



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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

SEP 03 2011

CERTIFIED MAIL 7010 1060 0002 1702 7789
RETURN RECEIPT REQUESTED

Mr. Steve Criswell, P.E.
Director, Division of Construction
Kentucky Transportation Cabinet
200 Metro Street
Frankfort, Kentucky 40622

Re: Consent Agreement and Final Order
Docket No. CWA-04-2011-4522(b)
US 421 Widening PCH 09-1121
Frankfort, Kentucky

Dear Mr. Criswell:

Enclosed please find a fully executed copy of the Consent Agreement and Final Order, finalized by the U.S. Environmental Protection Agency, Region 4 and the Regional Judicial Officer. Please make note of the provisions under Paragraph IV: Payment.

Should you have any questions or concerns regarding this matter, please contact Mr. Kenneth Kwan at (404) 562-9752.

Sincerely,

Denisse D. Diaz, Chief
Clean Water Enforcement Branch
Water Protection Division

Enclosure

cc: Mr. Jeff Cummins, Acting Director, Division of Enforcement
Kentucky Department for Environmental Protection

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4

IN THE MATTER OF:)

Kentucky Transportation Cabinet)
US 421 Widening PCN 09-1121)
Frankfort, Kentucky)

RESPONDENT.)

) CONSENT AGREEMENT AND
) FINAL ORDER

) DOCKET NO. CWA-04-2011-45226)

HEARING CLERK

2011 SEP - 8 PM 3: 44

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EPA REGION IV

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. 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 Protection Division, who in turn has delegated this authority to the Chief of the Clean Water Enforcement Branch of the EPA, Region 4 (“Complainant”).

II. Allegations

3. At all times relevant to this action, the Kentucky Transportation Cabinet (“Respondent”), is a government agency existing under the laws of the Commonwealth of Kentucky and is, therefore, 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, the Respondent owned and/or operated a construction site known as US 421 Widening PCN 09-1121 (“Development”) located at US 421 in Frankfort, Kentucky.

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 the EPA or authorized states to administer the NPDES Permit Program, including the issuance of NPDES permits allowing for the discharge of pollutants, including stormwater, into navigable waters subject to specific terms and conditions. The EPA has granted the Commonwealth of Kentucky

through the Department for Environmental Protection (“KDEP”) approval to issue NPDES permits pursuant to Section 402(b) of the CWA. The KDEP is responsible for the enforcement of Kentucky Revised Statutes Chapter 224 and the approval of coverage upon submission and approval of a Notice of Intent (“NOI”) requesting Permit coverage.

7. KDEP issued Permit No. KYR100000 (“Permit”), applicable to stormwater discharges associated with construction activities, in accordance with the provisions of the Kentucky Revised Statutes Chapter 224 and the CWA. The Permit was effective August 1, 2009, and expires July 31, 2014.

8. The Permit is a Kentucky statewide NPDES general permit governing stormwater point source discharges associated with construction activities including clearing, grading and excavation activities except operations that result in the disturbance of one (1) acre or more of total land area which are not part of a larger common plan of development or sale.

9. For “New Projects” to obtain coverage under the Permit, a signed NOI must be submitted to KDEP a minimum of seven (7) days before the proposed date for commencement or construction activities if the NOI is submitted electronically or a minimum of thirty (30) days before the proposed date of commencement of construction activities if submitted using a paper submission. For “Ongoing Projects”, those authorized and pending authorization by KDEP as of July 1, 2009, an NOI must be submitted to KDEP within one (1) year, terminating on July 31, 2010. Failure to obtain or maintain Permit coverage shall not relieve a discharger from complying with the applicable performance standards. 401 KAR 5:055, Section 1.

10. Records reviewed and information provided to the EPA state that the Respondent began construction in July 2009.

11. On February 17, 2010, the Respondent submitted an NOI requesting permit coverage to KDEP. KDEP granted permit coverage on February 25, 2010. Therefore, the Respondent did not request coverage under the KDEP Permit for stormwater discharges associated with industrial activity prior to beginning land disturbing activity.

12. Therefore, the Respondent has violated Sections 301 and 402(p) of the CWA, 33 U.S.C. §§ 1311 and 1342(p), by failing to obtain permit coverage to discharge stormwater associated with industrial activity to a water of United States from July 2009 until February 25, 2010.

13. On February 17, 2010, the Respondent submitted an NOI requesting permit coverage to the KDEP. A Notice of Coverage was sent to the Respondent with an effective date of February 25, 2010, and an expiration date of July 31, 2014.

14. Part II.A of the Permit requires the development and implementation of a Best Management Practices Plan (“BMP Plan”). All operators at the Development are required to comply with the BMP Plan or obtain separate Permit coverage.

15. Part II.A.2 of the Permit requires the BMP Plan to include a site map of sufficient scale to depict the following: 1) locations of equipment storage areas, materials storage areas including but not limited to top soil, storage, fuels, fertilizers, herbicides, etc.; and 2) locations of concrete wash-out areas, waste management areas and areas of site egress.

16. Part II.A.5.a of the Permit requires the Respondent to maintain erosion prevention measures, sediment controls measures and other site management practices to be maintained in an effective, operating condition.

17. Part II.A.5.b of the Permit requires the Respondent to perform maintenance on any sediment control measures, erosion control measure or other site management practices that are identified in an inspection as not operating effectively or otherwise require maintenance, before the next storm event or as soon as possible.

18. Part II.A.7.a of the Permit requires the Respondent to conduct inspections of the Development at least once every seven (7) calendar days, or at least once every fourteen (14) calendar days and within twenty-four (24) hours of any storm event of 0.5 inches or greater.

19. Part II.A.7.d and e of the Permit requires the Respondent to conduct visual inspections to determine proper installation, maintenance and effectiveness of erosion prevention measures, sediment control measures, other site management practices, disturbed areas, areas used for storage of materials and discharge points.

20. Part II.A.7.f of the Permit requires inspection reports for all the Respondent's inspections to be retained with the BMP Plan. Inspection reports shall include: date of the inspection; name and title of the inspector; synopsis of weather information for the period since the last inspection; weather conditions and description of any discharges; location(s) of discharges of sediment or other pollutants; location(s) of erosion prevention measures, sediment control measures, or other site management practices that failed or proved inadequate; location(s) where additional erosion prevention measures, sediment control measures, or other silt management practices are needed; identify any action taken in response to inspection findings; identify any incidents of noncompliance with BMP Plan; certify that there were no incidents of non-compliance if so determined; and sign the inspection report.

21. Part II.A.8.f of the Permit requires modification to or additional sediment control measures, erosion control measures or other site management practices, if determined necessary, before the next storm event. If implementation before the next storm event is impracticable, the reasons and when the changes will be implemented shall be documented in the BMP Plan.

22. Part II.B of the Permit requires the Respondent to minimize the disturbance and period of time that disturbed areas are exposed without stabilization. In "critical areas" erosion control measures shall be implemented within twenty-four (24) hours or "as soon as practicable" after disturbance/grading or following cessation of activities.

23. On August 26, 2010, representatives of the EPA in conjunction with the KDEP performed a Compliance Stormwater Evaluation Inspection ("CSWEI") at the Respondent's Development. The EPA's CSWEI was to evaluate the treatment and disposal of stormwater at the Development in accordance with the CWA, the regulations promulgated thereunder at 40 C.F.R. § 122.26 and the KDEP Permit.

24. As a result of the CSWEI, the EPA has determined that the Respondent discharged stormwater associated with industrial activity from its Development within the meaning of Section 402(p) of the CWA, 33 U.S.C. § 1342(p), and its implementing regulations into Slickman and Hickman

Branches, waters of the United States.

25. During the CSWEI, the EPA inspectors observed the following:
- A. A record review showed that the Respondent failed to obtain permit coverage to discharge stormwater associated with industrial activity to a water of United States during the period from July 2009 to February 25, 2010.
 - B. The Respondent failed to develop and implement a BMP Plan that provided a map showing or describing: 1) locations of equipment storage areas, materials storage areas including but not limited to top soil, storage, fuels, fertilizers, herbicides, etc.; and 2) locations of concrete wash-out areas, waste management areas and areas of site egress in accordance with Part II.A.2 of the Permit.
 - C. The Respondent's regular inspections were sporadic and failed to meet the timeframes to conduct inspections of the Development at least once every seven (7) calendar days, or at least once every fourteen (14) calendar days and within twenty-four (24) hours of any storm event of 0.5 inches or greater as required by Part II.A.7.a of the Permit.
 - D. The Respondent's inspection reports were incomplete, inadequate and were not certified in accordance with Parts II.A.7.d-f of the Permit.
 - E. The Respondent failed to perform stabilization and maintenance of sediment control measures so that control measures were operating effectively as required by Parts II.A.5 and II.B of the Permit. Specifically:
 - 1) Silt fences and rip rap were not effective in controlling erosion and sediment loss into the base of two (2) culverts.
 - 2) A storm drain inlet located on the east side of the site was unprotected. This storm drain inlet drains directly into Hickman Branch. Since the soil near this storm drain was bare with evidence of sediment deposits in front, inlet protection is necessary. Another storm drain at a roadside ditch on the east side of site was not protected with gravel bags as were other storm drains in the area.
 - 3) Rill erosion was observed in two (2) areas: 1) the ditch area along US 421 on the south side of the road; and 2) the bank area next to a stormwater culvert. These areas need to be stabilized within twenty-four (24) hours or "as soon as practical".
 - 4) Sediment was observed in Slickway Branch, downstream from the Development, on the north side of road, at the culvert for US 421.

26. Therefore, the Respondent has violated Sections 301 and 402(p) of the CWA, 33 U.S.C. §§ 1311 and 1342(p), by failing to comply with the Permit and also for discharges not authorized by the Permit.

III. Stipulations and Findings

27. Complainant and the 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.

28. For the purposes of this CA/FO, the Respondent admits the jurisdictional allegations set out above and admits the factual allegations set out above.

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

30. The 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.

31. By signing this CA/FO, the 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. The 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.

32. The 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 the Respondent was materially false or inaccurate at the time such information or certification was provided to the EPA.

33. Complainant and the 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.

IV. Payment

34. 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, the EPA has determined that **Eight Thousand Dollars (\$8,000)** is an appropriate civil penalty to settle this action.

35. The Respondent shall submit payment of the penalty specified in the preceding paragraph within thirty (30) days of the effective date of this CA/FO 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 the 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 979077
St. Louis, Missouri 63197-9000

36. At the time of payment, the 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

Mary Mattox
U.S. Environmental Protection Agency, Region 4
Water Protection Division
Clean Water Enforcement Branch
Municipal and Industrial Enforcement Section
61 Forsyth Street, S.W.
Atlanta, Georgia 30303-8960

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

38. Pursuant to Section 309(g)(9) of the CWA, 33 U.S.C. § 1319(g)(9), failure by the Respondent to pay the penalty assessed by the CA/FO in full by its due date may subject the 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

39. This CA/FO shall not relieve the 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 the EPA.

40. 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 the

Respondent's violation of this CA/FO or of the statutes and regulations upon which this CA/FO is based, or for the Respondent's violation of any federal or state statute, regulation or permit.

41. Except as otherwise set forth herein, this CA/FO constitutes a settlement by Complainant and the 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 the 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 the 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.

42. 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.

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

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

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

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

For Complainant:

Rolando Bascumbe
Associate Regional Counsel
Office of Environmental Accountability
U.S. Environmental Protection Agency, Region 4
61 Forsyth Street, S.W.
Atlanta, Georgia 30303-8960
(404) 562-9545

For the Respondent:

Steve Criswell, Director
Division of Construction
Kentucky Transportation Cabinet
200 Mero Street
Frankfort, Kentucky 40622
(502) 564-4780

47. 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.

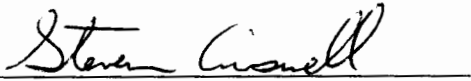
48. Pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), and 40 C.F.R. § 22.38(b), Complainant represents that the Commonwealth of Kentucky was provided a prior opportunity to consult with Complainant regarding this matter.

VI. Effective Date

49. The effective date of this CA/FO shall be the date on which the CA/FO is filed with the Regional Hearing Clerk.

AGREED AND CONSENTED TO:

For RESPONDENT, Kentucky Transportation Cabinet:

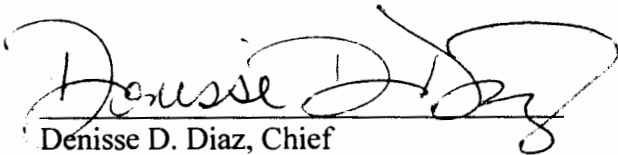


NAME: Steve Criswell

TITLE: Director, Division of Construction

Date: July 22, 2011

For COMPLAINANT, U.S. ENVIRONMENTAL PROTECTION AGENCY:



Denisse D. Diaz, Chief
Clean Water Enforcement Branch
Water Protection Division

Date: August 3, 2011

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4

IN THE MATTER OF:)
)
Kentucky Transportation Cabinet) CONSENT AGREEMENT AND
US 421 Widening PCN 09-1121) FINAL ORDER
Frankfort, Kentucky)
)
RESPONDENT.) DOCKET NO. CWA-04-2011-4522(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), the Respondent is hereby ordered to comply with the terms of the foregoing Consent Agreement.

U.S. ENVIRONMENTAL PROTECTION AGENCY

Date: Sept 8, 2011

Susan B. Schub
Susan B. Schub
Regional Judicial Officer

Docket No. CWA 04-2011-4522(b)

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the attached **CONSENT AGREEMENT AND FINAL ORDER** in the matter of US 421 Widening PCN 09-1121,

Docket No. CWA-04-2011-4522(b) (filed with the Regional Hearing Clerk on

9/8, 2011, was served on 9/8, 2011, in the manner specified to each of the persons listed below.

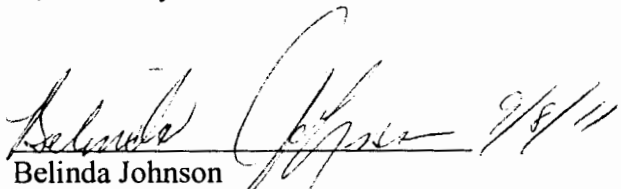
By hand-delivery:

Rolando Bascumbe
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:

Steve Criswell, Director
Division of Construction
Kentucky Transportation Cabinet
200 Mero Street
Frankfort, Kentucky 40622

Mr. Jeff Cummins
Acting Director, Division of Enforcement
Kentucky Department for Environmental Protection
14 Reilly Road
Frankfort, Kentucky 40601



Belinda Johnson
Acting Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 4
61 Forsyth Street, S.W.
Atlanta, Georgia 30303-8960
(404) 562-9511