

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

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)	
)	Docket No. CWA-07-2017-0041
Hubbell Metropolitan Development)	
Fund I, LLC)	
Waukee, Iowa)	COMPLAINT AND
Respondent)	CONSENT AGREEMENT/
)	FINAL ORDER
Proceedings under Section 309(g) of the)	
Clean Water Act, 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 Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation, Termination or Suspension of Permits ("Consolidated Rules"), 40 C.F.R. Part 22.

2. Complainant, the U.S. Environmental Protection Agency, Region 7 ("EPA") and Respondent, Hubbell Metropolitan Development Fund I, LLC ("Respondent" or "Hubbell"), 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 the Respondent has violated Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311, 1342, and regulations promulgated thereunder.

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, Region 7, who in turn has delegated the authority under Section 309(g) to the Director of the Water, Wetlands and Pesticides Division of EPA, Region 7 (collectively referred to as the "Complainant").

5. Hubbell is and was at all relevant times a limited liability company under the laws of 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 a National Pollutant Discharge Elimination System (“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.

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 comply 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)(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 acres of total land area which are part of a larger common plan of development or sale.”

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. IDNR issued Iowa General Permit No. 2 for Storm Water Discharge Associated with Industrial Activity for Construction Activities (“General Permit”) on October 1, 1992, and subsequently reissued it, currently effective from October 1, 2012, through October 1, 2017.

14. Any individual seeking coverage under the General Permit is required to submit a Notice of Intent (“NOI”) to IDNR.

15. The principal requirement of the General Permit is for the owner to develop and implement a Stormwater Pollution Prevention Plan (“SWPPP”). The SWPPP must identify potential sources of pollution which may reasonably be expected to affect the quality of the storm water discharge from the construction activities, describe and ensure the implementation

of best management practices (“BMPs”) which will be used to reduce the pollutants in storm water discharge associated with industrial activity for construction activities at the construction site and to assure compliance with the terms and conditions of the permit.

EPA’s General Allegations

16. Hubbell is a “person,” as defined by Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

17. Hubbell is and was at all times relevant to this action the owner and operator of Glynn Village Plat 10 construction site (“site”), comprised of approximately 93.1 acres and part of a 250-acre development located at the intersection of Booth Avenue and Grant Parkway in Waukee, Iowa 50263.

18. Stormwater, snow melt, surface drainage and runoff water leave Respondent’s site and discharge through various drainage pathways to an unnamed tributary of Sugar Creek.

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

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

21. Sugar Creek and its tributaries identified in Paragraph 18, above, 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 at the above referenced site 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 an industrial activity, as defined by 40 C.F.R. § 122.26(b)(14)(ii), requires a permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

24. Respondent filed a NOI with IDNR seeking coverage under the General Permit on or about September 24, 2005.

25. IDNR issued NPDES permit IA9433-9235 (“Permit”) to Hubbell for the site on or about May 31, 2005; the most recent Permit authorization will expire on May 31, 2017. The Permit governs Respondent’s stormwater discharges that are associated with industrial activity at the site.

26. On October 12 and 14, 2016, the EPA performed a Construction Stormwater Compliance Evaluation Inspection (“Inspection”) of Respondent’s site under the authority of

Section 308(a) of the CWA, 33 U.S.C. § 1318(a), to evaluate Respondent's compliance with its Permit and the CWA.

27. During the Inspection, the EPA inspector reviewed and obtained copies of Respondent's documents related to the Permit, including, but not limited to, the site's SWPPP dated March 22, 2015 and site inspection and self-monitoring records. The EPA inspector also toured the site and photographed various stormwater-related areas.

28. A Notice of Potential Violation ("NOPV") was issued by the EPA inspector at the conclusion of the Inspection. Respondent provided a written response to the NOPV dated October 21, 2016. A copy of the Inspection report was sent to Respondent by letter dated December 15, 2016, which identified potential violations including those described below.

EPA's Allegations

Count 1

Failure to Install Measures and Controls

29. The facts stated in Paragraphs 1 through 28 above are re-alleged and incorporated herein by reference.

30. Part IV of Respondent's Permit requires facilities to develop and implement the provisions of their SWPPP as a condition of the permit. Respondent's SWPPP provides that disturbed areas must be stabilized by temporary seeding or mulching no later than 14 days from the last construction activity if construction activity is not planned to occur for at least 21 days and by permanent seeding after final grading is complete. Respondent's SWPPP also provides that silt fence / filter socks shall be used for protection of inlets, used as ditch checks along temporary and permanent drainage ditches, and placed at areas where runoff can move off-site. Respondent's SWPPP further provides that below grade inlet protection devices shall be installed in public streets after pavement is placed.

31. Respondent's SWPPP provides material management practices including, but not limited to, storing materials onsite in appropriate containers or, if possible, under an enclosure, and storing petroleum in tightly sealed containers.

32. During the EPA inspection, the inspector observed:

- a. Lack of containment for a 4,000-gallon diesel fuel tank parked a few feet from an unprotected stormwater inlet;
- b. Lack of sediment controls on the banks of and significant accumulation of sediment in the unnamed tributary to Sugar Creek on the north side of Westown Parkway;
- c. Lack of sediment controls on ten stormwater inlets in the north ditch and on their associated outlets in the south ditch along Westown Parkway and significant

- amounts of sediment in the south ditch where it slopes downhill towards the unnamed tributary to Sugar Creek;
- d. Significant accumulation of sediment on the east bank and within the unnamed tributary to Sugar Creek near the south ditch referenced above;
 - e. Sediment accumulated inside a 36-inch pipe discharging to the unnamed tributary to Sugar Creek;
 - f. Significant sediment accumulation at the mouth of stormwater outlet number 7 leaving the site;
 - g. Lack of stabilization measures on the disturbed area at the bottom of a hillside north of stormwater inlet number 9, while inspection reports indicated that the top of the hill had been seeded on September 5, 2016;
 - h. Lack of controls to prevent sediment leaving the site on the steep hill sloping south to the unnamed tributary to Sugar Creek at the west end of the project; and
 - i. Significant accumulation of sediment on the riprap at the mouth of stormwater outlet number 10 leaving the site and moving into the unnamed tributary to Sugar Creek.

33. Respondent's alleged failure to install stormwater controls and BMPs at the site to reduce the amount of pollutants in stormwater discharges associated with the industrial activities at the site is a violation of the conditions of the NPDES permit, and as such, is a violation of Sections 301(a) and/or 402(p) of the CWA, 33 U.S.C. §§ 1311(a), 1342(p).

Count 2

Failure to Properly Operate and Maintain Measures and Controls

34. The facts stated in Paragraphs 1 through 33 above are re-alleged and incorporated herein by reference.

35. Part IV of Respondent's Permit requires facilities to develop and implement the provisions of their SWPPP as a condition of the permit. Respondent's SWPPP provides that all measures will be maintained in good working order, that any built up sediment will be removed from the silt fence/filter sock when it has reached one-half of the height of the fence, and that silt fence/filter socks/wattle will be inspected for depth of sediment, tears, etc., to see if the fabric is securely attached to the fence posts and to see that the fence posts are securely fastened in the ground.

36. During the EPA Inspection, the inspector observed sediment accumulated against silt fence dams and passing through several stages of silt fence dams before entering the unnamed tributary to Sugar Creek.

37. Respondent's alleged failure to properly operate and maintain adequate measures and controls to reduce the amount of pollutants in stormwater discharges associated with the industrial activities at the site is a violation of the conditions of the NPDES permit, and as such, is a violation of Sections 301(a) and/or 402(p) of the CWA, 33 U.S.C. §§ 1311(a), 1342(p).

Penalty

38. As alleged in the preceding Counts 1 and 2, and pursuant to Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), as adjusted pursuant to 40 C.F.R. § 19.4, Respondent is liable for civil penalties of up to \$20,965 per day for each day during which the violation continues, up to a maximum of \$262,066.

CONSENT AGREEMENT

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

40. 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 this Consent Agreement/Final Order.

41. Respondent neither admits nor denies the factual allegations and legal conclusions asserted by the EPA in this Complaint and Consent Agreement/Final Order.

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

43. Respondent and Complainant agree to conciliate 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 incurred as a result of this action.

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

45. 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.

46. Respondent certifies by the signing of this Consent Agreement/Final Order that to the best of their knowledge, Respondent's site is in current compliance with Iowa General NPDES Permit No. 2 IA-9433-9235, and Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342, and applicable regulations.

Penalty Payment

47. Respondent agrees that, in settlement of the claims alleged in this Consent Agreement/Final Order, Respondent shall pay a civil penalty of **Twenty-One Thousand Three Hundred and Eighty-Six Dollars (\$21,386)** pursuant to the authority of Section 309(g) of the

CWA, 33 U.S.C. § 1319(g), to be paid in full no later than 30 days after the effective date of this Consent Agreement/Final Order as set forth below.

48. The payment of penalties must reference docket number “CWA-07-2017-0041” and be remitted using one of the payment methods specified in Appendix A to this Order.

49. Copies of the checks or verification of another payment method for the penalty payments remitted as directed by above, shall be mailed to:

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

and

Shane McCoin
U.S. Environmental Protection Agency – Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219.

50. 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 Respondent as a deduction for federal, state, or local income tax purposes.

51. 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

52. Respondent’s payment of the entire civil penalty pursuant to this Consent Agreement/Final Order resolves all civil and administrative claims pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), for alleged violations identified in this Complaint and 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.

53. The effect of settlement described above is conditional upon the accuracy of the Respondent’s representations to the EPA, as memorialized in Paragraph 46 of this Consent Agreement/Final Order.

54. Nothing contained in this Consent Agreement/Final Order shall alter or otherwise affect Respondent's obligation to comply with all applicable federal, state and local environmental statutes and regulations and applicable permits.

55. 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 or administrative action pursuant to Section 309 of the CWA, 33 U.S.C. § 1319, and to seek penalties against Respondent or to seek any other remedy allowed by law.

56. 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

57. 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.

58. Pursuant to 40 C.F.R. § 22.31(b), this Consent Agreement/Final Order shall be effective after signature by the authorized regional official and upon filing with the Regional Hearing Clerk, U.S. Environmental Protection Agency, 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.

59. 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).

60. 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.

61. 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

Jeffery Robichaud
Acting Director
Water, Wetlands and Pesticides Division

Shane E. C. McCain
Office of Regional Counsel

For the Respondent, Hubbell Metropolitan Development Fund I, LLC:

By Hubbell Realty Company, managing member



Signature

Date

4/26/2017

Name

Joe Pietruszynski

Title

Vice president of Hubbell Realty Company

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

APPENDIX A
PENALTY PAYMENT INFORMATION

CHECK PAYMENTS:

US Environmental Protection Agency
Fines and Penalties - CFC
PO Box 979077
St. Louis, MO 63197-9000

WIRE TRANSFERS:

Wire transfers should be directed to the Federal Reserve Bank of New York

Federal Reserve Bank of New York
ABA = 021030004
Account = 68010727
SWIFT address = FRNYUS33
33 Liberty Street
New York NY 10045
Field Tag 4200 of the Fedwire message should read "D 68010727 Environmental Protection Agency"

OVERNIGHT MAIL:

U.S. Bank
1005 Convention Plaza
Mail Station SL-MO-C2GL
ATTN Box 979077
St. Louis, MO 63101
Contact: Natalie Pearson 314-418-4087

ACH (also known as REX or remittance express):

Automated Clearinghouse (ACH) for receiving US currency

PNC Bank
808 17th Street, NW
Washington, DC 20074
Contact: Jesse White 301-887-6548
ABA = 051036706
Transaction Code 22 - checking
Environmental Protection Agency
Account 310006
CTX Format

ONLINE PAYMENT:

There is now an On Line Payment Option, available through the Dept. of Treasury.
This payment option can be accessed from the information below:

WWW.PAY.GOV
Enter "SFO 1.1" in the search field

Open form and complete required fields.