

Guy, Lydia

From: Joyce, Patrick D <PJoyce@seyfarth.com>
Sent: Thursday, March 24, 2016 12:32 PM
To: Guy, Lydia
Cc: Gable, Kelly; Olson, Jeryl
Subject: CWA-03-2016-0040 - In the Matter of Recycled Aggregates LLC et al - Respondents' Answer, Request for Hearing, and Appearance
Attachments: 25693437_1_CWA-03-2016-0040 - Answer and Request for Hearing.PDF; 25693532_1_CWA-03-2016-0040 - Appearance.PDF

Ms. Guy,

Attached for filing is Respondents Recycled Aggregates, LLC's and John Driggs Company's Appearance, Answer to Complaint, and Request for Hearing in the above reference matter.

As we discussed on the phone, a hard copy original is being sent overnight via FedEx for delivery tomorrow morning.

Please let me know if you have any questions.

Thank you,

Patrick Joyce

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III

In the Matter of:

Recycled Aggregates, LLC

and

John Driggs Company,
Respondents,

Property Location:
1721 South Capitol St., S.W.
Washington, DC 20003

Docket No. CWA-03-2016-0040

Proceeding to Assess Class II
Administrative Penalty Under
Section 309(g) of the Clean Water Act

**ANSWER TO COMPLAINT
AND REQUEST FOR HEARING**

NOW COMES Recycled Aggregates, LLC and John Driggs Company, by and through their attorneys, Seyfarth Shaw LLP, and for their Answer to Administrative Penalty Complaint and Notice of Opportunity to Request Hearing, states as follows:

I. STATUTORY AUTHORITY

COMPLAINT ¶1:

Pursuant to Section 309(g) of the Clean Water Act (“CWA” or “Act”), 33 U.S.C. § 1319(g), the Administrator of the United States Environmental Protection Agency (“EPA” or “the Agency”) is authorized to assess administrative penalties against persons who violate Section 301(a) of the Act, 33 U.S.C. § 1311(a). The EPA Administrator has delegated this authority to the Regional Administrator of EPA, Region III, who in turn has delegated this authority to the Water Protection Division Director (“Complainant”).

ANSWER:

Respondents admit Complainant purports to bring this action under the cited statutes, that Complainant purports to assess penalties for alleged violations under the cited statutes, and that Complainant describes Respondents’ options related to the Complaint. Respondents deny they are liable for a civil penalty pursuant to the cited statutes. Respondents deny the remaining allegations in Paragraph 1 of the Complaint.

COMPLAINT ¶2:

Pursuant to Section 309 of the Act, 33 U.S.C. § 1319, and in accordance with the enclosed *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* (“*Consolidated Rules*”), 40 C.F.R. Part 22, Complainant hereby proposes to assess a civil penalty in the amount of \$54,000 (fifty-four thousand dollars) against Recycled Aggregates, LLC and John Driggs Company (together, “Respondents”), for violations of Section 301 of the CWA, 33 U.S.C. § 1311.

ANSWER:

Respondents admit Complainant purports to bring this action under the cited statutes, that Complainant purports to assess penalties for alleged violations under the cited statutes, and that Complainant describes Respondents’ options related to the Complaint. Respondents deny they are liable for a civil penalty pursuant to the cited statutes. Respondents deny the remaining allegations in Paragraph 2 of the Complaint.

II. FACTUAL AND LEGAL ALLEGATIONS

COMPLAINT ¶3:

Respondent Recycled Aggregates, LLC is a “person” within the meaning of Section 502(5) of the Act, 33 U.S.C. § 1362(5), and 40 C.F.R. section 122.2.

ANSWER:

Paragraph 3 of the Complaint states a legal conclusion to which no response is required. To the extent a response is required, Respondent Recycled Aggregates, LLC admits the allegations contained in Paragraph 3 of the Complaint.

COMPLAINT ¶4:

Respondent John Driggs Company is a “person” within the meaning of Section 502(5) of the Act, 33 U.S.C. § 1362(5), and 40 C.F.R. section 122.2.

ANSWER:

Paragraph 4 of the Complaint states a legal conclusion to which no response is required. To the extent a response is required, Respondent John Driggs Company admits the allegations contained in Paragraph 4 of the Complaint.

COMPLAINT ¶5:

The John Driggs Company, Inc. is the 95% owner of Recycled Aggregates LLC.

ANSWER:

Respondents are unable to determine what is meant by the phrase “95% owner of Recycled Aggregates LLC” and are unable to form a belief as to the truth or falsity of the allegations contained in Paragraph 5 of the Complaint and therefore, deny any and all allegations contained in Paragraph 5 of the Complaint.

COMPLAINT ¶6:

Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant (other than dredged or fill material) from a point source into waters of the United States except in compliance with a permit issued pursuant to the National Pollutant Discharge Elimination System (“NPDES”) program under Section 402 of the Act, 33 U.S.C. § 1342.

ANSWER:

The terms of Section 301(a) of the Act stand on their own, and Respondents deny any allegation contained in Paragraph 6 of the Complaint inconsistent with those terms. Respondents deny they violated the Act or its implementing regulations.

COMPLAINT ¶7:

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 or may authorize states to issue such permits. The discharges are subject to specific terms and conditions as prescribed in the permit.

ANSWER:

The terms of Section 402(a) of the Act stand on their own, and Respondents deny any allegation contained in Paragraph 7 of the Complaint inconsistent with those terms. Respondents deny they violated the Act or its implementing regulations.

COMPLAINT ¶8:

Section 402(p) of the Act, 33 U.S.C. § 1342(p), and 40 C.F.R. sections 122.2 and 122.26 provide that, with some exceptions not relevant here, storm water discharges are “point sources” subject to NPDES permitting requirements under Section 402(a) of the Act, 33 U.S.C. § 1342(a).

ANSWER:

The terms of Section 402(p) of the Act stand on their own, and Respondents deny any allegation contained in Paragraph 8 of the Complaint inconsistent with those terms. Respondents deny they violated the Act or its implementing regulations.

COMPLAINT ¶9:

“Storm water” is defined as “storm water runoff, snow melt runoff and surface runoff and drainage.” 40 C.F.R. § 122.26(b)(13).

ANSWER:

The terms of 40 C.F.R. § 122.26(b)(13) stand on their own, and Respondents deny any allegation contained in Paragraph 9 of the Complaint inconsistent with those terms. Respondents deny they violated the Act or its implementing regulations.

COMPLAINT ¶10:

“Discharge of a pollutant” includes “any addition of any ‘pollutant’ or combination of pollutants to ‘waters of the United States’ from any ‘point source’”. 40 C.F.R. § 122.2.

ANSWER:

The terms of 40 C.F.R. § 122.2 stand on their own, and Respondents deny any allegation contained in Paragraph 10 of the Complaint inconsistent with those terms. Respondents deny they violated the Act or its implementing regulations.

COMPLAINT ¶11:

Respondents own and/or operate a business processing rock, crushed stone, crushed concrete, sand, and gravel at a facility known as “DC Rock”, located at 1721 South Capitol Street, SW, Washington, DC 20003 (“the Facility”).

ANSWER:

Denied. Respondent Recycled Aggregates, LLC operates the Facility, but does not own the Facility. Respondent John Driggs Company does not own or operate the Facility.

COMPLAINT ¶12:

The Standard Industrial Classification (“SIC”) code number assigned to the Facility is 1429.

ANSWER:

Admitted.

COMPLAINT ¶13:

Facilities classified as SIC code categories 10 through 14 are considered to be engaging in “industrial activity” within the meaning of Section 402(p) of the Act, 33 U.S.C. § 1342(p), and 40 C.F.R. section 122.26(b)(14)(iii). SIC code number 1429 is such a classification.

ANSWER:

The terms of Section 402(p) of the Act and 40 C.F.R. § 122.26(b)(14)(iii) stand on their own, and Respondents deny any allegation contained in Paragraph 13 of the Complaint inconsistent with those terms. Respondents deny that they violated the Act or its implementing regulations. To the extent Paragraph 13 of the Complaint states a legal conclusion, no response is required. To the extent a response is required to such legal conclusion, Respondents deny the allegations contained in Paragraph 13 of the Complaint.

COMPLAINT ¶14:

The Anacostia River is considered a “water of the United States” within the meaning of Section 502(7) of the Act, 33 U.S.C. § 1362(7), and 40 C.F.R. section 122.2.

ANSWER:

Paragraph 14 of the Complaint states a legal conclusion to which no response is required. To the extent a response is required, Respondents lack knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 14 of the Complaint and therefore, deny any and all allegations contained in Paragraph 14 of the Complaint.

COMPLAINT ¶15:

The Facility is a “point source” as that term is defined at Section 502(14) of the Act, 33 U.S.C. § 1362(14), and 40 C.F.R. section 122.2.

ANSWER:

Paragraph 15 of the Complaint states a legal conclusion to which no response is required. To the extent a response is required, Respondents deny the allegations contained in Paragraph 15 of the Complaint.

COMPLAINT ¶16:

Respondents, as the owners and/or operators of the Facility, “discharged” “pollutants” with storm water runoff as those terms are defined at Sections 502(6) and 502(16) of the Act, 33 U.S.C. §§ 1362(6) and 1362(16), and 40 C.F.R. section 122.2.

ANSWER:

Paragraph 16 of the Complaint states a legal conclusion to which no response is required. To the extent a response is required, Respondents deny the allegations contained in Paragraph 16 of the Complaint. Respondents further state: Respondent Recycled Aggregates LLC is the operator of the Facility, but not the owner of the Facility; Respondent John Driggs Company does not own or operate the Facility.

COMPLAINT ¶17:

Therefore, Respondents were required to obtain NPDES permit coverage prior to discharging any pollutants from a point source to a water of the United States as a result of an industrial activity.

ANSWER:

Paragraph 17 of the Complaint states a legal conclusion to which no response is required. To the extent a response is required, Respondents deny the allegations contained in Paragraph 17 of the Complaint.

COMPLAINT ¶18:

Pursuant to Sections 402(a) and 402(p) of the Act, 33 U.S.C. §§ 1342(a) and 1342(p), as well as 40 C.F.R. section 122.26(b)(14), EPA issued a Multi-Sector General Permit for Storm Water Discharges Associated with Industrial Activity (“MSGP”) effective September 29, 2008 (“the 2008 Permit” or “the 2008 MSGP”). The 2008 Permit authorized discharges of storm water associated with construction activities, but only in accordance with the conditions of the 2008 Permit.

ANSWER:

The terms of Sections 402(a) and 402(p) of the Act, 40 C.F.R. § 122.26(b)(14), and the 2008 MSGP stand on their own, and Respondents deny any allegation contained in Paragraph 18 of the Complaint inconsistent with those terms. Respondents deny that they violated the Act or its implementing regulations.

COMPLAINT ¶19:

The 2008 Permit replaced the prior MSGP, effective October 30, 2000 (hereinafter, “the 2000 Permit” or “the 2000 MSGP”).

ANSWER:

The terms of the 2000 MSGP and the 2008 MSGP stand on their own, and Respondents deny any allegation contained in Paragraph 19 of the Complaint inconsistent with those terms. Respondents deny that they violated the Act or its implementing regulations.

COMPLAINT ¶20:

The 2008 Permit required that existing dischargers authorized for coverage under the 2000 MSGP must submit a Notice of Intent (“NOI”) for coverage under the 2008 MSGP no later than January 5, 2009. 2008 MSGP at Part 1.3, Table 1-2.

ANSWER:

The terms of the 2000 MSGP and the 2008 MSGP stand on their own, and Respondents deny any allegation contained in Paragraph 20 of the Complaint inconsistent with those terms. Respondents deny that they violated the Act or its implementing regulations.

COMPLAINT ¶21:

Respondents were existing dischargers with coverage for the Facility under the 2000 MSGP.

ANSWER:

Paragraph 21 of the Complaint states a legal conclusion to which no response is required. To the extent a response is required, Respondents deny the allegations contained in Paragraph 21 of the Complaint.

COMPLAINT ¶22:

On September 19, 2012, representatives of EPA Region III and EPA contractors from ERG (“the Inspection Team”) conducted an inspection at the Facility (“the Inspection”).

ANSWER:

Respondents admit that on or about September 19, 2012, the Inspection Team conducted the Inspection.

COMPLAINT ¶23:

After a review of its records, EPA determined that Respondents did not have an NPDES permit for discharges of storm water from the Facility, nor had the Respondents applied for coverage for its discharges of storm water under the 2008 MSGP.

ANSWER:

Respondents lack knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 23 of the Complaint and therefore, deny any and all allegations contained in Paragraph 23 of the Complaint.

COMPLAINT ¶24:

On or about September 21, 2012, Respondents submitted an NOI for coverage for the Facility under the 2008 Permit.

ANSWER:

Respondents admit that on or about September 21, 2012, Respondent Recycled Aggregates LLC submitted an NOI for coverage of the Facility under the 2008 MSGP. Respondent John Driggs Company did not submit a NOI to EPA, nor was it required to do so. Respondents deny that they violated the Act or its implementing regulations.

COMPLAINT ¶25:

EPA determined that the Facility was eligible for coverage under the 2008 Permit, effective October 21, 2012, and assigned the Facility Permit Tracking Number DCRO5AA06.

ANSWER:

Respondents lack knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 25 of the Complaint and therefore, deny any and all allegations contained in Paragraph 25 of the Complaint.

COMPLAINT ¶26:

The Inspection Team prepared an inspection report from the Inspection (“the Inspection Report”).

ANSWER:

Respondents lack knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 26 of the Complaint and therefore, deny any and all allegations contained in Paragraph 26 of the Complaint.

COMPLAINT ¶27:

EPA sent a copy of the Inspection Report to Respondent Recycled Aggregates, LLC on March 25, 2013.

ANSWER:

Respondents admit that Respondent Recycled Aggregates LLC received an Inspection Report from EPA in March, 2013.

COMPLAINT ¶28:

As documented in the Inspection Report, storm water discharges from the Facility have flowed to the Washington, D.C. municipal separate storm sewer system (“DC MS4”), which ultimately discharges to the Anacostia River.

ANSWER:

Respondents lack knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 28 of the Complaint and therefore, deny any and all allegations contained in Paragraph 28 of the Complaint..

COMPLAINT ¶29:

On July 31, 2014, EPA sent an Information Requirement letter pursuant to Section 308 of the Act, 33 U.S.C. § 1318, to the John Driggs Company.

ANSWER:

Respondent John Driggs Company admits that on or about July 31, 2014, it received an Information Requirement letter from EPA.

COMPLAINT ¶30:

On September 18, 2014, EPA received information in response to the Information Requirement letter.

ANSWER:

Respondent John Driggs Company admits that, on or about September 18, 2014, it sent EPA information in response to the July 31, 2014 Information Requirement letter.

III. FINDINGS OF VIOLATION

Discharge Without a Permit (2011-2012)

COMPLAINT ¶31:

The 2008 Permit required that existing dischargers authorized for coverage under the 2000 MSGP must submit an NOI for coverage under the 2008 MSGP no later than January 5, 2009. 2008 MSGP at Part 1.3, Table 1-2.

ANSWER:

The terms of the 2000 MSGP and the 2008 MSGP stand on their own, and Respondents deny any allegation contained in Paragraph 31 of the Complaint inconsistent with those terms. Respondents deny that they violated the Act or its implementing regulations.

COMPLAINT ¶32:

Respondents were existing dischargers with coverage for the Facility under the 2000 MSGP.

ANSWER:

Paragraph 32 of the Complaint states a legal conclusion to which no response is required. To the extent a response is required, Respondents deny the allegations contained in Paragraph 32 of the Complaint.

COMPLAINT ¶33:

Respondents submitted an NOI for the Facility for coverage under the 2008 MSGP on September 21, 2012.

ANSWER:

Admitted with respect to Respondent Recycled Aggregates LLC. Denied with respect to Respondent John Driggs Company. Respondents deny that they violated the Act or its implementing regulations.

COMPLAINT ¶34:

Based upon the information obtained during the Inspection and from the review of the information received in response to the Information Requirement [SIC] letter, Respondents failed to submit an NOI for the Facility by January 5, 2009.

ANSWER:

Respondents lack knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 34 of the Complaint and therefore, deny any and all allegations contained in Paragraph 34 of the Complaint.

COMPLAINT ¶35:

Respondents' failure to submit an NOI for the Facility by January 5, 2009 constitutes violations of the 2008 Permit and Section 301 of the Act, 33 U.S.C. § 1311. Respondents have violated Section 301 of the Act, 33 U.S.C. § 1311, by discharging storm water from its facility to a water of the United States without first obtaining an NPDES permit and/or authorization under the MSGP.

ANSWER:

Denied.

IV. PROPOSED CIVIL PENALTY

The Complaint contains paragraphs numbered 36-40 regarding Complainant's proposed penalties. Without admitting that these matters are properly pled and/or require a response, Respondent states as follows: as set forth herein, Respondent denies that it has violated the referenced statutes and implementing regulations. Respondent therefore denies that it is liable for penalties. Respondent further states that to the extent any violation is found to have occurred, which Respondent denies, the penalties proposed by Complainant are inappropriate and that, in fact, no penalty should be awarded given the nature, extent and gravity of the alleged violation and taking into account all appropriate factors as justice requires. EPA incorrectly applied its penalty guidance, and in any event, the Administrative Law Judge is not obligated to follow the penalty policy.

REQUEST FOR HEARING

Respondents hereby request a hearing on this matter.

DATED: March 24, 2016

RECYCLED AGGREGATES, LLC AND
JOHN DRIGGS COMPANY

By: /s/ Jeryl L. Olson
One of Their Attorneys

Jeryl L. Olson
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Certificate of Service

The undersigned, an attorney, hereby certifies that he served a copy of the foregoing Answer to Complaint and Request for Hearing to the following via email, before the hour of 5:00 pm, on March 24, 2016:

Lydia Guy
Regional Hearing Clerk (3RC00)
U.S. EPA, Region 3
1650 Arch Street
Philadelphia, PA 19103-2029
guy.lydia@epa.gov

Kelly Gable
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and via FedEx overnight delivery to:

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 /s/ Patrick D. Joyce
Patrick D. Joyce