

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION IX**
75 Hawthorne Street
San Francisco, California 94105

IN THE MATTER OF:)	DOCKET NO. CWA-09-2018-0013
)	
Nor-Cal Rock, Inc.)	
Oakland, CA)	COMPLAINT, CONSENT AGREEMENT
Respondent.)	AND PROPOSED FINAL ORDER
)	
)	<i>Class I Administrative Penalty Proceeding</i>
)	<i>under Section 309(g) of the Clean Water Act,</i>
)	<i>33 U.S.C. § 1319(g), and 40 C.F.R. §§</i>
)	<i>22.13(b) and 22.18</i>

CONSENT AGREEMENT AND FINAL ORDER

I. AUTHORITY AND PARTIES

1. This is a Class I civil administrative penalty proceeding under Section 309(g)(1)(A) and 2(A) of the Clean Water Act (CWA), 33 U.S.C. § 1319(g)(1)(A) and 2(A), and 40 C.F.R. Part 22 (*Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits*).
2. Pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), the Administrator of the United States Environmental Protection Agency (EPA) is authorized to assess administrative penalties against persons who violate Section 301(a) of the Act, 33 U.S.C. § 1311 (a). The Administrator has delegated this authority to the Regional Administrator of the EPA Region IX, who in turn has delegated this authority to the Director of the Enforcement Division, hereinafter “Complainant.”
3. Respondent is Nor-Cal Rock, Inc. (“Respondent”).
4. This Consent Agreement and Final Order (CA/FO), which contains the elements of a complaint required by 40 C.F. R. § 22.14(a), simultaneously commences and concludes this penalty proceeding, as authorized by 40 C.F.R. §§ 22.13(b) and 22.18(b)(2) and (3).

NOW THEREFORE, before the taking of any testimony, without adjudication of any issue of fact or law, and upon consent by the EPA and Respondent, it is hereby STIPULATED, AGREED, AND ORDERED:

II. STATUTORY AND REGULATORY FRAMEWORK

5. CWA Section 301(a), 33 U.S.C. § 1311(a), makes it unlawful for a person to discharge pollutants from a point source into waters of the United States, except as authorized by a National Pollutant Discharge Elimination System (NPDES) permit issued pursuant to CWA Section 402, 33 U.S.C. § 1342.
6. CWA Section 402, 33 U.S.C. § 1342, establishes the NPDES program and authorizes the EPA and authorized states to issue permits governing the discharge of pollutants from point sources into waters of the United States. CWA Section 402(p), 33 U.S.C. § 1342(p) requires that NPDES permits be issued for stormwater discharges “associated with industrial activity.”
7. 40 C.F.R. § 122.26(b)(14)(vi) defines stormwater discharges associated with industrial activity to include inter alia, those generated at facilities involved in the recycling of materials classified under SIC Code 5093.
8. 40 C.F.R. § 122.26(b)(14)(iii) defines stormwater discharges associated with industrial activity to include inter alia, those generated at facilities involved in gravel preparation operations classified under SIC Code 1442.
9. Pursuant to CWA § 402(p)(4), dischargers of stormwater associated with industrial activity are required to seek coverage under a promulgated general permit or seek individual permit coverage.
10. The State of California has an EPA-authorized NPDES program and issues permits, including industrial storm water permits, through its State Water Resources Control Board (SWRCB) and nine Regional Water Quality Control Boards. On April 17, 1997, the State Water Board adopted General Permit No. CAS000001 for *Discharges of Stormwater Associated with Industrial Activities Excluding Construction Activities*, Water Quality Order No. 97-03-DWQ, which was in effect through June 30, 2015 and subsequently revised by the State Water Board on April 1, 2014, Water Quality Order No. 2014-0057-DWQ, which became effective on July 1, 2015 (hereinafter, “General Permit”).
11. Pursuant to CWA Section 309(g)(2)(A), 33 U.S.C. § 1319(g)(2)(A), and 40 C.F.R. Part 19.4, the EPA may assess a Class I civil administrative penalty of up to \$16,000 per day of violation, not to exceed \$37,500 in total, against a person for CWA Section § 301(a) violations that occurred on or after December 6, 2013. For violations that occurred after November 2, 2015, the EPA may assess a penalty up to \$21,393 per day of violation, not to exceed \$53,484 in total.

III. FINDINGS OF FACT, JURISDICTIONAL ALLEGATIONS, AND CONCLUSIONS OF LAW

12. Respondent is a California corporation and therefore, a person within the meaning of CWA §

Section 502(5), 33 U.S.C. § 1362(5). Respondent operated a concrete and asphalt recycling facility located at 768 46th Avenue, Oakland, California, hereinafter the “Facility.”

13. Respondent has been engaged in concrete and asphalt recycling at the Facility since at least 2014, a time frame best known to Respondent. Respondent’s operations at the Facility fall within activities classified under SIC Code 5093 and are therefore an “industrial activity” for purposes of CWA Section 402(p), 33 U.S.C. § 1342(p), and 40 C.F.R. § 122.26(b)(14)(vi). Respondent’s operations may also fall within activities classified under SIC Code 1442. An activity under Code 1442 is also considered an “industrial activity” for purposes of CWA Section 402(p), 33 U.S.C. § 1342(p), and 40 C.F.R. § 122.26(b)(14)(iii).
14. Stormwater runoff from the Facility discharges from material stockpiles to a storm drain inlet connected to the Alameda municipal separate storm sewer system (MS4), as well as directly into Peralta Creek. Such conveyances, including curbs, gutters and inlets and the Alameda MS4, are “point sources” within the meaning of CWA Section 502(14), 33 U.S.C. § 1362(14).
15. Stormwater runoff from the Facility is a “stormwater discharge associated with industrial activity,” as defined by 40 C.F.R. § 122.26(b)(14)(iii) and (vi).
16. Stormwater discharges from the facility include dirt and crushed rock, and therefore contain “pollutants,” as defined by CWA Section 502(6), 33 U.S.C. § 1362(6).
17. Discharges from the Facility enter the Alameda MS4 and discharge into San Leandro Bay, a tributary to the San Francisco Bay, which flows to the Pacific Ocean. San Leandro Bay, San Francisco Bay and the Pacific Ocean are “waters of the United States” within the meaning of CWA Section 502(7), 33 U.S.C. § 1362(7), and implementing regulations.
18. Respondent’s discharge of pollutants in stormwater into waters of the United States constitutes a “discharge of pollutants” within the meaning of CWA Section 502(12), 33 U.S.C. § 1362(12).
19. On or around December 13, 2017, Respondent submitted a Notice of Intent (“NOI”) to the State Water Board seeking coverage under the General Permit for the Facility. On December 18, 2017, the State Water Board granted Respondent coverage under the General Permit and assigned WDID Number 2 01I027510 for the Facility. Prior to December 13, 2017, stormwater discharges from Respondent’s Facility were not authorized by the General Permit or an individual NPDES permit.
20. EPA inspected the Facility on March 6, 2017. The EPA Inspector observed a complete lack of control measures for the stockpiles of concrete, asphalt, and finished drain rock. The Facility lacked any Storm Water Pollution Prevention Plan (“SWPPP”), and no NOI had been submitted.
21. Between July 1, 2015 (effective date of current California General Permit) and December 13, 2017 (NOI submittal) at least 37 days with rainfall in excess of 0.5 inches were recorded at

the Oakland Airport. Upon information and belief, EPA alleges each of these rainfall events resulted in a discharge of stormwater from the Facility.

IV. ALLEGED VIOLATIONS

22. Between July 1, 2015 and December 13, 2017 Respondent violated CWA Section 301(a), 33 U.S.C. § 1311(a), on at least 37 days by discharging pollutants from a point source into waters of the United States without NPDES permit authorization.

V. ADMINISTRATIVE PENALTY

23. In consideration of the penalty factors of CWA Section 309(g), 33 U.S.C. § 1319(g), Respondent shall pay to the United States a civil administrative penalty in the amount of \$15,000. Respondent shall make an initial payment of \$7,500 within thirty (30) calendar days of the Effective Date, as defined in Section X below, of this CA/FO. The remaining three payments will be made every 120 days per the terms included in Attachment A.

24. Respondent shall make all penalty payments by one of the options listed below:

- a. Check Payment. Payment by a cashier's or certified check shall be made payable to "Treasurer, United States of America" and be mailed as follows:

- i. *If by regular U.S. Postal Service Mail:*

U.S. Environmental Protection Agency
Fines and Penalties
PO BOX 979077
St. Louis, MO 63197-9000

- ii. *If by overnight mail:*

U.S. Environmental Protection Agency
Government Lockbox 979077
USEPA Fines and Penalties
1005 Convention Plaza
SL-MO-C2-GL
St. Louis, MO 63101

- b. Automated Clearinghouse Payment: Payment by Automated Clearinghouse (ACH) via Vendor Express shall be made through the U.S. Treasury as follows:

U.S. Treasury REX/Cashlink ACH Receiver
ABA: 051036706
Account Number: 310006, Environmental Protection Agency
CTX Format Transaction Code 22 – checking

- c. Fedwire: Payment by wire transfer to the EPA shall be made through the Federal Reserve Bank of New York as follows:

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)

- d. Online Payment: This payment option can be accessed from the information below

Go to www.pay.gov
Enter "SFO Form Number 1.1." in the search field
Open "EPA Miscellaneous Payments – Cincinnati Finance Center" form
and complete required fields

Payment instructions are available at: <http://www2.epa.gov/financial/makepayment>. If clarification regarding a method of payment remittance is needed, contact the EPA Cincinnati Finance Center at (513) 487-2091.

25. To ensure proper credit, Respondent shall include the following transmittal information with each penalty payment: (i) Respondent's name (as appeared on the CA/FO), complete address, contact person, and phone number; (ii) the EPA case docket number; (iii) the EPA contact person; and (iv) the reason for payment.
26. Concurrent with the payments, Respondent shall send a true and correct copy of each payment and accompanying transmittal information to the following addresses:

Regional Hearing Clerk
Office of Regional Counsel (ORC-1)
U.S. Environmental Protection Agency, Region 9
75 Hawthorne Street
San Francisco, CA 94105

Lawrence Torres
Clean Water Enforcement Section II (ENF-3-2)
U.S. Environmental Protection Agency, Region 9
75 Hawthorne Street
San Francisco, CA 94105

27. Respondent shall not, and shall not allow any other person to, deduct any penalties and interest paid under this CA/FO from federal, state, or local taxes.

28. Pursuant to CWA Section 309(g)(9), 33 U.S.C. § 1319(g)(9), if Respondent fails to make the assessed penalty payments on time, the EPA may request the U.S. Department of Justice to bring a civil action to recover the overdue amount, plus interest at currently prevailing rates from the Effective Date of this CA/FO. In such an action, the validity, amount, or appropriateness of the assessed penalty shall not be subject to review. In addition to any assessed penalty and interest, Respondent shall pay attorney fees, costs for collection proceedings, and a quarterly nonpayment penalty, which shall equal 20% of the aggregate amount of Respondent's penalties and nonpayment penalties that are unpaid as of the beginning of such quarter, for each quarter during which such failure to pay persists. The EPA may also take other debt collection actions as authorized by law, including, but not limited to, the Debt Collection Act, 33 U.S.C. § 3711, and 33 C.F.R. Part 13.

VI. APPLICABILITY

29. This CA/FO shall apply to and be binding on Respondent, Respondent's officers, directors, partners, agents, successors and assigns. Action or inaction of any persons, firms, agents, or corporations acting under, through, or for Respondent shall not excuse any failure of Respondent to fully perform its obligations under this CA/FO. Changes in ownership, real property interest, or transfer of personal assets shall not alter Respondent's obligations under this CA/FO.

VII. RESPONDENT'S ADMISSIONS AND WAIVERS

30. In accordance with 40 C.F.R. § 22.18(b), for this proceeding, Respondent:

- a. admits the jurisdictional allegations of the complaint;
- b. neither admits nor denies the facts stipulated in the consent agreement;
- c. consents to all conditions specified in this CA/FO and to the assessment of the civil administrative penalty set forth in Section V above;
- d. waives any right to contest the allegations set forth in this CA/FO; and
- e. waives its right to appeal this proposed Final Order.

VIII. RESERVATION OF RIGHTS

31. In accordance with 40 C.F.R. § 22.18(c), full payment of the penalty set forth in this CA/FO only resolves Respondent's CWA civil penalty liabilities for the violations specifically alleged herein and does not in any case affect the right of the EPA to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law.

32. This CA/FO is not a permit or modification of any existing permit issued pursuant to any federal, state, or local laws or regulations, and shall in no way relieve or affect Respondent's

obligations under any applicable federal, state or local laws, regulations, or permits.

IX. ATTORNEY FEES AND COSTS

33. Unless otherwise specified, each party shall bear its own attorney fees and costs.

X. EFFECTIVE DATE AND TERMINATION

34. In accordance with 40 C.F.R. §§ 22.18(b)(3) and 22.31(b), the Effective Date of this CA/FO is the date that the Final Order, having been signed by the Regional Judicial Officer, is filed with the Regional Hearing Clerk. This CA/FO shall terminate when Respondent has complied with the requirements of this CA/FO in full.

XI. PUBLIC NOTICE

35. Pursuant to CWA Section 309(g)(4), 33 U.S.C. §1319(g)(4), and 40 C.F.R. § 22.45(b), this Consent Agreement is subject to public notice and comment prior to issuance of the proposed Final Order. Complainant reserves the right to withhold or withdraw consent to this Consent Agreement if public comments disclose relevant and material information that was not considered by Complainant in entering into this Consent Agreement. Respondent may withdraw from this Consent Agreement only upon receipt of written notice from the EPA that it no longer supports entry of this Consent Agreement.

36. Pursuant to CWA Section 309(g)(1), 33 U.S.C. § 1319(g)(1), the EPA has consulted with the State of California regarding this penalty action.

For Complainant, the U.S. Environmental Protection Agency, Region 9

_____/s/_____
Thanne Berg
Acting Assistant Director
EPA Region IX Enforcement Division

_____/7/24/2018_____
Date

Of Counsel: Julia Jackson
Asst. Regional Counsel
EPA Region IX

For Nor-Cal Rock, Inc.

_____/s/_____
Frank Sanchez
General Manager

_____/7/17/2018_____
Date

FINAL ORDER

It is Hereby Ordered that this Consent Agreement and Final Order (U.S. EPA Docket No. CWA-09-2018-0013) be entered and that Respondent shall pay a civil penalty in the amount of \$15,000 in accordance with the terms of this Consent Agreement and Final Order.

Date

Steven L. Jawgiel
Regional Judicial Officer
U.S. EPA, Region IX