

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

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:)	
)	
WHITAKER AGGREGATES, INC.)	Docket No. CWA-07-2017-0465
d/b/a Centerville Quarry)	
)	
Respondent)	CONSENT AGREEMENT/ FINAL ORDER
)	
Proceedings under Section 309(g) of the)	
Clean Water Act, 33 U.S.C. § 1319(g))	
_____)	

The U.S. Environmental Protection Agency, Region 7 (“EPA”) and Whitaker Aggregates, Inc. (“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 and the Revocation/Termination or Suspension of Permits, 40 C.F.R. Part 22 (“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 the Respondent violated terms of its National Pollutant Discharge Elimination System (“NPDES”) permit in violation of Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342.

Parties

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

4. Respondent, Whitaker Aggregates, Inc. (“Respondent”) operates a quarry facility located within the Linn County, near Centerville, Kansas.

Statutory and Regulatory Framework

5. Section 301(a) of CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants, unless such discharge is in compliance with, inter alia, Section 402 of CWA, 33 U.S.C. § 1342, which provides that pollutants may be discharged only in accordance with the terms of a NPDES permit.

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 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.

8. 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 storm water 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”) 10 through 14, which includes establishments primarily engaged in mineral industries, SIC 14. *See* 40 C.F.R. § 122.26(b)(14)(iii). SIC code 1422 is specific to facilities and products produced using crushed and broken limestone.

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

10. 40 C.F.R. §§ 122.26(a)(1)(ii), 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. The Kansas Department of Health and Environment (“KDHE”) is the state agency within the state of Kansas 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.

12. 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.

FACTUAL ALLEGATIONS

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

14. At all times relevant for this action, Respondent is and was the owner and/or operator of a limestone quarry (“facility” or “site”), operating under SIC 1422, comprised of approximately twenty-eight acres located on the east side of Road 1077 just south of Centerville, (NE ¼ of NW ¼ of Section 20, Township 21 South, Range 22 East), in Linn County, Kansas.

15. Process waste water from washing activities at its limestone quarry and crushing operations, as well as stormwater, snow melt, surface drainage and runoff water leave Respondent’s facility and discharge to Sugar Creek, which flows to the Marais des Cygnes River.

16. Process waste water and stormwater from the facility contain “pollutants” as defined by Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

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

18. Process waste water discharges and stormwater discharges associated with industrial activity are “point sources” as defined by Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

19. Sugar Creek and the Marais des Cygnes River identified in Paragraph 15, above, are “navigable waters” as defined by Section 502(7) of the CWA, 33 U.S.C § 1362(7).

20. Process waste water discharges and 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).

21. 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)(iii), requires a permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

22. On August 20, 2009, KDHE granted NPDES Permit No. KS009275 (hereafter “Permit” when referred to in general or “2009 Permit” when referred to with specificity), to the Whitaker Companies, Inc., Centerville Quarry, for discharges from the “Outfall 001A1 – Treated wash-water from settling pond,” and “Outfall 001 – Stormwater runoff,” to the Marais des Cygnes River via Sugar Creek, subject to compliance with conditions and limitations set forth in the applicable NPDES Permit. The 2009 Permit was effective from September 1, 2009, to August 31, 2014. The 2009 Permit was administratively continued by KDHE until a new permit was issued.

23. On October 23, 2014, KDHE reissued NPDES Permit No. KS009275 (hereafter “2014 Permit” when referred to with specificity), to the Whitaker Companies, Inc., Centerville

Quarry, for discharges from the “Outfall 001A1 – Treated wash-water from settling ponds,” and “Outfall 001A1 – Pit Drainage and Stormwater Runoff,” to the Marais des Cygnes River via Sugar Creek, subject to compliance with conditions and limitations set forth in the applicable NPDES Permit. The 2014 Permit is effective from November 1, 2014, to October 31, 2019. For purposes of this action, and except as noted herein, the provisions of the 2009 and 2014 Permits are significantly similar.

24. On approximately April 13 and April 20, 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 requested to review and copy the Respondent’s records related to the Permits, including, but not limited to, the facility’s stormwater pollution prevention plan dated February 28, 2008 (hereafter “SWP2 Plan”), employee training records, monthly discharge monitoring reports, and monthly and annual inspection 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 letter dated April 30, 2016, the Respondent submitted information to the EPA inspector, “[a]ddressing issues of the NPDES Inspection.”

28. A copy of the Inspection report, was sent to Respondent by the EPA by letter dated June 20, 2016.

ALLEGATIONS OF VIOLATION

Count 1

Inadequate SWP2 Plan / Failure to Re-Evaluate and Modify SWP2 Plan

29. Section D., Paragraph 5, of Respondent’s 2009 Permit authorized the discharge of industrial stormwater in accordance with K.A.R. 28-16-28 and the requirements of the Permit, unless specifically excluded or waived in accordance with an implemented SWP2 Plan developed in accordance with Attachment A of the Permit.

30. Attachment A of Respondent’s 2009 Permit requires that the SWP2 Plan be specific to the industrial activities and site characteristics occurring at the location described in the Permit, and include, in pertinent part: the pollution prevention team members; a description of potential pollutant sources, including a detailed site map; a description of stormwater management controls that address minimum components; qualified facility personnel to perform annual comprehensive site evaluations; monitoring and recordkeeping procedures; and a process to re-evaluate and modify the SWP2 Plan in a timely manner, but in no case more than 90 days

after significant changes to the site or its controls or an indication, through inspections or evaluations that existing controls are ineffective and/or additional controls are needed.

31. Section D., Paragraph 5, of Respondent's 2014 Permit requires Respondent to develop and implement written procedures to minimize the discharge of silt from the site, including methods to minimize erosion of stockpiles on-site and minimize the amount of solids in the water discharge from the quarry pit.

32. Section D., Paragraph 7, of Respondent's 2014 Permit, in pertinent part, requires Respondent to implement its 2008 SWP2 Plan or a more recent, revised plan submitted to the KDHE, and further requires that the 2008 SWP2 Plan:

. . . shall be re-evaluated and modified in a timely manner, but in no case more than 90 days after (1) a change in the design, construction, operation or maintenance of the facility that would have a significant effect on the potential for discharge of pollutants from the facility's outfalls; (2) deficiencies are found in the SWP2 Plan or any BMPs, discovered during the site compliance evaluation or during other on-site inspections conducted by KDHE; (3) a visual inspection of the site indicates the plan appears to be ineffective in eliminating or significantly minimizing pollutants from sources identified in the SWP2 Plan; (4) an outfall is either added or eliminated.

33. Respondent's SWP2 Plan, in pertinent part, identifies members of the SWP2 team, an inventory of exposed material that may be potential pollution sources, a site map, and a description of best management practices ("BMPs").

34. Based on observations and information collected from the EPA Inspection, review of Respondent's SWP2 Plan and other available information regarding Respondent's facility, Respondent failed to prepare an adequate SWP2 Plan and/or amend the SWP2 Plan after there was a change in design, construction, operation or maintenance at the facility that had an impact on the potential to discharge pollutants or when controls were determined to be ineffective, as follows:

- a. The SWP2 Plan inventory of exposed material that may be potential pollution sources was inconsistent with potential pollution sources identified by the EPA inspector;
- b. The SPW2 Plan site map lacks specificity, is not to scale or labeled, and is not consistent with existing conditions at the facility;
- c. The BMPs described in the SWP2 Plan do not include any structural BMPs, are inconsistent with BMPs currently in place at the facility, and some of the identified BMPs are missing.

35. Respondent's failure to develop and update, as appropriate, an adequate SWP2 Plan is a violation of the Permit, and as such, is a violation of Section 402(p) of the CWA, 33 U.S.C. § 1342(p).

Count 2

Failure to Perform and/or Document Facility Inspections and Evaluations

36. Section A of Respondent's 2009 Permit requires Respondent to inspect the outfall(s) and receiving stream(s) in May and September to ensure compliance with Water Quality Standards, and to maintain a log documenting the results of any visual inspections performed.

37. Section A of Respondent's 2014 Permit requires Respondent to visually inspect the outfall(s) and receiving stream(s) in May and September to ensure compliance with Water Quality Standards, and to maintain a log documenting the results of any monitoring or inspections performed.

38. Section 7 of Respondent's SWP2 Plan states that inspections will be performed after every rainfall event above 2 inches, every calendar quarter, and that a complete facility evaluation will be performed annually. An example inspection report form is attached to the SWP2 Plan at Appendix B.

39. Data obtained from the National Centers for Environmental Information's National Oceanic and Atmospheric Administrations, Global Historical Climatology Network- Daily climate data Station code Centerville 4 SW KS US identify 12 months between March 20, 2012, and the date of the Inspection during which rains of above two inches occurred in the area of Respondent's facility.

40. During the Inspection, the inspector determined that for the period from July 1, 2012, to the date of the Inspection, the facility had no records for outfall or stream visual inspections or monitoring in May and September, inspections after 2 inch rains, or annual complete facility evaluations as required by the 2009 and 2014 Permits and the SWP2 Plan. Facility records for that time period also indicated not all quarterly inspections were conducted as required by the SWP2 Plan. Further, Respondent's personnel interviewed during the Inspection stated that monitoring, inspections and evaluations had not been performed.

41. Respondent's failure to perform and/or document inspections and monitoring of its outfalls and the stream, and to perform and/or document facility inspections and evaluations are violations of the Permit, and as such, are violations of Section 402(p) of the CWA, 33 U.S.C. § 1342(p).

Count 3

Failure to Implement and Maintain Appropriate Controls

42. Section D, Paragraph 5, of Respondent's 2009 Permit authorized Respondent to discharge industrial stormwater in accordance with applicable state regulations, the Permit and in

accordance with an implemented SWP2 Plan developed in accordance with Attachment A of the Permit. Attachment A requires, in pertinent part, that Respondent develop and implement stormwater management controls appropriate for the facility and a schedule to implement such controls, including, but not limited to:

- a. good housekeeping requiring the maintenance of areas in a clean, orderly manner including handling, processing, and storage areas for raw materials, scrap metals, fuels, paints, etc.;
- b. preventative maintenance, including timely inspection and maintenance of stormwater management controls, like oil water separators, catch basins, etc.;
- c. spill prevention and response procedures, including appropriate material handling procedures and storage requirements; and
- d. sediment and erosion control measures to minimize erosion in areas which, due to topography, activities, or other factors, have a high potential for significant soil erosion.

43. Section 5 of Respondent's SWP2 Plan includes a table with a list of BMPs for the facility, including good housekeeping, preventative maintenance, spill prevention response, sediment and erosion controls.

44. During the EPA Inspection, the inspector observed the following conditions:

- a. used oil was stored in one or more open containers, exposed to the elements;
- b. the diesel fuel tank was not double-walled, as described in the SWP2 Plan BMPs, and did not have secondary containment;
- c. the wash pond and quarry settling pond, used for both process water and stormwater storage, were small and shallow, and likely not adequate for stormwater management; and
- d. several areas of erosion indicated that stormwater and/or wastewater drained away from wash pond and quarry settling pond, including runoff from the northwest side of the gravel storage pile and drainage from the top of ledge on the south side of the quarry draining east.

45. Respondent's failure to develop, implement and maintain effective stormwater management controls is a violation of the Permit, and as such, is a violation of Section 402(p) of the CWA, 33 U.S.C. § 1342(p).

Count 4
Failure to Conduct Employee Training

46. Attachment A, Paragraph 3.e., of Respondent's 2009 NPDES permit requires Respondent to include in its SWP2 Plan a training program for new and existing staff to inform personnel responsible for implementing activities identified in the SWP2 Plan or otherwise responsible for stormwater management, at all levels of responsibility, of the components of the SWP2 Plan.

47. Section 8 of Respondent's SWP2 Plan state that the frequency of training is within one week of hire for new employees and annually for existing employees. A blank example form listing general areas of training is attached to the SWP2 Plan at Appendix C.

48. During the EPA Inspection, the inspector noted that the facility failed to conduct or complete records of employee training in any year from 2011 to the date of the Inspection.

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

CONSENT AGREEMENT

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

51. Respondent neither admits nor denies the factual allegations contained in this CA/FO.

52. Respondent waives any right to contest the allegations and its right to appeal the proposed Final Order accompanying this Consent Agreement.

53. Respondent and Complainant each agree to bear their own costs and attorney's fees.

54. 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.

55. Respondent certifies that it is fully authorized to enter the terms and conditions of this CA/FO and to execute and legally bind Respondent to it.

56. Respondent certifies by the signing of this CA/FO that, to the best of its knowledge, Respondent is in compliance with all requirements of Sections 301 and 402 of the CWA.

57. The effect of settlement is conditional upon the accuracy of the Respondent's representations to EPA, as memorialized in paragraph 56 above, of this CA/FO.

PENALTY

IT IS HEREBY AGREED BY THE PARTIES, and pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), that:

58. Respondent shall pay a civil penalty of Five Thousand Dollars (\$5,000). The penalty shall be paid in full within thirty (30) days following receipt by Respondent of a fully executed copy of this CA/FO. Respondent shall pay the penalty by certified or cashier's check payable to "Treasurer, United States of America" and shall deliver it, with a transmittal that identifies the case name and docket number to:

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

The check must also be annotated with the docket number and with the name of the case. Copies of the transmittal letter and the check shall be simultaneously sent to:

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

and

Chris Muehlberger
Office of Regional Counsel
U.S. Environmental Protection Agency - Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219.

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.

59. 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.

Reservation of Rights

60. 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.

61. 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.

Parties Bound

62. This Final Order shall apply to and be binding upon the 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 it with respect to matters included herein comply with the terms of this CA/FO.

Effective Date

63. This Final Order shall become effective upon filing pursuant to 40 C.F.R. § 22.31(b). All time periods herein shall be calculated therefrom unless otherwise provided in this Final Order.

COMPLAINANT:
U.S. ENVIRONMENTAL PROTECTION AGENCY

Jeffery Robichaud
Acting Director
Water, Wetlands and Pesticides Division

Date

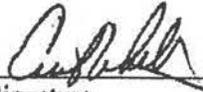
Chris Muehlberger
Assistant Regional Counsel

Date

RESPONDENT:

For Whitaker Aggregates, Inc.:

CURT WHITAKER President
Name/Title


Signature

12-12-17
Date

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