

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION IX**

75 Hawthorne Street
San Francisco, California 94105

IN THE MATTER OF:)	DOCKET NO. CWA-09-2019-0033
)	
Asanuma Kokuba Joint Venture)	
Nippo USA, Inc.)	COMPLAINT, CONSENT AGREEMENT AND FINAL ORDER
)	
Tamuning, Guam)	
)	<i>Class II Administrative Penalty Proceeding</i>
Respondents.)	<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 II civil administrative penalty proceeding under Section 309(g)(1)(A) and 2(B) of the Clean Water Act (CWA), 33 U.S.C. § 1319(g)(1)(A) and 2(B), 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. Respondents are Asanuma Kokuba Joint Venture, a joint venture of Asanuma Corporation and Kokuba Gumi Co., Ltd. (hereinafter sometimes “Asanuma JV”), and Nippo USA, Inc. (hereinafter sometimes “Nippo”).
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 Respondents, 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, including the territorial seas, except, *inter alia*, 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 and CWA Section 402(p), 33 U.S.C. § 1342(p), requires that NPDES permits be issued for certain stormwater discharges. Pursuant to authority in Section 402(p), EPA regulations provide that regulated stormwater discharges include small construction activity. 40 C.F.R. § 122.26(a)(9)(i)(B).
7. 40 C.F.R. § 122.26(b)(15)(i) defines stormwater discharges associated with small construction activity to include clearing, grading and excavating that result in land disturbance of equal to or greater than one acre and less than five acres. Small construction activity also includes the disturbance of less than one acre of total land area that is part of a larger common plan of development or sale if the larger common plan will ultimately disturb equal to or greater than one and less than five acres. 40 C.F.R. § 122.26(b)(15)(i).
8. Each person discharging stormwater must request and obtain authorization to discharge under either an individual NPDES permit or a promulgated NPDES general permit issued by the EPA or by a state with an EPA-approved NPDES program. 40 C.F.R. § 122.26(c)(1), 33 U.S.C. §§ 1311(a) and 1342(p).
9. The EPA is the NPDES permitting authority in Guam. Since 1992, the EPA has issued a series of Construction General Permits that are available in areas where the EPA is the NPDES permitting authority. Most recently, the EPA issued the *2017 NPDES General Permit for Discharges from Construction Activities* (hereinafter “2017 Construction General Permit”) on February 16, 2017. The 2017 Construction General Permit replaced the 2012 Construction General Permit, which was in effect from February 16, 2012 through February 16, 2017.
10. Under 40 C.F.R. § 122.21(c), a discharger proposing a new discharge of stormwater associated with construction activity covered by 40 C.F.R. 122.26(b)(15) must submit an application ninety (90) days prior to the date construction is to commence, or by the deadlines provided by the terms of any applicable general permit. See 40 C.F.R. § 122.28(b)(2).
11. Under the 2017 Construction General Permit, an “operator” is the party, usually the general contractor, that has day-to-day operational control of those activities at a project that are necessary to ensure compliance with the permit conditions. The 2017 Construction General Permit explains that an “operator” is one who is authorized to direct workers at a site to carry out activities required by the permit. See 2017 Construction General Permit, Section 1.1.1.b.

12. Under Section 502(12) of the CWA, the term “discharge of pollutants,” means, *inter alia*, any addition of any pollutant to navigable waters from any point source. 33 U.S.C. § 1362(12).
13. Under Section 502(6) of the CWA, the term “pollutant,” means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. 33 U.S.C. § 1362(6).
14. Under Section 502(14) of the CWA, the term “point source,” means any discernible, confined and discrete conveyance from which pollutants are or may be discharged. 33 U.S.C. § 1362(14).
15. Under Section 502(7) of the CWA, the term “navigable waters,” means the waters of the United States, including the territorial seas. 33 U.S.C. § 1362(7).
16. Under Section 502(8) of the CWA, the term “territorial seas,” means the belt of seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles.
17. Under Section 502(5) of the CWA, the term “person” means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body. 33 U.S.C. § 1362(5).
18. Pursuant to CWA Section 309(g)(2)(B), 33 U.S.C. § 1319(g)(2)(B), and 40 C.F.R. Part 19.4, the EPA may assess a Class II civil administrative penalty of up to \$21,933 per day of violation, not to exceed \$274,159 in total, against a person for CWA Section § 301(a) violations that occurred after November 2, 2015.

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

19. Respondent, Asanuma JV, is an unincorporated enterprise of Asanuma Corporation and Kokuba Gumi Co., Ltd., both of which are Japanese corporations and therefore “persons” within the meaning of CWA § Section 502(5), 33 U.S.C. § 1362(5).
20. Respondent, Nippo USA, Inc., is an Ohio corporation and therefore a “person” within the meaning of CWA § Section 502(5), 33 U.S.C. § 1362(5).
21. Respondents have been engaged in clearing, grading, excavating, and disturbing land at the Tsubaki Tower Project located at 245 Gun Beach Road in Tumon, Guam (“Project Site”) since November 2015, a date best known to Respondents. The total land disturbance at the Project Site is approximately four acres. The Project Site is located approximately 30 yards from Tumon Bay.
22. Asanuma JV is an “operator” of the Project Site as defined by 40 C.F.R. § 122.2 and Section

1.1.1.b of the 2017 Construction General Permit.

23. Nippo is an “operator” of the Project Site as defined by 40 C.F.R. § 122.2 and Section 1.1.1.b of the 2017 Construction General Permit.
24. For purposes of CWA Section 402(p), 33 U.S.C. § 1342(p), stormwater runoff from the Project Site is a “stormwater discharge associated with small construction activity” as defined by 40 C.F.R. § 122.26(b)(15)(i).
25. Stormwater runoff discharges from the Project Site through the fence line, flowing down the curb and gutter into a storm drain inlet on Gun Beach Road. Stormwater flows through the storm drain inlet on Gun Beach Road and then discharges into Tumon Bay. The discharges from the Project Site and the curbs, gutters, and inlets are “point sources” within the meaning of CWA Section 502(14), 33 U.S.C. § 1362(14).
26. Stormwater discharges from construction sites, such as the Project Site, include sediment, represented as Total Suspended Solids, metals from exposed rebar, phosphorus, pH from concrete debris, and other chemicals found in construction products and therefore, these discharges contain “pollutants,” as defined by CWA Section 502(6), 33 U.S.C. § 1362(6).
27. Respondents discharge pollutants in stormwater to Tumon Bay, which connects to the Pacific Ocean. Tumon Bay is a territorial seas and a “navigable water,” within the meaning of CWA Sections 502(7) and 502(8), 33 U.S.C. §§ 1362(7) and 1362(8) and implementing regulations.
28. Respondents’ discharge of pollutants in stormwater into waters of the United States constitutes a “discharge of pollutants” within the meaning of CWA Sections 301(a) and 502(12), 33 U.S.C. §§ 1311(a) and 1362(12).
29. On September 14, 2017, the EPA inspected the Project Site to evaluate compliance with the CWA and the 2017 Construction General Permit. Prior to the inspection, the EPA searched E-Enterprise Environmental Portal, EPA’s database that contains NOIs for construction projects subject to the Construction General Permit, and did not find a NOI for the Tsubaki Tower Project. During the inspection, Respondents were unable to produce documentation that it had applied for authorization under either the 2012 or 2017 Construction General Permits to discharge stormwater from the Project Site. Respondents were unable to produce a Stormwater Pollution Prevention Plan, as required by the 2017 Construction General Permit. 2017 Construction General Permit, Section 7. During the inspection, the EPA also observed rebar stockpiles that did not have adequately maintained best management practices, multiple construction debris piles on-site, portable toilets without adequate containment or stabilization, a non-stormwater discharge seeping from the fence line and flowing into an adjacent drain inlet on Gun Beach Road, a concrete washout area at the staging area that did not have adequate control measures, and multiple stockpiles of waste materials near the perimeter of the staging area without cover or containment.
30. The EPA sent the inspection report to Respondents on November 15, 2017. Respondents

formally responded to the inspection report on January 12, 2018, which included a summary of compliance activities that Respondents performed after the inspection and documentation of improved best management practices at the Project Site.

31. Respondents obtained authorization under the 2017 Construction General Permit on December 5, 2017.
32. Between November 1, 2015 and December 4, 2017, the National Oceanic and Atmospheric Administration recorded at least one hundred eleven (111) days of rain events exceeding 0.5 inches within twenty-four hours at the Guam International Airport.
33. Respondents discharged stormwater associated with construction activity on at least one hundred eleven (111) days without authorization under the 2012 or the 2017 Construction General Permits between November 1, 2015 and December 4, 2017.

IV. ALLEGED VIOLATION

34. Between November 1, 2015 and December 5, 2017, Respondents violated CWA Section 301(a), 33 U.S.C. § 1311(a), on at least one hundred eleven (111) days by discharging pollutants from a point source into waters of the United States, including the territorial seas, without NPDES permit authorization.

V. ADMINISTRATIVE PENALTY

35. In consideration of the penalty factors of CWA Section 309(g), 33 U.S.C. § 1319(g), Respondents shall pay to the United States a civil administrative penalty in the amount of **one hundred twenty-nine thousand forty-eight dollars (\$129,048)** within thirty (30) calendar days of the Effective Date, as defined in Section X below, of this CA/FO.
36. Respondents shall make penalty payment 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 particular method of payment remittance is needed, contact the EPA Cincinnati Finance Center at (513) 487-2091.

37. To ensure proper credit, Respondents shall include the following transmittal information with the penalty payment: (i) Respondents’ 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.
38. Concurrent with the payment, Respondents shall send a true and correct copy of the 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

Connor Adams
U.S. Environmental Protection Agency, Region 9
Pacific Islands Contact Office
300 Ala Moana Blvd., #5-152
Honolulu, HI 96850

39. Respondents 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.
40. Pursuant to CWA Section 309(g)(9), 33 U.S.C. § 1319(g)(9), if Respondents fail to pay the assessed penalty 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, Respondents shall pay attorney fees, costs for collection proceedings, and a quarterly nonpayment penalty, which shall equal 20% of the aggregate amount of Respondents' 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

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

VII. RESPONDENTS' ADMISSIONS AND WAIVERS

42. In accordance with 40 C.F.R. § 22.18(b), for the purpose of this proceeding, Respondents:
- a. admit the jurisdictional allegations of the complaint;
 - b. neither admit nor deny specific factual allegations contained in the complaint;
 - c. consent to all conditions specified in this CA/FO and to the assessment of the civil administrative penalty set forth in Section V above;
 - d. waive any right to contest the allegations set forth in this CA/FO; and

- e. waive its right to appeal this proposed Final Order.

VIII. RESERVATION OF RIGHTS

- 43. In accordance with 40 C.F.R. § 22.18(c), full payment of the penalty set forth in this CA/FO only resolves Respondents' 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.
- 44. 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 Respondents' obligations under any applicable federal, state or local laws, regulations, or permits.

IX. ATTORNEY FEES AND COSTS

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

X. EFFECTIVE DATE AND TERMINATION

- 46. 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 Respondents have complied with the requirements of this CA/FO in full.

XI. PUBLIC NOTICE

- 47. 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. Respondents 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.
- 48. Pursuant to CWA Section 309(g)(1), 33 U.S.C. § 1319(g)(1), the EPA has consulted with the territory of Guam regarding this penalty action.

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

/s/

April 24, 2019

Amy Miller
Acting Director
Enforcement Division

Date

For Respondent Asanuma Kokuba Joint Venture

/s/

April 10, 2019

Name: Yasuhiro Oikawa
Title:
Asanuma Corporation
As Representative of Asanuma Kokuba Joint Venture

Date

For Respondent Nippo USA, Inc.

/s/

April 10, 2019

Name: Arvin Cubacub
Title:

Date

FINAL ORDER

It is Hereby Ordered that this Consent Agreement and Final Order (U.S. EPA Docket No. CWA-09-2019-0033) be entered and that Respondents shall pay a civil penalty in the amount of **one hundred twenty-nine thousand forty-eight dollars (\$129,048)** in accordance with the terms of this Consent Agreement and Final Order.

Date

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