

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

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)	
)	Docket No. CWA-07-2017-0207
Benton's Ready Mixed Concrete, Inc.)	
Cedar Falls, 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, Benton's Ready Mixed Concrete, Inc. ("Respondent") 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 and 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. Respondent is and was at all relevant times a corporation 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) defines “stormwater discharge associated with industrial activity,” as “the discharge from any conveyance that is used for collecting and conveying stormwater and that is directly related to manufacturing, processing or raw material storage areas at an industrial plant.” Included in the categories of facilities considered to be engaging in “industrial activity” are facilities under Standard Industrial Classifications (“SIC”) Industry Group 32. *See* 40 C.F.R. §122.26(b)(14)(ii). SIC code 3273 specifically includes establishments primarily engaged in manufacturing portland cement concrete manufactured and delivered to a purchaser in a plastic and unhardened state.

12. The Iowa Department of Natural Resources (“IDNR”) is the state agency within the state of Iowa that has been authorized by the EPA to administer the federal NPDES program pursuant to Section 402 of the CWA, 33 U.S.C. § 1342, and applicable implementing regulations.

13. Pursuant to Section 402(i) of the CWA, 33 U.S.C. § 1342(i), the EPA retains concurrent enforcement authority with authorized states for violations of the CWA.

EPA's General Allegations

14. Respondent is a "person," as defined by Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

15. At all times relevant for this action, Respondent is and was the owner and/or operator of a ready mixed concrete supply facility ("facility" or "site"), operating under SIC code 3273, comprised of approximately ten acres located at 725 Center Street, Cedar Falls, Iowa 50613.

16. The facility site is bordered to the east by Snag Creek. Stormwater, snow melt, surface drainage and runoff water leave Respondent's facility through one of three outfalls and flow approximately 500 feet, 950 feet, or 1,550 feet, respectively, before discharging to Snag Creek and/or ponds connected to Snag Creek, which flows to the Cedar River.

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

18. The facility has "stormwater discharges associated with industrial activity" as defined by 40 C.F.R. § 122.26(b)(14).

19. Stormwater discharges associated with industrial activity are "point sources" as defined by Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

20. Snag Creek, ponds connected to Snag Creek, and the Cedar River identified in Paragraph 16, above, are "navigable waters" as defined by Section 502(7) of the CWA, 33 U.S.C. § 1362(7).

21. Stormwater runoff from industrial activity at Respondent's above referenced facility 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).

22. Respondent's discharge of pollutants, including discharges of stormwater 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.

23. On October 1, 1992, IDNR granted authorization to the facility under Iowa General Permit No. 3, authorization number 0908-0942, for discharges of stormwater runoff to Snag Creek, subject to compliance with conditions and limitations set forth in the applicable NPDES Permit. The facility has received continuing coverage under the permit through October 1, 2017 (hereinafter "NPDES Permit").

24. On December 6 and 7, 2016, the EPA performed an Industrial Stormwater 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.

25. During the Inspection, the EPA inspector reviewed Respondent's records and obtained copies of Respondent's documents related to the NPDES Permit, including, but not limited to, the facility's stormwater pollution prevention plan ("SWPPP") dated February 23, 2005 (hereinafter "2005 SWPPP"), and a revised SWPPP for the facility dated December 7, 2016 (hereinafter "2016 SWPPP"), inspection records, and monitoring records. The EPA inspector also toured the facility, observed discharge locations, and photographed various stormwater-related areas.

26. A Notice of Potential Violation ("NOPV") was issued by the EPA inspector at the conclusion of the Inspection.

27. By email dated December 13, 2016, the Respondent submitted an update to the stormwater pollution prevention plan dated December 7, 2016 to the EPA inspector (hereinafter "revised 2016 SWPPP").

28. A copy of the Inspection report was sent to Respondent by the EPA by letter dated March 8, 2017.

EPA's Specific Allegations

Count 1 Unauthorized Discharges

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

30. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants, unless such discharge is in compliance with a NPDES permit. Part III.A of Respondent's NPDES Permit requires that discharges covered by the permit shall be composed entirely of stormwater. Part III.C requires that facilities implement practices that reduce pollutants in stormwater discharges.

31. During the EPA Inspection, the inspector observed sediment in Outfall Nos. 1 and 2 and released from the facility site. Observations and information obtained during the EPA Inspection confirmed that Respondent failed to implement practices to reduce pollutants in stormwater discharges, as alleged in further detail below.

32. Based on observations and information collected from the EPA Inspection and aerial images obtained by the EPA, drainage from Outfall Nos. 1 and 2 flow 950 feet and 500 feet, respectively, and discharge to waters with a direct connection to Snag Creek.

33. Based on the size of the facility, the distance from the facility to Snag Creek and waters connected to Snag Creek, the slope and condition of the land across that distance, and failure to implement practices to reduce pollutants in stormwater discharges, stormwater containing pollutants from the facility discharged into Snag Creek during significant

precipitation events. Unauthorized discharges are violations of the conditions of Respondent's NPDES permit and Sections 301(a) and/or 402(p) of the CWA, 33 U.S.C. §§ 1311(a), 1342(p).

Count 2
Inadequate SWPPP / Failure to Update SWPPP

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

35. Part III.C of Respondent's NPDES Permit requires the facility to develop and implement a SWPPP as a condition of the permit that identifies potential sources of pollution and describes and ensures the implementation of practices to reduce pollutants in stormwater discharges from the facility. More specifically, Part III.C.4.A. requires that the SWPPP identify all activities and significant materials which may potentially be significant pollutant sources, and Part III.C.4.B requires the SWPPP to develop a description of controls appropriate to those sources.

36. Part III.C.4.B of Respondent's NPDES Permit contains requirements for specific components of the facility's SWPPP, including: identification of individuals responsible for SWPPP implementation, maintenance and revision; risk identification and assessment and a material inventory, including an evaluation of specified areas such as loading and unloading operations, outdoor storage activities and on-site waste disposal practices; narrative consideration of the appropriateness of traditional stormwater management practices; and periodic dates for employee training.

37. Parts III.C.2.A. and IV.G of Respondent's NPDES Permit require the SWPPP to be signed by an appropriate person, which for corporations is a principal executive officer of at least the level of vice-president, and Part IV.H requires the signatory to make a certification.

38. Part III.C.3 of Respondent's NPDES Permit requires the permittee to amend the SWPPP whenever there is a change in design, construction, operation or maintenance, which has a significant effect on the potential for the discharge of pollutants to waters of the U.S. or if the SWPPP proves ineffective in achieving the general objectives of controlling pollutants in stormwater discharges.

39. Based on observations and information collected from the EPA Inspection and review of Respondent's SWPPP, the 2005 SWPPP failed to include required components and to accurately identify conditions and controls on site, requiring amendment, as follows:

- a. Outdated list of individuals responsible for SWPPP implementation;
- b. No identified dates for training or any training programs;
- c. Failure to identify Outfall No. 3;
- d. Inaccurate description and location of stormwater holding ponds; and
- e. Incorrect identification of the location of storage of liquid admixtures.

40. The facility prepared a 2016 SWPPP only after the EPA inspector identified several deficiencies in the 2005 SWPPP, and revised the 2016 SWPPP after the EPA inspector identified deficiencies in the first draft.

41. The revised 2016 SWPPP continued to contain the following deficiencies:

- a. No controls described for several identified pollution sources;
- b. No risk identification and assessment and material inventory;
- c. No consideration of traditional stormwater management practices; and
- d. No signature and certification by an appropriate corporate representative.

42. Respondent's failure to prepare and update, as appropriate, an adequate SWPPP is a violation of the conditions of Respondent's NPDES Permit, and as such, is a violation of Section 402(p) of the CWA, 33 U.S.C. § 1342(p).

Count 3

Failure to Implement SWPPP / Failure to Implement Adequate Controls

43. The facts stated in Paragraphs 1 through 42 above are re-alleged and incorporated herein by reference.

44. Part III.C. of Respondent's NPDES Permit requires the facility to implement the provisions of the SWPPP. Part III.C.4.B of Respondent's NPDES Permit requires the facility to implement stormwater management controls appropriate to the identified potential sources of pollutants at the facility.

45. During the EPA Inspection, the inspector observed the following conditions, indicating that the 2005 SWPPP and/or appropriate controls were not being implemented:

- a. No holding pond near the truck washing area as described in the SWPPP;
- b. Several totes stored outside on the southeast side of the site that are not identified or addressed by the SWPPP;
- c. Several tanks and totes containing liquid admixtures used in the concrete production process stored outside the batch plant, rather than inside as specified in the SWPPP;
- d. Waste material stockpiles without containment; and
- e. Sediment in Outfall Nos. 1 and 2.

46. Respondent's failure to implement the SWPPP and/or implement adequate stormwater management controls is a violation of the conditions of Respondent's NPDES Permit, and as such, is a violation of Section 402(p) of the CWA, 33 U.S.C. § 1342(p).

Count 4
Failure to Adequately Perform and Document Visual Inspections

47. The facts stated in Paragraphs 1 through 46 above are re-alleged and incorporated herein by reference.

48. Part III.C.4.C of Respondent's NPDES Permit requires Respondent to conduct and document visual inspections of designated equipment and the plant area at a minimum of once per year. Pursuant to Part III.C.4.C(1), inspections shall include material handling areas and other potential sources of pollution for evidence of pollutants entering the drainage system, structural control measures to ensure that they are operating correctly and equipment needed to implement the SWPPP. Part III.C.4.C(2) requires that the SWPPP be revised as appropriate based on the results of the inspection. Part III.C.4.C(3) requires that inspections be documented in a report summarizing the scope of the inspection, major observations, and actions taken, and be signed by an appropriate corporate representative.

49. A review of inspection reports provided by the facility during the EPA Inspection identified that not all potential sources of pollutants, control measures and equipment were inspected, observations were infrequently made, and when observations were made, follow-up actions were not always documented.

50. Respondent's failure to adequately perform and document inspections is a violation of the conditions of Respondent's NPDES Permit, and as such, is a violation of Section 402(p) of the CWA, 33 U.S.C. § 1342(p).

Count 5
Failure to Perform Monitoring and/or Retain Records

51. The facts stated in Paragraphs 1 through 50 above are re-alleged and incorporated herein by reference.

52. Part V.B.2 of Respondent's NPDES Permit requires facilities with stormwater discharge associated with industrial activity from concrete batch plants to measure total suspended solids ("TSS") and pH, together with specified information regarding the sample and conditions during the sampling, at least annually. Parts V.E and VI.N of Respondent's NPDES Permit require the permittee to retain records of all monitoring information for a period of at least three years from the date of measurement or for the duration of the permit, whichever is longer.

53. A review of monitoring records provided by the facility during the EPA Inspection identified that no monitoring records prior to 2016 and no records of pH monitoring in 2016 were available.

54. Respondent's failure to perform monitoring and/or to retain monitoring records is a violation of the conditions of Respondent's NPDES Permit, and as such, is a violation of Section 402(p) of the CWA, 33 U.S.C. § 1342(p).

Count 6

Failure to Conduct Employee Training

55. The facts stated in Paragraphs 1 through 54 above are re-alleged and incorporated herein by reference.

56. Part III.C.4.B(8) of Respondent's NPDES Permit requires the SWPPP to identify periodic dates for employee training and requires training to inform all personnel of the goals of the SWPPP and to address such topics as spill response, good housekeeping and material management practices.

57. The 2005 SWPPP was silent as to employee training. The revised 2016 SWPPP provides that training will be conducted at weekly safety meetings.

58. During the EPA Inspection, the inspector noted that there were no records of employee training available.

59. Respondent's failure to conduct employee training is a violation of the conditions of Respondent's NPDES Permit, and as such, is a violation of Section 402(p) of the CWA, 33 U.S.C. § 1342(p).

Penalty

60. As alleged in the preceding Counts, 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

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

62. 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.

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

64. 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.

65. 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.

66. 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.

67. Respondent understands and agrees that this Consent Agreement/Final Order shall apply to and be binding upon Respondent and Respondent' 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.

68. Respondent certifies by the signing of this Consent Agreement/Final Order that to the best of their knowledge, Respondent's facility is in current compliance with NPDES Permit No. 0908-0942, and Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342, and applicable regulations.

Penalty Payment

69. Respondent agrees that, in settlement of the claims alleged in this Consent Agreement/Final Order, Respondent shall pay a civil penalty of **Twenty-Seven Thousand Six Hundred and Thirty Dollars (\$27,630)** 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 thirty (30) days after the effective date of this Consent Agreement/Final Order as set forth below.

70. The payment of penalties must reference docket number "CWA-07-2017-0207" and be remitted using one of the payment methods specified in Appendix A to this Order.

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

72. 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.

73. 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

74. 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.

75. The effect of settlement described above is conditional upon the accuracy of the Respondent's representations to the EPA, as memorialized in Paragraph 68 of this Consent Agreement/Final Order.

76. 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.

77. 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.

78. 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

79. 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.

80. 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.

81. 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).

82. 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.

83. Respondent and Complainant agree that this Consent Agreement/Final Order may be signed in part and counterpart.

For the Complainant, U.S. Environmental Protection Agency:

Issued this _____ day of _____, 2017.

Jeffery Robichaud
Acting Director
Water, Wetlands and Pesticides Division

Shane E. C. McCoin
Assistant Regional Counsel
Office of Regional Counsel

For the Respondent, Benton's Ready Mixed Concrete, Inc.:



Signature

6-23-17

Date

TODD A. ECKHART

Name

GM

Title

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.