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

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
	)	
Mercy Health	)	
(formerly Sisters of Mercy Health System)	)	Docket No. CWA-07-2014-0084
	)	
	)	
	)	CONSENT AGREEMENT AND
	)	FINAL ORDER
Respondent	)	
	)	
Proceedings under Section 309(g) of the	)	
Clean Water Act, 33 U.S.C. § 1319(g)	)	
	)	

The United States Environmental Protection Agency (EPA), Region 7 (Complainant) and Mercy Health (formerly Sisters of Mercy Health System) (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) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits (Consolidated Rules), 40 C.F.R. §§ 22.13(b) and 22.18(b)(2). This is a "Class II" penalty action pursuant to Section 309(g)(2)(B) of the CWA, 33 U.S.C. 1319(g)(2)(B). This Consent Agreement and Final Order shall be entered and become effective only after the conclusion of the period of 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.

A. ALLEGATIONS

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, 40 C.F.R. Part 22This Consent Agreement and Final Order (CAFO) serves as notice that 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

2. The authority to take action under Section 309(g) of the CWA, 33 U.S.C. § 1319(g), is vested in the Administrator of EPA. The Administrator has delegated this authority to the Regional Administrator, EPA, Region 7, who in turn has delegated it to the Director of the Water, Wetlands and Pesticides Division of EPA, Region 7 (Complainant).

3. The Respondent is Mercy Health (formerly known as Sisters of Mercy Health System). The claims resolved by this CAFO pertain to the Mercy Hospital Construction Project in Joplin, Mo, consisting of the construction of a new hospital and the relocation of two public city streets ("Site"). The hospital construction portion of the project is located at the intersections of Interstate 44 and State Highway 86 (also known as Main Street) and the roadway construction project is located at 50th Street and Indiana Avenue in Joplin, Missouri.

Statutory and Regulatory Framework

4. 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, 33 U.S.C. § 1342, provides that pollutants may be discharged only in accordance with the terms of a National Pollutant Discharge Elimination System (NPDES) permit issued pursuant to that Section.

5. 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.

6. 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 storm water. Section 402(p) of the CWA, 33 U.S.C. § 1342(p), requires, in part, that a discharge of storm water associated with an industrial activity must conform with the requirements of an NPDES permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

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

8. 40 C.F.R. §§ 122.26(a)(1)(ii) and 122.26(c) require dischargers of storm water associated with industrial activity to apply for an individual permit or to seek coverage under a promulgated storm water general permit.

9. 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 (5) acres of total land area which are not part of a larger common plan of development or sale.

10. The Missouri Department of Natural Resources ("MDNR") is the state agency with the authority to administer the federal NPDES program in Missouri pursuant to Section 402 of

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the CWA, 33 U.S.C. § 1342. EPA maintains concurrent enforcement authority with authorized states for violations of the CWA. EPA has notified MDNR of this enforcement action and CAFO.

11. MDNR issued a general permit for the discharge of stormwater under the NPDES, referenced as "General Permit No. 2" (hereafter, the "General Permit"). MDNR's General Permit governs stormwater discharges associated with construction or land disturbance activity. The General Permit became effective on February 8, 2012 and expires on February 7, 2017.

Factual Allegations

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

13. At all times relevant to this action, Respondent was the owner(s) and/or operator(s) of the Site. As described below, construction activities occurred at the Site including clearing, grading, and excavation which disturbed five (5) or more acres of total land area.

14. Surface drainage for most of the Site travels to the southwest or southeast sections of the Site. The primary discharge point located near the southeast corner of the project travels south through an ephemeral ditch approximately 597 stream yards to Silver Creek. Silver Creek is a perennial stream. The primary discharge point located near the southwest corner of the project travels southwest through an unnamed intermittent tributary approximately 605 stream yards to Shoal Creek. Shoal Creek is a perennial stream and is listed as impaired under CWA Section 303(d). Stormwater, snow melt, surface drainage and runoff water leaves the Site and flows via unnamed tributaries into Silver and/or Shoal Creeks. Silver Creek and Shoal Creek are each a "navigable water" of the United States as defined by Section 502(7) of the CWA, 33 U.S.C. § 1362(7).

15. The runoff and drainage from the Site is "stormwater" as defined by 40 C.F.R. § 122.26(b)(13). Stormwater from the Site contains "pollutants" as defined by Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

16. The Site has "stormwater discharge associated with industrial activity" as defined by 40 C.F.R. § 122.26(b)(14)(x), and is a "point source" as defined by Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

17. Stormwater runoff from Respondent's construction Site results in the "discharge of a pollutant" as defined by CWA Section 502(12), 33 U.S.C. § 1362(12).

18. Respondent's discharge of pollutants associated with an industrial activity, as defined by 40 C.F.R. § 122.26(b)(14)(x), requires a permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

19. Respondent applied for and was issued NPDES permit coverage under the general permit described in Paragraph 11 above. MDNR assigned Respondent two authorizations as a permit holder under the General Permit for construction activity at the Site; one for the

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hospital construction project (Permit No. MORA00206) and a second for the relocation of the two public city streets at 50th Street and Indiana Avenue (Permit No. MORA02716).

20. The hospital construction portion of the Site occupies 97.87 acres of land of which nearly 96 were disturbed. The right-of-way project was projected to disturb 15.52 acres. Ground breaking for the replacement hospital occurred in January 2012. Ground breaking began in the city right-of-way portion of the Site during February 2013.

21. In February 2012, MDNR received a complaint that water leaving the Site had high turbidity and was causing issues with a downstream drinking water intake. MDNR performed several inspections of the Site, including on March 1, 13, 20, and 22, 2012; January 10 and 29, 2013; and April 19, 2013. Three letters of warning were issued by MDNR on April 4, 2012, February 13, 2013, and May 7, 2013 describing alleged violations of Respondent's authorizations under the General Permit. Respondent promptly took corrective action and responded in writing to each of the MDNR letters of warning.

22. On or about July 15 and 16, 2013, the U.S. Environmental Protection Agency inspected the Site under the authority of Section 308(a) of the CWA, 33 U.S.C. § 1318. The purpose of EPA's inspection was to evaluate the management of stormwater at the site in accordance with the CWA. EPA's inspection identified alleged violations of the CWA stormwater permits referenced above (The period of February 2012 through July 16, 2013 is hereafter referred to as the "inspection period"). Respondent promptly took corrective action and responded in writing to EPA to the alleged violations in connection with this action and documented a return to compliance.

Alleged Violations

Count I

Discharges in violation of water quality standards

23. The facts stated in Paragraphs 12 through 22, above, are herein incorporated.

24. Section A.6 of the General Permit, as authorized and applicable to the Site, requires that "discharges shall not cause violations of the Water Quality Standards 10 CSR 20-7.0.031(3)."

25. The MDNR inspections referenced in Paragraph 21, above, identified discharges that violated Section A.6 of the General Permit, as authorized and applicable to the Site, including:

a. In February 2012, MDNR received a complaint that water leaving the Site had high turbidity and was causing issues with a downstream drinking water intake (Shoal Creek).
b. In March 2012, MDNR observed and documented sediment discharged into the waters adjacent to the Site (tributary of Silver Creek and tributary's confluence with Shoal Creek);

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c. In January 2013, MDNR observed and documented reddish brown and turbid discharges from sedimentation basins impacting about 300 feet downstream (tributary of Silver Creek); and
d. In April 2013, MDNR observed and/or documented discharges of sediment and brown-tan colored water impacting the receiving stream (tributaries of Silver Creek and Shoal Creek).

26. Respondent's discharges in violation of applicable water quality standards are each a violation of the General Permit, as authorized and applicable to the Site, and as such, are each a violation of Sections 301(a) and 402(p) of the CWA, 33 U.S.C. § 1311(a) and § 1342(p).

Count 2
Failure to Develop, Maintain and Implement
Adequate Stormwater Pollution Prevention Plan

27. The facts stated in Paragraphs 12 through 22, above, are herein incorporated.

28. Section C.2 of the General Permit, as authorized and applicable to the Site, requires and states that Respondent develop and implement a Stormwater Pollution Prevention Plan (SWPPP), and that the purpose of the SWPPP "is to ensure, the design, implementation, management and maintenance of BMPs in order to prevent sediment and other pollutants in stormwater discharges associated with land disturbance activities...".

29. Section C.3.b of the General Permit, as authorized and applicable to the Site, describes the requirements for the SWPPP site map, which includes in pertinent part, the areas of soil disturbance, materials storage areas, and locations of structural and/or structural BMPs.

30. Section C.3.k of the General Permit, as authorized and applicable to the Site, requires that the SWPPP include and identify Best Management Practices (BMPs) that are "designed, installed, implemented and maintained to: (1) minimize the discharge of pollutants...".

31. Section C.8 of the General Permit, as authorized and applicable to the Site, requires the SWPPP (including the required Site Map), be amended and updated when there is change in the design, operation or maintenance of BMPs.

32. Section C.12 of the General Permit, as authorized and applicable to the Site, requires the permittee to provide notice to each contractor or entity (including utility crews and city employees or their agents) who will perform work at the Site of the existence of the SWPPP and what actions or precautions are required on site to minimize the potential for erosion and the potential for damaging any BMP.

33. The MDNR and/or EPA inspections referenced in Paragraphs 21 and 22, above, revealed that Respondent's Site Map did or did not sufficiently describe the following areas in violation of Section C.3.b of the General Permit:

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a. The location of an overburden soil pile;
b. The location of a drainage ditch and mulch socks/rock check dams along the drainage ditch;
c. The actual location of materials staging and storage areas and BMPs associated with those areas;
d. Mortar and fire suppressant mixing stations; and
e. Description of dewatering methods.

34. The MDNR and/or EPA inspections referenced in Paragraphs 21 and 22, above, revealed that Respondent did not or did not sufficiently update and/or amend the SWPPP to include training documentation and the installation of BMPs that were not previously described in the SWPPP (rock dams, mulch socks, design change of sediment detention basins), in violation of Section C.8 of the General Permit.

35. The MDNR and/or EPA inspections referenced in Paragraphs 21 and 22, above, revealed that Respondent did not or did not sufficiently provide notice of the SWPPP and/or requirements of the SWPPP to all required contractors, in violation of Section C.12 of the General Permit.

36. The MDNR and/or EPA inspections referenced in Paragraphs 21 and 22, above, revealed that Respondent's SWPPP did not or did not sufficiently identify pollution control BMPs for the areas described in Paragraph 33, above, in violation of Section C.3.k of the General Permit.

37. Respondent's failures to adequately develop, implement and/or maintain a SWPPP are each a violation of the General Permit, as authorized and applicable to the Site, and as such, are each a violation of Sections 301(a) and 402(p) of the CWA, 33 U.S.C. § 1311(a) and § 1342(p).

Count 3

Failure to Properly Design, Install, Implement and/or Maintain Best Management Practices (BMPs)

38. The facts stated in Paragraphs 12 through 22, above, are herein incorporated.

39. Section C.1 of the General Permit, as authorized and applicable to the Site, requires that the permitee design, install and maintain erosion controls and sediment controls to minimize the discharge of pollutants.

40. Section C.3.f and C.3.i of the General Permit, as authorized and applicable to the Site, require, respectively, that the permittee select appropriate structural BMPs for use at the Site, list them in the SWPPP and ensure the BMPs are properly installed at the locations and relative times described in the SWPPP.

41. The MDNR and/or EPA inspections referenced in Paragraphs 21 and 22, above, revealed that Respondent had not adequately selected, designed, installed and/or maintained

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BMPs to protect receiving waters, in violation of Sections C.1 and C.3.f and C.3.i of the General Permit. Such failure resulted in the unauthorized discharge of sediment offsite. These violations included:

a. Several locations where inlet controls had not been installed, were inadequate or damaged;
b. Lack of sediment control barriers in necessary locations, (including rip rap and silt control fences), lack of adequate sediment control barriers and/or removal of control barriers prior to permanent stabilization;
c. Failure to install and/or adequately maintain rock check dams;
d. Failure to install drain valves on storage tank containments;
e. Lack of perimeter controls around the overburden soil pile;
f. Lack of perimeter controls around the 4 fire suppressant or mortar mixing areas and concrete washout;
g. Lack of perimeter controls around the materials and storage areas and failure to store all materials and containers within such areas; and
h. Failure to provide spill prevention kits at materials storage, fuel storage and concrete washout areas.

42. Respondent's failures to properly select, install, design, implement and maintain BMPs are each a violation of the General Permit, as authorized and applicable to the Site and as such, are each a violation of Sections 301(a) and 402(p) of the CWA, 33 U.S.C. § 1311(a) and § 1342(p).

Count 4

Failure to Perform and Document Site Inspections

45. The facts stated in Paragraphs 12 through 22, above, are herein incorporated

46. Section C.10 of the General Permit, as authorized and applicable to the Site, requires that qualified personnel shall perform and document the inspection of areas of the Site that have not been finally stabilized at least once every seven calendar days and inspect BMPs within 48 hours of the end of a rainfall event that causes stormwater runoff (or 72 hours if on a non-work day such as a weekend or holiday).

47. Section C.10 of the General Permit, as authorized and applicable to the Site, requires that the required inspections document and record actions taken to correct observed problems.

48. The MDNR and/or EPA inspection referenced in Paragraphs 21 and 22, above, revealed that Respondent, on several occasions, did not, or did not adequately, perform and/or document required Site inspections and/or corrective actions, in violation of Section C.10 of the General Permit.

49. Respondent's failure to properly perform and/or document site inspections and/or corrective actions is a violation of the General Permit, as authorized and applicable to the Site,

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and as such, is a violation of Sections 301(a) and 402(p) of the CWA, 33 U.S.C. § 1311(a) and § 1342(p).

B. CONSENT AGREEMENT

1. Respondent and EPA agree to the terms of this CAFO and Respondent agrees to comply with the terms of the Final Order portion of this CAFO.

2. Respondent admits the jurisdictional allegations of this CAFO and agrees not to contest EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of the Final Order portion of this CAFO.

3. Respondent neither admits nor denies the specific factual allegations and alleged violations set forth above.

4. Respondent waives its right to a judicial or administrative hearing on any issue of fact or law set forth above, and its right to appeal the Final Order portion of this CAFO.

5. Respondent and Complainant agree to conciliate the matters set forth in this CAFO 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.

6. The undersigned representative of the Respondent certifies that he/she is fully authorized to enter the terms and conditions of this CAFO and to execute and legally bind Respondent to it.

7. Nothing contained in the Final Order portion of this CAFO shall alter or otherwise affect Respondent's obligation to comply with all applicable federal, state, and local environmental statutes and regulations and applicable permits.

8. This CAFO addresses all civil and administrative claims for the CWA violations identified above. Complainant reserves the right to take any enforcement action with respect to any other violations of the CWA or any other applicable law.

9. Respondent certifies by the signing of this CAFO that, to the best of its knowledge, the Site is in compliance with all requirements of Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342.

10. The effect of settlement described in Paragraph B.8, above, is conditional upon the accuracy of the Respondent's representation to EPA in Paragraph B.9, above of this CAFO.

11. Respondent agrees that, in settlement of the claims alleged in this CAFO, Respondent shall pay a penalty of $82,500, as set forth in Paragraph B.13 below.

12. Respondent understands that failure to pay any portion of the civil penalty on the date the same is due may result in the commencement of a civil action in Federal District Court to collect said penalty, along with interest thereon at the applicable statutory rate.

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13. Respondent shall pay a civil penalty of Eighty-Two Thousand, Five Hundred Dollars ($82,500) to be paid in full no later than 30 days after the effective date of this CAFO. Payment of the penalty shall be by cashier or certified check made payable to the "United States Treasury" and remitted to:

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

This payment shall reference docket number CWA-07-2014-0084.

Copies of the check(s) shall be mailed to:

Howard C. Bunch
Sr. Assistant Regional Counsel
U.S. Environmental Protection Agency – Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219

and to

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

14. No portion of the civil penalty or interest paid by Respondent pursuant to the requirements of this CAFO shall be claimed by Respondent as a deduction for federal, state, or local income tax purposes.

Parties Bound

15. This CAFO 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 CAFO.

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General Provisions

16. Notwithstanding any other provision of this CAFO, EPA reserves the right to enforce the terms of this CAFO 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 associated with a violation of this CAFO.

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17. Complainant reserves the right to take enforcement action against Respondent for any violations of the CWA not resolved by this CAFO, and its implementing regulations, and to enforce the terms and conditions of this CAFO.

18. This CAFO shall be entered and become effective only after the conclusion of the period of 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. Unless otherwise stated, all time periods stated herein shall be calculated in calendar days from such date.

19. The headings in this CAFO are for convenience of reference only and shall not affect interpretation of this CAFO.

20. Respondent and Complainant agree that this CAFO can be signed in part and counterpart.

FOR RESPONDENT:

MERCY HEALTH

07/22/2014
Date

Name: Philip Wheeler
Title: Secretary

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FOR COMPLAINANT:

U.S. ENVIRONMENTAL PROTECTION AGENCY

_____ Date

_____
Karen Flournoy, Director
Water, Wetlands and Pesticides Division

_____ Date

_____
Howard C. Bunch
Sr. Assistant Regional Counsel
Office of Regional Counsel

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C. FINAL ORDER

IT IS SO ORDERED. This Final Order shall become effective immediately.

_____ _____

Karina Borromeo
Regional Judicial Officer

Date

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