the authority to issue this Complaint to the Regional Administrator of EPA Region 6, who further delegated this authority to the Director of the Compliance Assurance and Enforcement Division of EPA Region 6 (“Complainant”). This Class I Administrative Complaint is issued in accordance with the “Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits,” 40 C.F.R. §§ 22.1 through 22.52, including rules related to administrative proceedings not governed by Section 554 of the Administrative Procedure Act, 40 C.F.R. §§ 22.50 through 22.52.

Based on the following Findings of Fact and Conclusions of Law, Complainant finds that CIMCO, LLC (“Respondent”) violated the Act and the regulations promulgated under the Act and should be ordered to pay a civil penalty.

II. Findings of Fact and Conclusions of Law

1. Respondent is a corporation incorporated under the laws of the State of Delaware and doing business in the State of New Mexico, and as such, Respondent is a “person,” as that term is defined in Section 502(5) of the Act, 33 U.S.C. § 1362(5), and 40 C.F.R. § 122.2.

2. At all times relevant to the violations alleged herein (“relevant time period”), Respondent owned or operated lots (identified as lots 123B through 133B, 134C, 135B through 142B, and 153B through 161B) at the Eastland Hills Subdivision, an eighty (80) acre residential construction site located east of Cypress Boulevard between Bravo Loop and Paraiso Lane in Los Lunas, Valencia County, New Mexico (“facility”).

3. During the relevant time period, the facility discharged pollutant-laden storm water into the receiving waters of an unnamed arroyo, thence through a series of irrigation ditches, and thence to the Rio Grande, which is considered a “water of the United States” within the meaning of Section 502 of the Act, 33 U.S.C. § 1362, and 40 C.F.R. § 122.2.

4. The facility was a “point source” of a “discharge” of “pollutants” to “waters of the United States,” as those terms are defined in 40 C.F.R. § 122.2.

5. Under Section 301 of the Act, 33 U.S.C. § 1311, it is unlawful for a person to discharge a pollutant from a point source to waters of the United States, except with the authorization of, and in compliance with, an NPDES permit issued pursuant to Section 402 of the Act, 33 U.S.C. § 1342.

6. During the relevant time period, Respondent and/or a contractor(s) acting on behalf of Respondent engaged in construction activities at the facility, including, but not limited to,

clearing, grading and/or excavating operations, that resulted in disturbance of greater than five acres of land and/or were part of a larger common plan of development that ultimately disturbed greater than five acres of land.

7. Pursuant to 40 C.F.R. § 122.26(b)(14)(x), construction activity, including clearing, grading and excavation, is among those categories of facilities considered to be engaging in “industrial activity” for purposes of Section 402(p) of the Act, 33 U.S.C. § 1342(p) and 40 C.F.R. §§ 122.1 and 122.26.

8. Section 402(p) of the Act, 33 U.S.C. § 1342(p), and 40 C.F.R. §§ 122.1 and 122.26 provide that storm water discharges associated with industrial activity are point sources subject to National Pollutant Discharge Elimination System (“NPDES”) permitting requirements under Section 402(a) of the Act, 33 U.S.C. § 1342(a).

9. Because Respondent owned or operated a facility subject to regulation under the NPDES program, Respondent is an “owner or operator” as defined in 40 C.F.R. § 122.2.

10. Because Respondent owned or operated a facility that acted as a point source of discharges of pollutants to waters of the United States, Respondent and the facility were subject to the Act, 33 U.S.C. §§ 1251–1387, and the NPDES program.

11. Section 402(a) of the Act, 33 U.S.C. § 1342(a), provides that the Administrator of EPA may issue permits under the NPDES program for the discharge of pollutants from point sources to waters of the United States. Any such discharge is subject to the specific terms and conditions prescribed in the applicable permit.

12. Pursuant to Section 402(a) of the Act, 33 U.S.C. § 1342(a), EPA issued the Final NPDES General Permit for Storm Water Discharges from Construction Activities (“Construction General Permit”), which became effective on July 1, 2008, 68 Fed. Reg. 39087, and covered discharges where EPA is the permitting authority in New Mexico. The Construction General Permit requires, among other things, preparation and submittal of a Storm Water Pollution Prevention Plan (“SWPPP”) and implementation of Best Management Practices (“BMPs”) to prevent sediment discharges from the facility.

13. Respondent was required to apply for and obtain NPDES permit coverage under the Construction General Permit before discharging storm water associated with construction activities at the facility.

14. Respondent failed to apply for permit coverage for its storm water discharges associated with construction activities at the facility, and the facility was not covered by a NPDES permit during the relevant time period for storm water discharges.

15. Each day that a storm water discharge occurred at the facility and Respondent operated the facility without NPDES permit coverage is a separate violation of Section 301 of the Act, 33 U.S.C. § 1311.

16. During the relevant time period, there were at least fifteen (15) occasions of one-half ( $\frac{1}{2}$ ) inch or greater rainfall events at the facility.

17. Each rainfall event resulted in the discharge of pollutants from the facility into a water of the United States.

18. On April 12 and July 8, 2010, two Compliance Evaluation Inspections were conducted at the facility by a representative from the New Mexico Environment Department. The inspection reports indicate that a SWPPP was not developed for the facility and no BMPs were implemented at the facility to prevent the discharge of sediment during rainfall events during the relevant time period.

19. On August 19, 2010, EPA issued Administrative Order CWA-06-2010-1866 to Respondent. The Order required Respondent to apply for permit coverage and comply with the conditions of the EPA Construction General Permit. Respondent did not comply with the Order.

20. Pursuant to Section 309(g)(2)(B) of the Act, 33 U.S.C. § 1319(g)(2)(B), Respondent is liable for a civil penalty in an amount not to exceed sixteen thousand dollars (\$16,000.00) per day for each day during which a violation continues, up to a maximum of thirty-seven thousand five hundred dollars (\$37,500.00).

21. The State of New Mexico was notified and given an opportunity to consult with EPA regarding the proposed assessment of an administrative penalty against Respondent.

22. EPA provided public notice of and reasonable opportunity to comment on the proposed issuance of a penalty order against Respondent. At the expiration of the notice period, EPA will consider any comments filed by the public.

### III. Proposed Penalty

23. Based on the foregoing Findings and pursuant to the authority of Sections 309(g)(1) and 309(g)(2)(B) of the Act, 33 U.S.C. § 1319(g)(1) and (g)(2)(B), EPA Region 6 hereby

proposes to assess against Respondent a penalty of eighteen thousand four hundred and thirty-four dollars (\$18,434.00).

24. The proposed penalty amount was determined based on the statutory factors specified in Section 309(g)(3), 33 U.S.C. § 1319(g)(3), which includes such factors as the nature, circumstances, extent and gravity of the violation(s), any prior history of such violations, the degree of culpability, economic benefit, if any, and such other matters as justice may require.

#### IV. Failure to File an Answer

25. If Respondent wishes to deny or explain any material allegation listed in the above Findings or to contest the amount of the penalty proposed, Respondent must file an Answer to this Complaint within thirty (30) days after service of this Complaint whether or not Respondent requests a hearing as discussed below.

26. The requirements for such an Answer are set forth at 40 C.F.R. § 22.15. Failure to file an Answer to this Complaint within thirty (30) days after service of the Complaint shall constitute an admission of all facts alleged in the Complaint and a waiver of the right to hearing. Failure to deny or contest any individual material allegation contained in the Complaint will constitute an admission as to that finding or conclusion under 40 C.F.R. § 22.15(d).

27. If Respondent does not file an Answer to this Complaint within thirty (30) days after service of this Complaint, a Default Order may be issued against Respondent pursuant to 40 C.F.R. § 22.17. A Default Order, if issued, would constitute a finding of liability, and could make the full amount of the penalty proposed in this Complaint due and payable by Respondent without further proceedings thirty (30) days after a Final Default order is issued.

28. Respondent must send its Answer to this Complaint, including any request for hearing, and all other pleadings to:

Regional Hearing Clerk (6RC-D)  
U.S. EPA, Region 6  
1445 Ross Avenue, Suite 1200  
Dallas, TX 75202-2733

Respondent shall also send a copy of its Answer to this Complaint to the following EPA attorney assigned to this case:

Mr. Tucker Henson (6RC-EW)  
U.S. EPA, Region 6  
1445 Ross Avenue, Suite 1200  
Dallas, TX 75202-2733

29. The Answer must be signed by Respondent, Respondent's counsel, or other representative on behalf of Respondent and must contain all information required by 40 C.F.R. §§ 22.05 and 22.15, including the name, address, and telephone number of Respondent and Respondent's counsel. All other pleadings must be similarly signed and filed.

#### V. Notice of Opportunity to Request a Hearing

30. Respondent may request a hearing to contest any material allegation contained in this Complaint, or to contest the appropriateness of the amount of the proposed penalty, pursuant to Section 309(g) of the Act, 33 U.S.C. § 1319(g). The procedures for hearings are set out at 40 C.F.R. Part 22, with supplemental rules at 40 C.F.R. § 22.38.

31. Any request for hearing should be included in Respondent's Answer to this Complaint; however, as discussed above, Respondent must file an Answer meeting the

requirements of 40 C.F.R. § 22.15 in order to preserve the right to a hearing or to pursue other relief.

32. Should a hearing be requested, members of the public who commented on the issuance of the Complaint during the public comment period will have a right to be heard and to present evidence at such hearing under Section 309(g)(4)(B) of the Act, 33 U.S.C. § 1319(g)(4)(B).

#### VI. Settlement

33. EPA encourages all parties against whom civil penalties are proposed to pursue the possibility of settlement through informal meetings with EPA. Regardless of whether a formal hearing is requested, Respondent may confer informally with EPA about the alleged violations or the amount of the proposed penalty. Respondent may wish to appear at any informal conference or formal hearing personally, by counsel or other representative, or both. To request an informal conference on the matters described in this Complaint, please contact Everett H. Spencer, of my staff, at (214) 665-8060. If represented by counsel, please contact Mr. Tucker Henson at (214) 665-8148.

34. If this action is settled without a formal hearing and issuance of an opinion by the Presiding Officer pursuant to 40 C.F.R. § 22.27, this action will be concluded by issuance of a Consent Agreement and Final Order (“CAFO”) pursuant to 40 C.F.R. § 22.18(b). The issuance of a CAFO would waive Respondent’s right to a hearing on any matter stipulated to therein or alleged in the Complaint. Any person who commented on this Complaint would be notified and given an additional thirty (30) days to petition EPA to set aside any such CAFO and to hold a

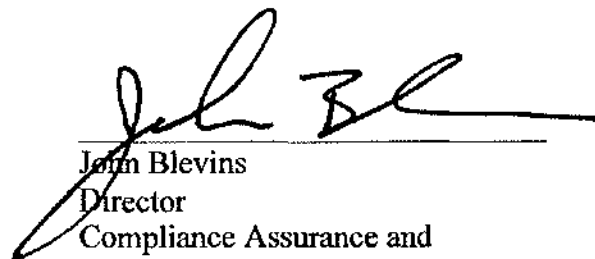


hearing on the issues raised in the Complaint. Such a petition would be granted and a hearing held only if the evidence presented by the petitioner's comment was material and was not considered by EPA in the issuance of the CAFO.

35. Neither assessment nor payment of a penalty in resolution of this action will affect Respondent's continuing obligation to comply with all requirements of the Act, the applicable regulations and permits, and any separate Compliance Order issued under Section 309(a) of the Act, 33 U.S.C. § 1319(a), including one relating to the violations alleged herein.

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Date

  
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John Blevins  
Director  
Compliance Assurance and  
Enforcement Division

CERTIFICATE OF SERVICE

I hereby certify that on this 15 day of February, 2011, the original of the foregoing Class I Administrative Complaint concerning CIMCO, LLC, Docket No. CWA-06-2011-1706, was filed with the Regional Hearing Clerk, EPA Region 6, Dallas, Texas, and that a true and correct copy of such Administrative Complaint was sent to the following persons, in the manner specified:

Copy by certified mail,  
return receipt requested:

Mr. Sean Cummins, CEO  
CIMCO, LLC  
250 Fischer  
Costa Mesa, CA 92626

Mr. Glenn Saums, Acting Chief  
Surface Water Quality Bureau  
New Mexico Environment Department  
P.O. Box 26110  
Santa Fe, NM 87502

Copy hand-delivered:

Mr. Tucker Henson (6RC-EW)  
U.S. EPA, Region 6  
1445 Ross Avenue, Suite 1200  
Dallas, TX 75202-2733

Dated: Janice Allen