

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

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:)
) Docket No. CWA-07-2015-0070
)
MID-AMERICA SAND, L.L.C.)
)
)
) CONSENT AGREEMENT AND
) FINAL ORDER
Respondent,)
)
)
Proceedings under Section 1319(g) of the)
Clean Water Act, 33 U.S.C. § 1319(g))
_____)

The United States Environmental Protection Agency, Region 7 (“EPA”) and Mid-America Sand, L.L.C. (“Respondent”), have agreed to a settlement of the alleged violations set forth in this Consent Agreement and Final Order (“CA/FO”). 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. Part 22, and pursuant to Subpart C of the Consolidated Rules.

COMPLAINT

Jurisdiction

1. This is an administrative action for the assessment of civil penalties instituted pursuant to Section 309(g)(2)(B) of the Clean Water Act (“CWA”), 33 U.S.C. § 1319(g)(2)(B), and in accordance with the Consolidated Rules.

2. This CA/FO alleges that Respondent discharged pollutants into a water of the United States in violation of Section 301 of the CWA, 33 U.S.C. § 1311.

Parties

3. Complainant, by delegation from the Administrator of EPA to the Regional Administrator, EPA, Region 7, and re-delegation, is to the Director of Region 7’s Water, Wetlands and Pesticides Division.

4. Respondent is Mid-America Sand, L.L.C. (hereafter “Respondent”), a corporation and a “person” within the meaning of Section 502(4) of the CWA, 33 U.S.C. § 1362(5).

Statutory and Regulatory Framework

5. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants except in compliance with, *inter alia*, Section 404 of the CWA, 33 U.S.C. § 1344.

6. 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.

7. Section 404 of the CWA, 33 U.S.C. § 1344, specifically requires a person to obtain a permit from the Secretary of the Army acting through the Chief of Engineers, commonly referred to as the United States Army Corps of Engineers (hereinafter “Corps”), for any discharge of “dredged or fill material” into the “navigable waters” of the United States.

8. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines “navigable waters,” in part, as the “waters of the United States,” which are defined at 40 C.F.R. § 232.2 and 33 C.F.R. Part 328, and which include wetlands adjacent to waters of the United States.

9. 40 C.F.R. § 232.2 defines the term “dredged material” to mean material that is excavated or dredged from waters of the United States.

10. 40 C.F.R. § 232.2 defines the term “discharge of dredged material” to mean, with specified exceptions, any addition of dredged material into, including redeposit of dredged material other than incidental fallback within, the waters of the United States. The term includes, but is not limited to, *inter alia*, the addition of dredged material to a specified discharge site located in waters of the United States; and any addition, including redeposit other than incidental fallback, of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized land-clearing, ditching, channelization, or other excavation.

11. 40 C.F.R. § 232.2 defines the term “fill material” to include material placed in waters of the United States where the material has the effect of changing the bottom elevation of any portion of a water of the United States. The definition provides examples including, *inter alia*, rock, sand, soil, clay, overburden, and materials used to create any structure or infrastructure in the waters of the United States.

12. 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 to the requirements of a NPDES permit issued pursuant to Sections 301 and 402 of the CWA.

13. Pursuant to Section 402(p) of the CWA, EPA promulgated regulations setting forth the NPDES permit requirements for stormwater discharges at 40 C.F.R. § 122.26.

14. 40 C.F.R. § 122.26(a)(1)(ii) and 122.26(c) requires dischargers of stormwater associated with industrial activity to apply for an individual permit or to seek coverage under a promulgated stormwater general permit.

15. 40 C.F.R. § 122.26(b)(14)(iii) defines “stormwater discharge associated with industrial activity”, in part, as facilities classified as Standard Industrial Classification 1442 (Construction Sand and Gravel).

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

17. MDNR implements General Permit, MO-G500000, for the discharge of stormwater under the NPDES program. The permit governs stormwater and other specified discharges from sand and/or gravel mining, washing, sorting or storage facilities.

18. Section 309(a) of the CWA, 33 U.S.C. § 1319(a), authorizes the issuance of an order against any person who violates Section 301 of the CWA, 33 U.S.C. § 1311, requiring such person to comply.

Factual Background

19. Respondent is a “person” within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

20. At all times relevant to this action, Respondent owned, operated, leased and/or otherwise controlled property located in the Sections 1 and 2 of Township 50 North, Range 32 West, Jackson County, Missouri and Sections 29 and 32 of Township 51 North, Range 31 West, Clay County, Missouri (hereinafter the “Site” or “Facility”).

21. On August 22, 2011, MDNR issued a General State Operating Permit, MO-G500174, (“NPDES Permit”) to Respondent. As required by the NPDES Permit, Respondent developed a Stormwater Pollution Prevention Plan (“SWPPP”) in October 2011 and updated the SWPPP on April 2013.

22. Respondent's NPDES Permit authorizes discharges of stormwater, process, and wash water from all outfalls, including an outfall identified by Respondent as "Outfall 001".

23. In 2010 continuing through the present, Respondent and/or persons acting on its behalf, by the use of earth moving equipment and/or Outfall 001, authorized and/or directed the grading, excavation, placement, and discharge of dredged and/or fill material including, but not limited to, dirt, spoil, rock, and sand, impacting approximately 5.35 acres of wetlands.

24. On November 1, 2012, representatives from the Corps inspected the Site and documented the discharges of dredged and/or fill material described in Paragraph 23.

25. The dredged and/or fill materials discharged by Respondent into wetlands are "pollutants" within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

26. The discharge of the dredged and/or fill material into wetlands referenced in Paragraph 23 constitutes the "discharge of a pollutant" within the meaning of Section 502(12) of the CWA, 33 U.S.C. § 1362(12).

27. The earth moving equipment and Outfall 001 referenced in Paragraphs 22 and 23 constitute "point source(s)" within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

28. The wetlands, referenced in Paragraph 23, are "waters of the United States" within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7), 40 C.F.R. § 232.2, and 33 C.F.R. Part 328.

29. Respondent did not obtain a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, prior to the performance of the work described in Paragraph 23.

30. At all times relevant to this action, Respondent was the owner and/or operator of a Facility known as Mid-America Sand, L.L.C., described in Paragraph 20 above, operating under SIC code 1442.

31. Storm water, snow melt, surface drainage and runoff water leaves Respondent's facility and flows into an unnamed tributary to Shoal Creek. The runoff and drainage from Respondent's facility is "storm water" as defined by 40 C.F.R. § 122.26(b)(13). The Facility has "storm water discharge associated with industrial activity", specifically discharges associated with "facilities classified as Standard Industrial Classifications...14" as defined by 40 C.F.R. § 122.26(b)(14)(iii) and is a "point source" as defined by Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

32. Storm water from the facility contains “pollutants” as defined by Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

33. Respondent discharged pollutants into an unnamed tributary to Shoal Creek and Shoal Creek, which are navigable waters of the United States within the meaning of 40 C.F.R. § 112.2 and Section 502(7) of the Act, 33 U.S.C. § 1362(7).

34. 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).

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

36. Respondent applied for and was issued NPDES permit coverage under the general permit described in Paragraph 21 above.

37. Respondent’s NPDES permit, pursuant to Applicability, Paragraph 7(a), prohibits discharges within 1,000 feet of areas which would drain to a wetland.

38. Respondent’s NPDES permit, Requirements, Paragraph 1(a) and (b)(3) provides:

- (a) Discharges to waters of the state shall not cause a violation of water quality standards rule under 10 CSR 20-7.031, including both specific and general criteria.
- (b) No water contaminant, by itself or in combination with other substances, shall prevent the waters of the state from meeting the following conditions:

...(3) Waters shall be free from substances in sufficient amounts to cause unsightly color or turbidity, offensive odor or prevent full maintenance of beneficial uses.

39. On February 18 and 20, 2014, EPA performed an inspection of the Facility under the authority of Section 308(a) of the CWA, 33 U.S.C. § 1318(a). The purpose of the inspection was to evaluate the management of stormwater at the Facility in accordance with the CWA.

40. The inspection, as described in Paragraph 39 above, included a visual inspection of the entire Facility, stormwater Outfall #001, and the receiving stream and its confluence with Shoal Creek. The inspection also included a review of the recordkeeping and self-monitoring procedures.

Allegations of Violation

41. The facts stated in Paragraphs 19 through 40 above are herein incorporated into each of Counts 1 through 4 below.

Count 1

Unauthorized Discharge of Dredge and/or Fill Material

42. Respondent's discharges of pollutants from a point source into a water of the United States, described in Paragraph 23 above, occurred without a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344. Therefore, these discharges violated Section 301 of the CWA, 33 U.S.C. § 1311.

Count 2

Unauthorized Stormwater Discharge

43. Paragraph 1(a) and (b)(1) and (3) of the Requirements section of Respondent's NPDES permit does not authorize any discharge in violations of the general criteria as outlined in Paragraph 39 above.

44. The EPA inspection referenced in Paragraph 39 above, documented a wastewater discharge from Outfall #001, into an unnamed tributary to Shoal Creek, to Shoal Creek that was described and photographed as turbid and light brown to brown.

45. Respondent's unauthorized discharge of pollutants from a point source into waters of the United States causing turbidity and/or unsightly color, is a violation of the general criteria set forth in Respondent's NPDES permit, and is such a violation of Sections 301(a) of the CWA, 33 U.S.C. §§ 1311(a).

Count 3

Failure to Properly Conduct and Document Inspections

46. Respondent's NPDES Permit, Paragraph 2, Requirements, states that Respondent's SWPPP shall include a schedule for inspections each work day. The inspection must include observation and evaluation of Best Management Practices ("BMP") effectiveness, deficiencies, and corrective measures that will be taken. Deficiencies must be corrected within seven days and MDNR must be notified by letter. A log of the inspection reports must be maintained with the SWPPP.

47. The EPA inspection referenced in Paragraph 39 above, documented that Respondent failed to document and log work day site inspections from January 2012 through January 2014.

48. Respondent's failure to properly conduct and document Site inspections is a violation of Respondent's NPDES permit, and as such, is a violation of Sections 301(a) and 402(p) of the CWA, 33 U.S.C. §§ 1311(a) and 1342(p), and implementing regulations.

Count 4

Failure to Conduct Employee Training

49. Respondent's NPDES permit, Paragraph 2, Requirements, provides that Respondent must prepare a SWPPP that requires the inclusion of a provision for providing training to all personnel involved in material handling and storage, and housekeeping of areas having materials exposed to storm water. This may be satisfied by in-house training provided by facility staff. Proof of training shall be submitted upon request. Respondent's SWPPP requires the training to be performed annually.

50. The EPA inspection referenced in Paragraph 39 above, documented that Respondent failed to conduct training annually, specifically in 2012.

51. Respondent's failure to conduct training is a violation of Respondent's permit, and as such, is a violation of Sections 301(a) and 402(p) of the CWA, 33 U.S.C. §§ 1311(a) and 1342(p), and implementing regulations.

CONSENT AGREEMENT

52. Respondent admits the jurisdictional allegations set forth in this CA/FO and agrees not to contest EPA's jurisdiction in this proceeding or in any subsequent proceeding to enforce the terms of the Final Order portion of this CA/FO.

53. Respondent neither admits nor denies the factual allegations set forth in this CA/FO.

54. Respondent waives his right to contest the allegations set forth in this CA/FO and his right to appeal the Final Order portion of this CA/FO.

55. Respondent and Complainant each agree to bear their respective costs and attorney's fees incurred as a result of this action.

56. Nothing contained in the 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.

57. The undersigned representative of Respondent certifies that he or she is fully authorized to enter the terms and conditions of this CA/FO and to execute and legally bind Respondent to it.

58. Respondent certifies by the signing of this CA/FO that, to the best of his knowledge, Respondent is in compliance with all requirements of Sections 301, 402, and 404 of the CWA. Respondent has consented to an Administrative Order for Compliance, CWA-07-2015-0069.

59. The effect of settlement is conditional upon the accuracy of Respondent's representations to EPA, as memorialized in Paragraph 58 above, of this CA/FO.

60. Respondent consents to the issuance of the Final Order hereinafter recited.

61. Payment of the entire civil penalty shall resolve all civil and administrative claims of the United States alleged in the Findings of Violations.

Reservation of Rights

62. EPA reserves the right to enforce the terms of this CA/FO by initiating a judicial or administrative action pursuant to Section 309 of the CWA, 33 U.S.C. § 1319.

63. With respect to matters not addressed in this CA/FO, EPA reserves the right to take any enforcement action pursuant to the CWA, or any other available legal authority, including, without limitation, the right to seek injunctive relief, monetary penalties and punitive damages.

Payment of Penalty

64. Respondent shall pay a civil penalty of Forty Thousand dollars (\$40,000), due thirty calendar days from the effective date of the Final Order as prescribed in 40 C.F.R. § 22.31(b). Respondent shall pay the penalty by cashier's or certified check made payable to "Treasurer, United States of America," and shall deliver the check with a transmittal that identifies the case name and docket number CWA-07-2015-0070 to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center

PO Box 979077
St. Louis, Missouri 63197-9000.

Copies of the transmittal letter and the check shall be simultaneously sent to:

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

and to:

Melissa A.C. Bagley
Office of Regional Counsel
U.S. Environmental Protection Agency - Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219.

65. Should the civil penalty not be paid as provided above, interest will be assessed at the annual rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717. The interest will be assessed on the overdue amount from the due date through the date of payment.

66. No portion of the civil penalty or interest paid by Respondent pursuant to the requirements of this CA/FO shall be claimed by Respondent as a deduction for federal, state, or local income tax purposes.

Parties Bound

67. This Consent Agreement and Final Order shall apply to and be binding upon Respondent, its agents, successors, and assigns. Respondent shall ensure that any directors, officers, employees, contractors, consultants, firms or other persons or entities acting under or for him with respect to matters included herein, comply with the terms of this CA/FO.

COMPLAINANT:
U.S. ENVIRONMENTAL PROTECTION AGENCY

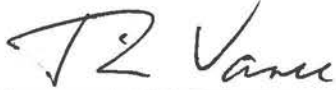
Karen A. Flournoy
Director
Water, Wetlands and Pesticides Division

Date

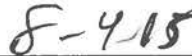
Melissa A.C. Bagley
Assistant Regional Counsel

Date

RESPONDENT:
MID-AMERICA SAND, L.L.C.



Tim Vance
Member
Mid-America Sand, L.L.C.



Date

FINAL ORDER

Pursuant to 40 C.F.R. 22.18(b)-(c) of EPA's Consolidated Rules of Practice, the foregoing Consent Agreement resolving this matter is incorporated by reference into this Final Order and is hereby ratified.

The Respondent is ORDERED to comply with all terms of the Consent Agreement effective immediately.

IT IS SO ORDERED.

Karina Borromeo
Regional Judicial Officer

Date: _____