

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

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:)	
)	
Bush Construction Company, Inc.)	Docket No. CWA-07-2020-0188
)	
Respondent)	
)	COMPLAINT AND
Proceedings under)	CONSENT AGREEMENT/
Section 309(g) of the Clean Water Act,)	FINAL ORDER
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 United States Environmental Protection Agency's (“EPA’s”) 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 (“Consolidated Rules of Practice”).

2. Complainant, the United States Environmental Protection Agency Region 7 (“EPA” or “Complainant”) and Respondent, Bush Construction Company, Inc. (“Bush Construction” or “Respondent”) 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 serves as notice that the EPA has reason to believe that Respondent violated its National Pollutant Discharge Elimination System ("NPDES") permit for stormwater discharges associated with industrial activity, issued under the authority of Section 402(p) of the CWA, 33 U.S.C. § 1342(p), and 40 C.F.R. § 122.26.

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, who in turn has delegated the authority to the

Director of the Enforcement and Compliance Assurance Division of EPA Region 7 (collectively referred to as the “Complainant”).

5. Respondent is and was at all times relevant a corporation under the laws of, and authorized to do business in, the state of Iowa.

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 an 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.

Stormwater

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 conform 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)(15)(i) defines “stormwater discharge associated with small construction activity” to include construction activities including clearing, grading and excavation that result in the disturbance of equal to or greater than one acre and less than five acres.

12. The Iowa Department of Natural Resources (“IDNR”) is the state agency with the authority to administer the federal NPDES program in Iowa pursuant to Section 402 of the CWA. The EPA maintains concurrent enforcement authority with authorized states for violations of the CWA.

13. The IDNR issued and implemented NPDES General Permit No. 2 (“GP #2”) for Storm Water Discharges Associated with Construction Activity. The most recent 5-year permit has an effective date of March 1, 2018, and an expiration date of February 28, 2023.

14. Any individual seeking coverage under GP #2 is required to submit a Notice of Intent (“NOI”) to the IDNR in accordance with the requirements of Part II. of the permit.

15. As required by Section III.G. of GP #2, the NOI must include a certification that a Stormwater Pollution Prevention Plan (“SWPPP”) has been developed before the NOI was submitted, that the SWPPP shall be implemented with the start of construction activities, that the NOI will be included and incorporated into the SWPPP and will be updated as required, and that the SWPPP “provides compliance with section 161A.64 of the Code of Iowa and local sediment and erosion plans and are consistent with the requirements of Part IV of [GP#2].”

EPA’s General Allegations

16. Respondent is and was at all times relevant to this action the operator of the construction site of approximately 3.2 acres located at 1620 Lincoln Road, Bettendorf, Iowa (hereafter, “Construction Site”) at which the Mark Twain Elementary School has been constructed.

17. Stormwater, snow melt, surface drainage and runoff water leave the Construction Site and discharge flows into an unnamed tributary of Duck Creek, which flows approximately 200 yards before discharging to Duck Creek, or flow into inlets for the municipal separate storm sewer system (“MS4”) owned and operated by the City of Bettendorf, Iowa, which discharges to Duck Creek.

18. The runoff and drainage from the Construction Site was “stormwater” as defined by 40 C.F.R. § 122.26(b)(13).

19. Stormwater from the Construction Site contained “pollutants” as defined by Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

20. During relevant times the Construction Site had “stormwater discharges associated with industrial activity” as defined by 40 C.F.R. § 122.26(b)(15) and is a “point source” as defined by Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

21. Duck Creek, as identified herein, flows to the Mississippi River. Duck Creek and the Mississippi River are “navigable waters” as defined by Section 502(7) of the CWA, 33 U.S.C. § 1362(7).

22. Stormwater runoff from Respondent’s industrial activity results in the addition of pollutants from a point source to navigable waters, and thus is the “discharge of a pollutant” as defined by CWA Section 502(12), 33 U.S.C. § 1362(12).

23. Respondent’s discharge of pollutants associated with small construction activity, as defined by 40 C.F.R. § 122.26(b)(15), requires a permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

24. After receipt of an NOI from Respondent, dated on or about September 14, 2018, the IDNR issued coverage under NPDES General Permit No. 2, Permit Authorization No. IA-33883-33579, for the Bettendorf School District, Mark Twain School located at 1620 Lincoln Rd., Bettendorf, Iowa, identifying the owner as the Bettendorf School District and the contact operator as Bush Construction. The Permit effective dates were from October 1, 2018 through October 1, 2021.

25. At all times relevant, the District has owned, and Bush Construction has operated, the Construction Site under the provisions of GP #2.

26. On or about October 16, 2019, the EPA, through its contractor PG Environmental, performed a Construction Stormwater Inspection (“Inspection”) of Respondent’s Construction Site under the authority of Section 308(a) of the CWA, 33 U.S.C. § 1318(a), to evaluate Respondent’s compliance with GP #2 and the CWA. A representative from the IDNR also participated in the Inspection.

27. During the Inspection, the inspectors reviewed Respondent’s records related to the GP #2 at the Construction Site, including Respondent’s SWPPP for the Construction Site, and observed the Construction Site, including stormwater outfalls and stormwater controls.

28. A copy of the inspection report narrative was mailed by the EPA to Respondent by letter dated December 12, 2019.

EPA’s Specific Allegations

Count 1

Failure to Develop an Adequate SWPPP

29. The allegations stated above are realleged and incorporated herein by reference.

30. Part IV. of GP #2 requires the permittee to develop and implement a SWPPP for each construction site covered by GP #2, that: is prepared in accordance with good engineering practices; identifies potential sources of pollution which may reasonably be expected to affect the quality of stormwater discharges from the construction activities; and describes and ensures the implementation of practices which will be used to reduce pollutants in stormwater discharges associated with industrial activity for construction activities and to assure compliance with the terms and conditions of this permit. Specific requirements for a SWPPP include the following:

- a. Part IV.D.1.D. of GP #2 requires a site map indicating drainage patterns and approximate slopes anticipated after major grading activities, areas of soil disturbance, the location of structural and nonstructural controls identified in the plan, the location of areas where stabilization practices are expected to occur, surface waters (including wetlands), and locations where storm water is discharged to a surface water.

31. Based on observations documented during the Inspections, review of information provided by the Respondents, and other relevant information, the EPA finds that Respondent's SWPPP failed to meet the requirements of Parts IV.D.1.D. of GP #2 because, while it included elevation lines, it did not adequately identify drainage patterns indicating the direction of runoff.

32. Respondent's failure to develop an adequate SWPPP are violations of the terms and conditions of its Permit, and as such, are violations of Section 402(p) of the CWA, 33 U.S.C. § 1342(p).

Count 2
Failure to Develop and Implement Appropriate Controls

33. The allegations stated above are re-alleged and incorporated herein by reference.

34. Part III.C.1. of GP #2 requires all sites and activities subject to the Permit to comply with federal effluent guidelines applicable to each activity, including Erosion and Sediment Controls listed in Part III.C.1. to design, install and maintain effective erosion controls. Subpart III.C.1.E. requires that the design, installation and maintenance of erosion and sediment controls must address factors such as the amount, frequency, intensity and duration of precipitation, the nature of resulting storm water runoff and soil characteristics including the range of soil particle sizes expected to be present on the site.

35. Part IV.D.2. of GP #2 requires that the SWPPP include controls that will be implemented at the Construction Site, including but not limited to:

- a. Subpart IV.D.2.A.(2).(b), which requires a description of structural practices to the degree attainable, to divert flows from exposed soils, store flows or otherwise limit runoff from exposed areas of the sites for drainage locations serving 10 or fewer acres, such as sediment traps, silt fences or equivalent controls for all sideslopes and downslope boundaries for the construction area or a sediment basin providing for 3,600 cubic feet of storage per acre drained; and
- b. Subpart IV.D.2.C(2) requires the off-site vehicle tracking of sediment to be minimized.

36. Section 2 of Respondent's SWPPP describes Erosion, Sediment, and Best Management Practices (BMP) Controls for the Construction Site, including the following:

- a. Section 2.1, Control Implementation Schedule, which requires in part that perimeter controls, including silt fence, should be actively maintained until final stabilization of those portions of the site upstream of the perimeter control. Stabilization construction entrance(s) and sediment basins should be installed as described in the intended sequence of construction activity;

- b. Section 2.2, Erosion and Sediment Controls, which requires in part that appropriate soil erosion and sediment controls should be implemented on-site and should be modified to reflect the current phase of construction, and that all temporary sediment and erosion control measures should be repaired or replaced as soon as deficiencies are noticed to maintain NPDES compliance; and
- c. Section 2.2, subsection 2, requires that in areas where flows may run offsite, silt fences shall be placed on the perimeter of the site prior to grading operations. Temporary sediment basins shall be provided at a rate of 3,600 c.f. of storage per acre of disturbed ground over 10 acres. If these requirements cannot be attained, a combination of silt fences, sediment traps and/or other sediment trapping measures may be used. The bordering streets shall be inspected daily and any significant tracking shall be cleaned up immediately.

37. Section 5 of the Respondent's SWPPP describes Inspections and Maintenance for the Construction Site, including Section 5.2, Maintenance of Controls, indicates that silt fences should be inspected regularly for undercutting where the fence meets the ground, overtopping, and tears along the length of the fence and any deficiencies should be repaired immediately, including removing accumulated sediments from the fence base when the sediment reaches one-half the fence height.

38. The Inspectors observed the Construction Site's stormwater management controls, including structural controls and best management practices, and collected documentation from Respondent regarding SWPPP implementation. The information collected during the Inspection indicates that, at the time of the Inspections:

- a. Approximately 100 feet of silt fence BMPs had not been properly installed and maintained along the western perimeter of the Construction Site, including sections of silt fence that had been undercut by erosion at the southwest corner of the site along a hill side adjacent to the main drainage ditch leading to Duck Creek;
- b. Approximately five erosion and sediment controls along the western perimeter of the Construction Site were half full or greater of sediment and had been overwhelmed in several locations, resulting in the discharge of sediment to the drainage ditch along the western perimeter of the site, which leads to Duck Creek, and sediment was observed within the drainage ditch near its discharge point to Duck Creek; and
- c. Erosion was evident at the eastern perimeter of the Construction Site and no BMPs were in place along a 10-foot section of the perimeter. Runoff from this area flows onto 18th Avenue and towards Duck Creek.

39. Based on observations documented during the Inspections, as described above, review of information provided by the Respondents, and other relevant information, the EPA

finds that Respondent failed to fully implement storm water management controls appropriate to address identified potential sources of pollutants at the Construction Site, as required by Parts III.C.1. and IV.D.2. of GP #2.

40. Respondent's failure to implement adequate stormwater management controls are violations of the conditions of Respondent's NPDES Permits, and as such, are violations of Section 402(p) of the CWA, 33 U.S.C. § 1342(p).

Count 3

Failure to Minimize Contributions of Pollution in Stormwater Discharges

41. The allegations stated above are re-alleged and incorporated herein by reference.

42. As described previously, GP #2 at Parts III.C.1. and IV. D.2.A. requires the Respondent to minimize sediment discharges from the Construction Site.

43. Sections 2, 3 and 5 of Respondent's SWPPP identify the controls and practices for activities at the Construction Site to control and minimize the discharge of pollutants in storm water discharges.

44. The Inspectors evaluated the Construction Site's stormwater management controls, including structural controls and best management practices, and collected

documentation from Respondent regarding SWPPP implementation. The following observations were made at the time of the Inspections Sediment from the Construction Site was observed in the unnamed tributary along the western boundary of the property. Stormwater entering this tributary will flow approximately 220 yards before discharging into Duck Creek.

45. Based on a review of information provided by the Respondent, and other relevant information, the EPA finds that Respondent failed to minimize the discharge of pollutants in stormwater discharges to Duck Creek through the unnamed tributary adjacent to the site.

46. Respondent's failure to control and minimize the discharge of pollutants in storm water discharges 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).

47. As alleged by the EPA above, and pursuant to Section 309(g)(2)(A) of the CWA, 33 U.S.C. § 1319(g)(2)(A), as adjusted pursuant to 40 C.F.R. § 19.4, for violations that occurred after November 2, 2015, where penalties are assessed on or after January 13, 2020, Respondent is liable for civil penalties of up to \$22,320 per day for each day during which the violation continues, up to a maximum of \$55,300.

CONSENT AGREEMENT

48. Respondent and the EPA agree to the terms of this Consent Agreement/Final Order.

49. Respondent admits the jurisdictional allegations of this Complaint and Consent Agreement/Final Order and agrees not to contest the EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of the Consent Agreement/Final Order.

50. Respondent neither admits nor denies the factual allegations and legal conclusions contained in this Complaint and Consent Agreement/Final Order.

51. Respondent waives their right to contest any issue of fact or law set forth above, and its right to appeal this Consent Agreement/Final Order.

52. Respondent and Complainant each agree to resolve the matters set forth in this Consent Agreement/Final Order without the necessity of a formal hearing and agree to bear their own costs and attorney's fees.

53. Respondent consents to receive the filed Consent Agreement and Final Order electronically at the following email address: rdavis@bushconstruct.com.

54. As required by Section 309(g)(3) of the CWA, 33 U.S.C § 1319(g)(3), the 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 in determining the appropriate penalty settlement amount to resolve this action.

55. The undersigned representative of Respondent certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Agreement/Final Order and to execute and legally bind Respondent to it.

56. Respondent understands and agrees that this Consent Agreement/Final Order shall apply to and be binding upon Respondent and Respondent's agents, successors and/or assigns. 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 Consent Agreement/Final Order.

57. Respondent certifies by signing this Consent Agreement/Final Order that it is currently in compliance with Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342, and its applicable regulations.

58. This Consent Agreement/Final Order addresses all civil administrative claims for CWA violations identified above. Complainant reserves the right to take any enforcement action with respect to other violations of the CWA or any other applicable law.

Penalty Payment

59. EPA has considered the appropriateness of the penalty pursuant to Section 309(g)(2)(A) of CWA, 33 U.S.C. 1319(g)(2)(A), and has determined that based on a certified statement from Respondent documenting the impact of COVID-19 on its business, the date for payment of the penalty recited in Paragraph 60, below, has been extended by sixty (60) days, for a total of ninety (90) days to pay the penalty after the effective date of the Consent Agreement/Final Order.

60. Respondent agrees that, in settlement of the claims alleged in this Consent Agreement/Final Order, Respondent shall pay a civil penalty of **TEN THOUSAND FIVE HUNDRED AND SEVENTY DOLLARS (\$10,570)** pursuant to the authority of Section 309(g)(2)(A) of the CWA, 33 U.S.C. § 1319(g)(2)(A), to be paid in full no later than **ninety (90)** days of the effective date of this Consent Agreement/Final Order as set forth below.

61. Respondent shall pay the penalty identified in Paragraph 60 by certified or cashier's check made payable to "Treasurer, United States of America," with a transmittal that identifies the case name, facility address, and docket number **CWA-07-2020-0188** to:

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

or by alternate payment method described at <http://www.epa.gov/financial/makepayment>.

62. Respondent shall simultaneously send by electronic mail copies of the transmittal letter and the check or proof of an alternate payment method, as directed above, to the following:

Regional Hearing Clerk
U.S. Environmental Protection Agency Region 7
R7_Hearing_Clerk_Filings@epa.gov

and

Dan Breedlove
Office of Regional Counsel
U.S. Environmental Protection Agency Region 7
breedlove.dan@epa.gov.

63. Respondent agrees that no portion of the civil penalty or interest paid by Respondent pursuant to the requirements of this Consent Agreement/Final Order shall be claimed by it as a deduction for federal, state, or local income tax purposes.

64. 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

65. Respondent's payment of the entire civil penalty resolves all civil and administrative claims pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), for violations alleged in this 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.

66. The effect of settlement described above is conditional upon the accuracy of the Respondent's representations to the EPA, as memorialized in Paragraph 58 of this Consent Agreement/Final Order.

67. Nothing contained in this Consent Agreement/Final Order shall alter or otherwise affect Respondent's obligations to comply with all applicable federal, state, and local environmental statutes and regulations and applicable permits, nor shall it be construed to be a ruling on, or determination of, any issue related to any federal, state or local permit.

68. Notwithstanding any other provision of this Consent Agreement/Final Order, the EPA reserves the right to enforce the terms of this Consent Agreement/Final Order by initiating a judicial collection action pursuant to Section 309(g)(9) of the CWA, 33 U.S.C. § 1319(g)(9), and to seek penalties against Respondent or to seek any other remedy allowed by law.

69. 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

70. The Parties acknowledge that this Consent Agreement/Final Order 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.

71. Pursuant to 40 C.F.R. § 22.31(b), this Consent Agreement/Final Order shall be effective after entry of the Final Order and upon filing with the Regional Hearing Clerk, U.S. Environmental Protection Agency Region 7, 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.

72. The state of Iowa 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).

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

74. Respondent and Complainant agree that this Consent Agreement/Final Order may be signed in part and counterpart.

For the Complainant, United States Environmental Protection Agency Region 7:

Date

David Cozad
Director
Enforcement and Compliance Assurance Division

Dan Breedlove
Office of Regional Counsel

For the Respondent, Bush Construction Company, Inc.:

12/22/2020

Date

Rob Davis

Signature

Digitally signed by Rob Davis
DN: c=US, E=rdavis@bushconstruct.com, O="Bush Construction
Company, Inc.", CN=Rob Davis
Date: 2020.12.22 16:43:52-06'00'

Rob Davis

Name

Vice President of Operations

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.

Date

Name: _____
Regional Judicial Officer

CERTIFICATE OF SERVICE

I certify a true and correct copy of the Complaint and Consent Agreement/Final Order was sent this day in the following manner to the addressees:

Copy by email to Respondent Bush Construction Company, Inc.:

Rob Davis
Vice President of Operations
Bush Construction Company, Inc.
rdavis@bushconstruct.com

Copy by email to representatives for Complainant:

Dan Breedlove
U.S. Environmental Protection Agency Region 7
Office of Regional Counsel
breedlove.dan@epa.gov

Erin Kleffner
U.S. Environmental Protection Agency Region 7
Enforcement and Compliance Assurance Division
kleffner.erin@epa.gov

Copy by email to the Iowa Department of Natural Resources:

Scott Wilson
Iowa Department of Natural Resources
Field Office 3 Supervisor
Scott.wilson@dnr.iowa.gov

Date

Regional Hearing Clerk, Region 7