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LEXSEE 2001 epa consent lexis 455

IN THE MATTER OF CITY OF FITCHBURG, MASSACHUSETTS, Respondent

DOCKET NO. CWA-1-2001-0036

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION I

2001 EPA Consent LEXIS 455

August 24, 2001

COUNSEL:

[*1] For CITY OF FITCHBURG: Mary H. Whitney, Mayor

U.S. ENVIRONMENTAL PROTECTION AGENCY: Sam Silverman, Acting Director, Office of Environmental Stewardship

JUDGES:

Sharon Wells, Regional Judicial Officer, U.S. EPA, Region I

OPINION:

CONSENT AGREEMENT AND FINAL ORDER

STATUTORY AUTHORITY

1. This Consent Agreement and Final Order is issued under the authority granted to the Administrator of the U.S. Environmental Protection Agency ("EPA") by Section 309(g)(2)(B) of the Clean Water Act (the "Act"), 33 U.S.C. § 1319(g)(2)(B). The Administrator has delegated this authority to the Regional Administrator of EPA, Region I, who, in accordance with the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits," at 40 C.F.R. Part 22 ("Part 22"), issues the Final Order below. The Regional Administrator of EPA, Region I has delegated the authority to enter into Consent Agreements to the Director of EPA, Region I's Office of Environmental Stewardship, who, in accordance with Part 22, hereby proposes to enter into the Consent Agreement below.

STIPULATIONS AND FINDINGS

2. The City of Fitchburg, Massachusetts ("Respondent"), [*2] by its authorized representative, stipulates, and EPA finds as follows:

3. EPA issued an Administrative Complaint, Docket No. CWA-1-2001-0036, to the Respondent on March 30, 2001, pursuant to Section 309(g)(2)(B) of the Clean Water Act, 33 U.S.C. § 1319(g)(2)(B), proposing a penalty of one hundred thirty-seven thousand five hundred dollars (\$ 137,500).

4. The Respondent admits the jurisdictional allegations in the Administrative Complaint and neither admits nor denies any specific fact or violation alleged in the Administrative Complaint. The Respondent waives its right to a hearing under Section 309(g)(2)(B) of the Act, and to appeal this Consent Agreement and Final Order under Section 309(g)(8)(A) of the Act, 33 U.S.C. § 1319(g)(8)(A).

CONSENT AGREEMENT

5. Based on the forgoing Stipulations and Findings, and taking into account the statutory penalty factors at Section 309(g)(3) of the Act, 33 U.S.C. § 1319(g)(3), and under the authority of Section 309(g)(2)(B), EPA hereby orders and the Respondent hereby consents that:

Payment of Penalty

6. The Respondent shall pay a penalty of sixty-six thousand dollars (\$ 66,000) for discharges of untreated wastewater during [*3] dry weather to the North Nashua River through various combined sewer overflow outfall regulators and combined sewer overflow discharge points, as alleged in the Administrative Complaint, that occurred through the effective date of this Consent Agreement and Final Order.

7. Within thirty (30) days of the effective date of this Consent Agreement and Final Order, the Respondent shall submit a cashier's or certified check payable to "Treasurer, United States of America" and referencing the title and docket number of the action, in the amount specified in the preceding paragraph above to:

EPA Region I

P.O. Box 360197M

Pittsburgh, PA 15251.

The Respondent shall simultaneously submit copies of the penalty payment check to:

Mary Anne Gavin

Regional Hearing Clerk

U.S. Environmental Protection Agency

Region I

One Congress Street

Boston, MA 02114-2023

and

Michael Wagner

Office of Environmental Stewardship

U.S. Environmental Protection Agency

Region I

One Congress Street

Boston, MA 02114-2023.

8. Pursuant to Section 309(g)(9), 33 U.S.C. § 1319(g)(9), a failure by the Respondent to pay the penalty assessed by this Consent Agreement and Final Order in full by its due date shall subject the Respondent [*4] to a civil action to collect the assessed penalty plus interest at current prevailing rates from the date of this Consent Agreement and Final Order. The rate of interest assessed shall be at the rate set forth in 4 C.F.R. 102.13(c), promulgated under 31 U.S.C. § 3717. Any person who fails to pay on a timely basis the amount of an assessed penalty shall be required to pay in addition to such amount and interest, attorney's fees, costs for collection proceedings, and a quarterly nonpayment penalty for each quarter during which such failure to pay persists. Such nonpayment penalty shall be in an amount equal to twenty percent of the aggregate amount of such person's penalties and nonpayment penalties which are unpaid as of the beginning of such quarter. In any such collection action, the validity, amount, and appropriateness of the penalty shall not be subject to review.

Performance of the Supplemental Environmental Projects

9. The Respondent shall complete the following supplemental environmental projects ("SEPs"), which the parties agree are intended to secure significant environmental or public health protection and improvements.

a. By no later than October 31, 2001, the [*5] Respondent shall assess the water quality of the North Nashua River in the vicinity of the City of Fitchburg and submit to the EPA and the MA DEP a report that characterizes the water quality of the river upstream, in the immediate vicinity of the Respondent's outfalls, and downstream of the City of Fitchburg during dry weather ("River Assessment"). The River Assessment shall quantify the impacts that the bacteriological component of the Respondent's dry weather discharges has on the river. The River Assessment shall be based on pH and fecal coliform analysis of multiple grab sample locations for at least five transects along the river. The River Assessment shall cost the Respondent no less than \$ 2,500.

b. By no later than September 30, 2002, the Respondent shall complete a storm water illicit connection project ("Illicit Connection Project"). The Illicit Connection Project shall identify and address illicit sanitary connections to the Respondent's separate storm water collection system. The Respondent shall spend at least \$ 41,500 on the Illicit Connection Project. The Illicit Connection Project shall include the following:

(1) By October 31, 2001, the Respondent shall submit a [*6] map to the EPA and MA DEP depicting the size and location of each of the Respondent's separate storm water discharge pipes. The map shall identify the approximate boundaries and typical land use for each discharge pipe's drainage area.

(2) The Respondent shall observe each discharge pipe's outfall on at least two separate days following 72 hours of no precipitation and no snow melt to determine if a flow exists during dry weather. If there is a flow, the observer shall record an estimate of the flow rate and a description of any odors, color, turbidity, floatables (solids and liquids), and suspended solids observed in the flow.

(3) The Respondent shall analyze samples collected from dry weather flows and wet weather flows from the Respondent's storm water collection system and conduct appropriate bacteriological monitoring to determine whether illicit connections to the storm water collection system exist.

(4) The Respondent shall attempt to identify the sources of all illicit discharges to the storm water collection system. For flows that cannot be attributed to a known source, the Respondent shall conduct appropriate monitoring to determine whether bacteria in the flows can be attributed [*7] entirely to non-human sources.

(5) All sampling, preservation, and analysis of samples shall be in accordance with EPA approved methods found at 40 C.F.R. Part 136.

(6) By September 30, 2002, the Respondent shall submit to EPA and the MA DEP a project completion report ("SEP Completion Report"). The SEP Completion Report shall contain the following information:

- (i) Itemized costs, documented by copies of invoices or canceled checks;
- (ii) Certification that the SEP has been fully implemented pursuant to the provisions of this Consent Agreement and Final Order;
- (iii) A list of all illicit connections identified during implementation of this project;
- (iv) A list of all illicit connections removed during implementation of this project;
- (v) A plan, including a schedule, for removing identified illicit connections that remain after submission of the project completion report; and
- (vi) A description of the environmental and public health benefits resulting from the pollution prevention assessment and/or the implementation of the report's recommendations (with a quantification of the benefits and pollutant reductions, if feasible).

The SEP Completion Report shall be submitted to:

Linda [*8] Brolin

U.S. Environmental Protection Agency

Region I

1 Congress St., Suite 1100 (SEW)

Boston, MA 02114

and

Massachusetts Department of Environmental Protection

Central Region

627 Main Street

Worcester, MA 01608

Attn: Robert Kimball.

10. The Respondent hereby certifies that, as of the date of this Consent Agreement, the Respondent is not required to perform or develop the SEPs by any federal, state or local law or regulation; nor is the Respondent required to perform or develop the SEPs by agreement, grant or as injunctive relief in this or any other case. The Respondent further certifies that it has not received, and is not presently negotiating to receive, credit in any other enforcement action for the SEPs.

11. The Respondent shall maintain legible copies of documentation of the underlying research and data for any and all documents or reports submitted to EPA pursuant to this Consent Agreement, and the Respondent shall provide the documentation of any such underlying research and data to EPA within seven days of a request for such information. In all documents or reports, including, without limitation, the River Assessment and the SEP Completion Report submitted to EPA pursuant [*9] to this Consent Agreement, the Respondent shall, by its officers, sign and certify under penalty of law that the information contained in such document or report is true, accurate, and not misleading by signing the following statement:

I certify under penalty of law that I have examined and am familiar with the information submitted in this document and all attachments and that, based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fines and imprisonment.

12. Following receipt of the River Assessment and SEP Completion Report described above, EPA will do one of the following: (i) accept the reports; (ii) reject the reports, notify the Respondent, in writing, of deficiencies in the reports and grant the Respondent an additional thirty (30) days in which to correct any deficiencies; or (iii) reject the reports and seek stipulated penalties in accordance with paragraph 13 herein. If EPA elects to exercise option (ii) above, EPA shall permit the Respondent the opportunity [*10] to object in writing to the notification of deficiency or disapproval given pursuant to this paragraph within ten (10) days of receipt of such notification. EPA and the Respondent shall have an additional thirty (30) days from the receipt by the EPA of the notification of objection to reach agreement. If agreement cannot be reached on any such issue within this thirty (30) day period, EPA shall provide a written statement of its decision to the Respondent, which decision shall be final and binding upon the Respondent. The Respondent agrees to comply with any requirements imposed by EPA to correct any such deficiency or failure to comply with the terms of this Consent Agreement and Order, provided such correction does not exceed the original scope of the SEPs. In the event that the SEPs are not completed as contemplated herein, as determined by EPA, stipulated penalties shall be due and payable by the Respondent to EPA in accordance with paragraph 13 herein.

13. a. In the event that the Respondent fails to comply with any of the terms or provisions of this Agreement relating to the performance of the SEPs described in paragraphs 9 through 12 above and/or to the extent that the actual [*11] expenditures for the SEPs do not equal or exceed the cost of the SEPs described in paragraph 9 above, the Respondent shall be liable for stipulated penalties according to the provisions set forth below:

(i) Except as provided in subparagraph 13.a(ii) below, if the SEPs are not completed satisfactorily pursuant to this Consent Agreement and Final Order, the Respondent shall pay a stipulated penalty to the United States in the amount of forty-four thousand dollars (\$ 44,000).

(ii) If the SEPs are not completely satisfactorily, but the Respondent: a) made good faith and timely efforts to complete the projects; and (b) certifies, with supporting documentation, that at least 90 percent of the amount of money which was required to be spent was expended on the SEPs, the Respondent shall not be liable for any stipulated penalty;

(iii) If the SEPs are satisfactorily completed, but the Respondent spent less than 90 percent of the amount of money required to be spent for the project, the Respondent shall pay a stipulated penalty to the United States in the amount of four thousand five hundred dollars (\$ 4,500).

(iv) If the SEPs are satisfactorily completed, and the Respondent spent at least [*12] 90 percent of the amount of money required to be spent for the projects, the Respondent shall not be liable for any stipulated penalty.

(v) For failure to submit the River Assessment or the SEP Completion Report required by paragraph 9 above, the Respondent shall pay a stipulated penalty in the amount of two hundred dollars (\$ 200) for each day the required submission is late.

b. The determinations of whether the SEPs have been satisfactorily completed and whether the Respondent has made a good faith, timely effort to implement the SEPs shall be in the sole discretion of EPA.

c. Stipulated penalties for subparagraph a.(v) above shall begin to accrue on the day after performance is due, and shall continue to accrue through the final day of the completion of the activity.

d. The Respondent shall pay stipulated penalties within fifteen (15) days of receipt of written demand by EPA for such penalties. Method of payment shall be in accordance with the provisions of paragraph 5 above. Interest and late charges shall be paid as stated in paragraph 8 above.

e. Nothing in this agreement shall be construed as prohibiting, altering or in any way limiting the ability of EPA to seek any other [*13] remedies or sanctions available by virtue of the Respondent's violation of this agreement or of the statutes and regulations upon which this agreement is based, or for the Respondent's violation of any applicable provision of law.

14. Any public statement, oral or written, in print, film, or other media, made by the Respondent making reference to either of the SEPs shall include the following language, "This project was undertaken in connection with the settlement of an enforcement action taken by the U.S. Environmental Protection Agency for violations of the Clean Water Act."

15. This Consent Agreement and Final Order shall not relieve the Respondent of its obligation to comply with all applicable provisions of federal, state or local law, nor shall it be construed to be a ruling on, or determination of, any issue related to any federal, state or local permit, nor shall it be construed to constitute EPA approval of the facilities installed or modified by the Respondent in connection with the illicit connect project under the terms of this Agreement.

General Provisions

16. The provisions of this Consent Agreement and Final Order shall be binding upon the Respondent, its [*14] officers, directors, agents, servants, employees, and successors or assigns.

17. Issuance of this Consent Agreement and Final Order constitutes a settlement by EPA of all claims for judicial or administrative civil penalties pursuant to Sections 309(d) or (g) of the Act, 33 U.S.C. § 1319(d) or (g), for the violations of the Act specifically alleged in the Complaint and continuing through to the date of the Consent Agreement and Final Order.

18. Issuance of this Consent Agreement and Final Order does not constitute a settlement by EPA of its right to enforce the substantive legal requirements underlying this administrative penalty assessment, whether administratively or judicially, pursuant to Sections 309(a), (b) and (c) of the Act, 33 U.S.C. § 1319(a), (b) and (c), or Section 504 of the Act, 33 U.S.C. § 1364.

19. This Consent Agreement and Final Order does not constitute a waiver, suspension or modification of the requirements of the Clean Water Act, 33 U.S.C. § 1251 et seq., or any regulations promulgated thereunder.

FINAL ORDER

Pursuant to Section 309(g)(2)(B) of the Act, 33 U.S.C. § 309(g)(2)(B) and in accordance with 40 C.F.R. Part 22, the forgoing Consent Agreement [*15] is hereby approved and incorporated by reference into this Final Order. The Respondent is ordered to comply with the terms of the referenced Consent Agreement. This Consent Order shall become effective thirty (30) days from today.

U.S. ENVIRONMENTAL PROTECTION AGENCY

CERTIFICATE OF SERVICE

I certify that the forgoing Consent Agreement and Final Order was sent to the following persons, in the manner specified, on the date below:

Original and one copy hand-delivered: Mary Anne Gavin (RCG)

Regional Hearing Clerk

U.S. EPA, Region I

One Congress Street

Boston, MA 02203

Copy by certified mail, return receipt requested: Richard H. Sedgley, Esq.

McGuire Woods

One James Center

901 East Cary Street

Richmond, VA 23219-4030

Copy by first class mail: Judge Barbara A. Gunning

Office of Administrative Law Judges

U.S. Environmental Protection Agency

Mail Code 1900L

1200 Pennsylvania Avenue, N.W.

Washington, DC 20460

Dated: 8 24-01

Michael Wagner

Counsel for Complainant