

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

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)	
)	
)	
Iowa Fertilizer Company, LLC)	
Orascom E&C USA, Inc.)	Docket No. CWA-07-2015-0074
)	
)	
)	CONSENT AGREEMENT AND
)	FINAL ORDER
Respondents)	
)	
Proceedings under Section 309(g) of the)	
Clean Water Act, 33 U.S.C. § 1319(g))	
_____)	

The United States Environmental Protection Agency (EPA), Region 7 (Complainant) and Iowa Fertilizer Company, LLC and Orascom E&C USA, Inc.(Respondents) 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) of 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 (Consolidated Rules), 40 C.F.R. §§ 22.13(b) and 22.18(b)(2). This is a "Class II" penalty action pursuant to Section 309(g)(2)(B) of the CWA, 33 U.S.C. 1319(g)(2)(B). This Consent Agreement and Final Order shall be entered and become effective only after the conclusion of the period of 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.

A. ALLEGATIONS.

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 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. This Consent Agreement and Final Order (CAFO) serves as notice that EPA has reason to believe that the Respondents have violated Sections 301 and 402 of the CWA, 33 U.S.C. § 1311 and § 1342, and regulations promulgated thereunder.

Parties

2. The authority to take action under Section 309(g) of the CWA, 33 U.S.C. § 1319(g), is vested in the Administrator of EPA. The Administrator has delegated this authority to the Regional Administrator, EPA, Region 7, who in turn has delegated it to the Director of the Water, Wetlands and Pesticides Division of EPA, Region 7 (Complainant).

3. The Respondents are Iowa Fertilizer Company, LLC and Orascom E&C USA, Inc. The claims resolved by this CAFO pertain to the Iowa Fertilizer Company Construction Project in Wever, Iowa, consisting of the construction of a new fertilizer plant and associated utilities and transportation routes and pipelines ("Site"). The fertilizer plant construction portion of the project is located southeast of the intersections of 180th Street and 354th Avenue in Wever, Iowa.

Statutory and Regulatory Framework

4. 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, 33 U.S.C. § 1342, provides that pollutants may be discharged only in accordance with the terms of a National Pollutant Discharge Elimination System (NPDES) permit issued pursuant to that Section.

5. 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.

6. 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 storm water. Section 402(p) of the CWA, 33 U.S.C. § 1342(p), requires, in part, that a discharge of storm water associated with an industrial activity must conform with the requirements of an NPDES permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

7. Pursuant to Section 402(p) of the CWA, 33 U.S.C. § 1342(p), EPA promulgated regulations setting forth the NPDES permit requirements for storm water discharges at 40 C.F.R. § 122.26.

8. 40 C.F.R. §§ 122.26(a)(1)(ii) and 122.26(c) require dischargers of storm water associated with industrial activity to apply for an individual permit or to seek coverage under a promulgated storm water general permit.

9. 40 C.F.R. § 122.26(b)(14)(x) defines "storm water discharge associated with industrial activity," in part, as construction activity including clearing, grading, and excavation, except operations that result in the disturbance of less than five (5) acres of total land area which are not part of a larger common plan of development or sale.

10. 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, 33 U.S.C. § 1342. EPA maintains concurrent enforcement authority with authorized states for violations of the CWA. EPA has notified IDNR of this enforcement action and CAFO.

11. IDNR issued a general permit for the discharge of stormwater under the NPDES, referenced as “General Permit No. 2” (hereafter, the “General Permit”). IDNR’s General Permit governs stormwater discharges associated with construction or land disturbance activity. The General Permit became effective on October 1, 2012 and expires on October 1, 2017.

Factual Allegations

12. Respondents are each a “person” as defined by Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

13. At all times relevant to this action, Respondents were the owner(s) and/or operator(s) of the Site. As described below, construction activities occurred at the Site including clearing, grading, and excavation which disturbed five (5) or more acres of total land area.

14. Surface drainage for most of the Site is directed and collected in several sediment basins. The basins are connected via a system of ditches and underground pipes. Stormwater is discharged to the 180th Street ditch via single or double outlet pipes. Stormwater from the road ditch travels east approximately 280 yards to Rogers Ditch. Rogers Ditch has perennial flow, and is a channelized tributary. Rogers Ditch flows southeast approximately 6 miles to the Mississippi River. The Mississippi River is listed as impaired under CWA Section 303(d). Rogers Ditch and the Mississippi River are each a “navigable water” of the United States as defined by Section 502(7) of the CWA, 33 U.S.C. § 1362(7).

15. The runoff and drainage from the Site is “stormwater” as defined by 40 C.F.R. § 122.26(b)(13). Stormwater from the Site contains “pollutants” as defined by Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

16. The Site has “stormwater discharge associated with industrial activity” as defined by 40 C.F.R. § 122.26(b)(14)(x), and is a “point source” as defined by Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

17. Stormwater runoff from Respondents’ construction Site results in the “discharge of a pollutant” as defined by CWA Section 502(12), 33 U.S.C. § 1362(12).

18. Respondents’ discharge of pollutants associated with an industrial activity, as defined by 40 C.F.R. § 122.26(b)(14)(x), requires a permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

19. Respondent Iowa Fertilizer Company, LLC applied for and was issued NPDES permit coverage under the General Permit described in Paragraph 11 above. IDNR issued Respondent Iowa Fertilizer Company, LLC NPDES permit discharge authorization number

IA22467-22231 on August 31, 2012, with coverage through October 1, 2017. Part IV.D.7 the General Permit, as authorized and applicable to the Site, states that the “contractor or subcontractor is a co-permittee with the owner [of the Site] and other co-permittee contractors.” Respondent Orascom E&C USA, Inc. is a contractor of the Site. Part VI of the General Permit, as authorized and applicable to the Site states permittee(s) “must comply with all conditions of this permit.”

20. The fertilizer plant construction portion of the Site occupies 369 acres of land, of which nearly 323 have been disturbed. Mass grading for the fertilizer plant began in approximately March 2013.

21. On June 14 2013, IDNR performed an inspection of the Site. A letter was issued by IDNR following the inspection, listing several compliance issues with the General Permit. IDNR inspected the receiving waters from the Site on October 1, 8, 16, 21, and 29, 2014. During IDNR’s inspections, sediment was observed leaving the site and entering the receiving waters.

22. On June 25 and 26, 2014, the U.S. Environmental Protection Agency inspected the Site under the authority of Section 308(a) of the CWA, 33 U.S.C. § 1318. The purpose of EPA’s inspection was to evaluate the management of stormwater at the site in accordance with the CWA. EPA’s inspection identified alleged violations of the CWA stormwater permit referenced above, including sediment leaving the Site, and at the conclusion of the inspection, Respondents were provided a Notice of Potential Violation (NOPV).

Alleged Violations

Count I

Prohibited Discharges

23. The facts stated in Paragraphs 12 through 22, above, are herein incorporated.

24. Part III.A.1 of the General Permit, as authorized and applicable to the Site, requires that “all discharges authorized by the permit be composed entirely of storm water except for non-storm discharges listed in Part III.A.2.”

25. The IDNR and EPA inspections referenced in Paragraphs 21 and 22, above, identified discharges that violated Part III.A.1 of the General Permit, as authorized and applicable to the Site.

26. Respondents’ discharges of stormwater (containing sediment) each constitute a violation of the General Permit, as authorized and applicable to the Site, and as such, are each a violation of Sections 301(a) and 402(p) of the CWA, 33 U.S.C. § 1311(a) and § 1342(p).

Count 2
Failure to update and/or amend
Stormwater Pollution Prevention Plan

27. The facts stated in Paragraphs 12 through 22, above, are herein incorporated.

28. Part IV of the General Permit, as authorized and applicable to the Site, requires and states that permittees shall develop and implement a Storm Water Pollution Prevention Plan (SWPPP), and that the SWPPP “shall describe and ensure the implementation of practices which will be used to reduce the pollutants in storm water discharge associated with industrial activity for construction activities at the construction site. Facilities must implement the provisions of the storm water pollution prevention plan required under this part as a condition of this permit”.

29. Part IV.D.2 of the General Permit, as authorized and applicable to the Site, requires and states that the required SWPPP “shall include a description of the controls that will be implemented at the construction site.”

30. Part IV.C of the General Permit, as authorized and applicable to the Site, requires and states that permittees shall amend the plan (SWPPP) if the plan “proves ineffective in eliminating or significantly minimizing pollutants from sources... or otherwise achieving the general objectives of controlling pollutants in stormwater discharge...”

31. The IDNR and/or EPA inspections referenced in Paragraphs 21 and 22, above, documented that Respondents did not update or amend the SWPPP to address the observed failures of site controls to prevent pollutants (sediment) from being discharged from the Site, in violation of Part IV.C. of the General Permit.

32. The IDNR and/or EPA inspections referenced in Paragraphs 21 and 22, above, revealed that Respondents’ SWPPP did not sufficiently identify necessary additional pollution controls for the Site, in violation of Parts IV.C and IV.D.2 of the General Permit.

33. Respondents’ failures to update and amend the Site’s SWPPP are each a violation of the General Permit, as authorized and applicable to the Site, and as such, are each a violation of Section 402(p) of the CWA, 33 U.S.C. § 1342(p).

Count 3

Failure to Properly Design, Install, Implement and/or Maintain Best Management Practices (BMPs)

34. The facts stated in Paragraphs 12 through 22, above, are herein incorporated.

35. Part IV.D.2 of the General Permit, as authorized and applicable to the Site, requires that the permittee design, install and/or maintain erosion controls and sediment controls to minimize the discharge of pollutants.

36. Part IV.D.2 of the General Permit, as authorized and applicable to the Site, requires that the permittee select appropriate structural controls for use at the Site, list them in the SWPPP and ensure the identified controls are properly installed at the locations and relative times described in the SWPPP.

37. The IDNR and/or EPA inspections referenced in Paragraphs 21 and 22, above, revealed that Respondents had not adequately selected, designed, installed and/or maintained controls identified in the Site's SWPPP to protect receiving waters, in violation of Part IV of the General Permit. Such failures resulted in the unauthorized discharge of sediment offsite. These violations included:

- a. Several locations where inlet controls had not been installed, were inadequate or damaged;
- b. Lack of sediment control barriers in necessary locations, (including straw bales, rip rap and silt control fences), lack of adequate sediment control barriers and/or removal of control barriers prior to permanent stabilization; and
- c. Failure to utilize concrete washout pit on all occasions.

38. Respondents' failures to properly select, install, design, implement and/or maintain controls are each a violation of the Part IV General Permit, as authorized and applicable to the Site and as such, are each a violation of Section 402(p) of the CWA, 33 U.S.C. § 1342(p).

Count 4

Failure to Perform and/or Adequately Document Site Inspections

45. The facts stated in Paragraphs 12 through 22, above, are herein incorporated

46. Part IV.D.4 of the General Permit, as authorized and applicable to the Site, requires that qualified personnel shall perform and document the inspection of areas of the Site that have not been finally stabilized at least once every seven calendar days and "[d]isturbed areas and areas used for the storage of materials that are exposed to precipitation...Erosion and sediment control measures identified in the plan shall be observed to ensure that they are operating correctly."

47. Parts IV.D.4.b and c of the General Permit, as authorized and applicable to the Site, requires that the permittee perform inspections, document the inspections, and record actions taken to correct observed problems.

48. The IDNR and/or EPA inspection referenced in Paragraphs 21 and 22, above, revealed that Respondents, on at least one occasion, did not timely, or did not adequately, perform and/or document required Site inspections and/or corrective actions, in violation of Part IV.D.4 of the General Permit.

49. Respondents' failure to timely and/or properly perform and/or document site inspections and/or corrective actions are each a violation of Part IV.D.4 the General Permit, as authorized

and applicable to the Site, and as such, is a violation of Section 402(p) of the CWA, 33 U.S.C. § 1342(p).

B. CONSENT AGREEMENT

1. Respondents and EPA agree to the terms of this CAFO and Respondents agree to comply with the terms of the Final Order portion of this CAFO.
2. Respondents admit the jurisdictional allegations of this CAFO and agree not to contest EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of the Final Order portion of this CAFO.
3. Respondents neither admit nor deny the specific factual allegations and alleged violations set forth above.
4. Respondents waive their right to a judicial or administrative hearing on any issue of fact or law set forth above, and their right to appeal the Final Order portion of this CAFO.
5. Respondents and Complainant agree to conciliate the matters set forth in this CAFO without the necessity of a formal hearing and agree to bear their own costs and attorney's fees incurred as a result of this action.
6. The undersigned representatives of the Respondents certify that he/she is fully authorized to enter the terms and conditions of this CAFO and to execute and legally bind Respondents to it.
7. Nothing contained in the Final Order shall alter or otherwise affect Respondents' obligation to comply with all applicable federal, state, and local environmental statutes and regulations and applicable permits.
8. This CAFO addresses all civil and administrative claims for the CWA violations identified above. Complainant reserves the right to take any enforcement action with respect to any other violations of the CWA or any other applicable law.
9. Respondents certify by the signing of this CAFO that, to the best of their knowledge, the Site is in compliance with all requirements of Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342.
10. The effect of settlement described in Paragraph B.8, above, is conditional upon the accuracy of the Respondents' representation to EPA in Paragraph B.9, above of this CAFO.
11. Respondents agree that, in settlement of the claims alleged in this CAFO, Respondents shall pay a penalty of \$80,689, as set forth in Paragraph B.13 below.
12. Respondents understand that failure to pay any portion of the civil penalty on the date the same is due may result in the commencement of a civil action in Federal District Court to collect said penalty, along with interest thereon at the applicable statutory rate.

13. Respondents shall pay a civil penalty of Eighty Thousand, Six Hundred Eighty Nine Dollars (\$80,689) to be paid in full no later than 30 days after the effective date of this CAFO. Payment of the penalty shall be by cashier or certified check made payable to the "United States Treasury" and remitted to:

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

This payment shall reference docket number CWA-07-2015-0074.

Copies of the check(s) shall be mailed to:

Howard C. Bunch
Sr. Assistant Regional Counsel
U.S. Environmental Protection Agency – Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219

and to

Kathy Robinson
Regional Hearing Clerk
U.S. Environmental Protection Agency - Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219

14. No portion of the civil penalty or interest paid by Respondents pursuant to the requirements of this CAFO shall be claimed by Respondents as a deduction for federal, state, or local income tax purposes.

Parties Bound

15. This CAFO shall apply to and be binding upon Respondents and Respondents' agents, successors and/or assigns. Respondents shall ensure that all contractors, employees, consultants, firms or other persons or entities acting for Respondents, with respect to matters included herein, comply with the terms of this CAFO.

General Provisions

16. Notwithstanding any other provision of this CAFO, EPA reserves the right to enforce the terms of this CAFO by initiating a judicial or administrative action pursuant to Section 309 of the CWA, 33 U.S.C. § 1319, and to seek penalties against Respondents or to seek any other remedy allowed by law associated with a violation of this CAFO.

17. Complainant reserves the right to take enforcement action against Respondents for any violations of the CWA not resolved by this CAFO, and its implementing regulations, and to enforce the terms and conditions of this CAFO.

18. This CAFO shall be entered and become effective only after the conclusion of the period of 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. Unless otherwise stated, all time periods stated herein shall be calculated in calendar days from such date.

19. The headings in this CAFO are for convenience of reference only and shall not affect interpretation of this CAFO.

20. Respondents and Complainant agree that this CAFO can be signed in part and counterpart.

FOR RESPONDENTS:

Iowa Fertilizer Company, LLC

7/28/15

Date



Name: *Shawn Rana*

Title: *President*

Orascom E&C USA, Inc.

Date

Name:

Title:

General Provisions

16. Notwithstanding any other provision of this CAFO, EPA reserves the right to enforce the terms of this CAFO by initiating a judicial or administrative action pursuant to Section 309 of the CWA, 33 U.S.C. § 1319, and to seek penalties against Respondents or to seek any other remedy allowed by law associated with a violation of this CAFO.

17. Complainant reserves the right to take enforcement action against Respondents for any violations of the CWA not resolved by this CAFO, and its implementing regulations, and to enforce the terms and conditions of this CAFO.

18. This CAFO shall be entered and become effective only after the conclusion of the period of 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. Unless otherwise stated, all time periods stated herein shall be calculated in calendar days from such date.

19. The headings in this CAFO are for convenience of reference only and shall not affect interpretation of this CAFO.

20. Respondents and Complainant agree that this CAFO can be signed in part and counterpart.

FOR RESPONDENTS:

Iowa Fertilizer Company, LLC

Date

Name:
Title:

Orascom E&C USA, Inc.

Date

Name:
Title:

29 JULY '15

Gary L Butcher
Name: Gary Butcher
Title: Project Executive

FOR COMPLAINANT:

U.S. ENVIRONMENTAL PROTECTION AGENCY

Date

Karen Flournoy, Director
Water, Wetlands and Pesticides Division

Date

Howard C. Bunch
Sr. Assistant Regional Counsel
Office of Regional Counsel

C. 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 Respondents are 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

Karina Boromeo
Regional Judicial Officer