

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 9**

75 Hawthorne Street
San Francisco, California 94105

IN THE MATTER OF:)	
)	Docket No. CWA 309(a)-10-014
)	
Fisher Sand and Gravel, dba Southwest Asphalt Paving)	FINDINGS OF VIOLATION
45 Castle Rock Road)	AND
Sedona, AZ 86351)	ORDER FOR COMPLIANCE
)	
)	Proceedings under Sections 308(a) and 309(a)
)	of the Clean Water Act, as amended, 33
)	U.S.C. §§ 1318(a), and 1319(a)

STATUTORY AUTHORITY

The following Findings of Violation are made and Order for Compliance (Order) issued pursuant to the authority vested in the Administrator of the U.S. Environmental Protection Agency (EPA) by Sections 308 and 309(a) of the Clean Water Act, as amended (the Act or CWA), 33 U.S.C. §§ 1318 and 1319(a). The Administrator has delegated these authorities to the Regional Administrator of EPA, Region IX, who has re-delegated them to the Director of the Water Division of EPA, Region IX. Notice of this action has been given to the State of Arizona.

FINDINGS OF VIOLATION

1. Under CWA section 301(a), 33 U.S.C. §§ 1311(a), it is unlawful for a person to discharge any pollutant from a point source into a water of the United States except in compliance with specific CWA sections, including Section 402. 33 U.S.C. § 1342.
2. "Waters of the United States" includes, inter alia: (i) all waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, and (ii) tributaries to such waters. 40 C.F.R. § 122.2.
3. Section 402 of the Act, 33 U.S.C. § 1342, establishes the National Pollutant Discharge Elimination System (NPDES) program, under which EPA and states with an EPA approved NPDES program may issue NPDES permits, including storm water permits, governing the discharge of pollutants from regulated sources.
4. Under Section 402(p) of the Act, 33 U.S.C. § 1342(p), and EPA's implementing

regulations at 40 C.F.R. § 122.26, NPDES permit authorization is required for discharges of storm water associated with industrial activity. Construction activity is an industrial activity under 40 C.F.R. § 122.26(b)(14)(x).

5. The State of Arizona has an EPA-approved NPDES (AZDES) program, which is administered by the Arizona Department of Environmental Quality (ADEQ). On February 28, 2008, ADEQ adopted its currently effective statewide NPDES general permit for discharges of storm water associated with construction activity, Permit No. AZG2008-001 (General Permit).
6. Under General Permit Part III.A, facility operators must develop and implement a storm water pollution prevention plan (SWPPP) before submitting a Notice of Intent, to identify sources of storm water pollution and to identify and implement site-specific best management practices (BMPs) to control discharges.
7. Under General Permit Part III.G.2, a copy of the SWPPP must be on-site whenever construction or support activities are actively underway.
8. Under General Permit Part IV.A, facility operators must design and implement a combination of erosion and sediment control BMPs to keep sediment in place and to capture sediment to the extent practicable before it leaves the site.
9. Under General Permit Part IV.C.4, facility operators must implement effective BMPs to ensure there is no discharge of sediments from construction activities to any water body including dry washes during dry weather.
10. Under General Permit Part IV.H.3, facility operators must, at a minimum, inspect all areas of the site disturbed by construction activity and areas used for storage of materials that are exposed to precipitation.
11. Under General Permit Part IV.I, facility operators must maintain BMPs to ensure they are kept in effective operating condition, including removing sediment from temporary sedimentation basins when the depth of sediment collected in the basin reaches 50% of storage capacity.
12. Under General Permit Part V, facility operators with projects located within ¼ mile of a “unique water,” which is a surface water that has been designated by ADEQ as an outstanding state resource under Arizona Administrative Code (A.A.C.) R18-11-112, must develop and implement a written monitoring program that includes visual and analytical monitoring. Specifically, facility operators must:
 - a. Include in the monitoring program, inter alia, (a) the name and title of the person conducting the monitoring, (b) a map showing the segments or portions of the receiving water that are most likely to be impacted, and (c) visual observation locations, procedures, and follow-up and tracking procedures (Part V.B);

- b. Conduct weekly inspections, document with photographs, and visually observe storm water discharges at all discharge locations within one business day after each 0.5 inches of precipitation from a rain event (Part V.C.); and
 - c. Analyze samples for turbidity upstream and downstream from the site, as well as at any location where the facility directly discharges to the unique water, at any time a pollutant (including sediment) is known or suspected to discharge from the construction site (Part V.D).
- 13. Fisher Sand and Gravel (Respondent), dba Southwest Asphalt Paving, is a subsidiary of Fisher Industries, a North Dakota corporation, and is licensed to do business in Arizona. Respondent is a “person” under CWA Section 502(5), 33 U.S.C. § 1362(5).
- 14. Respondent is a contractor for the Arizona Department of Transportation (ADOT) and operates ADOT’s State Route 179 Improvement Project (SR 179 project) from milepost (MP) 310.5 to MP 313.8 (Site) between the village of Oak Creek and the City of Sedona, Coconino and Yavapai Counties, Arizona.
- 15. The SR 179 project is a linear construction project along Oak Creek that includes the widening of a two-lane roadway, addition of shoulders and turn lanes, extension of pipes and culverts, construction of a pedestrian bridge, and replacement of an existing vehicle bridge over Oak Creek. Storm water runoff from the construction activities flows mostly via culverts directly to Oak Creek and occasionally via unnamed tributaries to nearby Oak Creek.
- 16. Oak Creek is a perennial water and a “water of the United States” under the Act. It is also a “unique water” under A.A.C. R18-11-112. Downstream from the Site, Oak Creek flows for approximately 35 miles to join the perennial Verde River near Bignotti, Arizona. From its confluence with Oak Creek, the Verde River flows for approximately 70 miles to Horseshoe Reservoir. Boating activities have been reported for the relevant reaches of Oak Creek and the Verde River and for Horseshoe Reservoir.
- 17. Respondent obtained General Permit coverage (AZDPES number 36435) for storm water discharges associated with the SR 179 project on May 29, 2008.
- 18. On February 5, 2010, representatives of EPA, accompanied by ADEQ and COE staff, inspected the Site to evaluate Respondent’s compliance with the General Permit.
- 19. Based on evidence collected during the February 5, 2010 inspection and file review, EPA finds that Respondent:
 - a. Has violated the SWPPP requirements at General Permit Part III.G.2 by failing to keep a copy of the SWPPP on-site during construction.
 - b. Has violated the BMP requirements at General Permit Part IV.A.3 by failing to:
 - 1. implement adequate BMPs on the Garland slope to prevent sediment

- discharge to Oak Creek;
 - 2. implement adequate BMPs when working in the stream bed to prevent the discharge of fine sediments from the drilling area to Oak Creek; and
 - 3. adequately treat sediment-laden water pumped from the drilling area before discharging.
- c. Has violated the BMP requirements at General Permit Part IV.C.4 by failing to implement effective BMPs to prevent sediment from discharging at the Chapel staging area.
 - d. Has violated the BMP maintenance requirements at General Permit Part IV.I by failing to remove sediment from the sediment basin constructed at the Chapel staging yard to contain the sediment-laden water pumped from the drilling area.
 - e. Has violated the good housekeeping BMPs requirements at General Permit Part IV.D by failing to have spill kits or implement BMPs to properly contain gasoline, lubricants and other chemicals at the Morgan staging yard.
 - f. Has violated the inspection requirements at General Permit Part IV.H.3 by failing to inspect all areas of the Site, including staging yards and areas under active construction.
 - g. Has violated the discharge monitoring requirements of General Permit Part V by failing to prepare a monitoring program that requires weekly visual observations and does not exempt the Site from analytical monitoring.
20. By discharging storm water associated with its construction activities at the Site to a water of the United States in violation of the General Permit requirements, as described above, Respondent has violated Section 301(a) of the Act, 33 U.S.C. § 1311(a).

ORDER FOR COMPLIANCE

Considering the foregoing Findings of Violations and the potential environmental effects of the violations, EPA has determined that compliance in accordance with the following requirements is reasonable. Pursuant to the authority of Sections 308 and 309 of the Act, 33 U.S.C. §§ 1318 and 1319, it is hereby ordered that Respondent comply with the following requirements:

- 21. Immediately upon receipt of this Order, Respondent shall take all necessary measures to fully and properly comply with all terms and conditions of the General Permit.
- 22. Immediately upon receipt of this Order, Respondent shall implement adequate BMPs at the Garland slope location. Adequate BMPs shall include a combination of erosion and

sediment control measures, including diversion of off-site run-on from the top of the slope, and other measures to protect the slope.

23. Immediately upon receipt of this Order, Respondent shall implement adequate BMPs while working within Oak Creek. Adequate BMPs shall include a method of retaining all pumped groundwater and construction-related storm water runoff for a sufficient period of time to allow the fine sediments to either settle out or be filtered before discharge to Oak Creek.
24. Immediately upon receipt of this Order, Respondent shall implement adequate BMPs to filter the sediment-laden water pumped from the drilling area. Adequate BMPs shall include redundant BMPs to ensure that the sediment is not discharged off-site.
25. Within 7 days of receipt of this Order, Respondent shall submit a Notice of Completion of the above measures to EPA.
26. Within 14 days of receipt of this Order, Respondent shall develop and implement adequate good housekeeping BMPs for all maintenance yards located at the project site. Adequate BMPs shall include secondary containment for daily use materials and accessible spill kits. Within 7 days of completion of this measure, Respondent shall submit a Notice of Completion to EPA.
27. Within 21 days of receipt of this Order, Respondent shall work in concert with ADOT and jointly submit a revised storm water monitoring plan to EPA that fully complies with all applicable requirements under the ADOT Permit and the AZPDES Construction General Permit.
28. Within 60 days of receipt of this order, Respondent shall submit to EPA all inspection and monitoring reports required under the General Permit for the SR 179 project that are completed after the receipt of this order.
29. The Notices of Completion required under this Order shall include a list of the measures taken, the date each measure was installed, the person(s) responsible for overseeing completion of each measure, and copies of documents associated with the completion of the measures, such as contracts, permits, manifests, and photographs
30. All submissions made pursuant to this Order must be signed by a principal executive officer, ranking elected official, or duly authorized representative of Respondent (as specified by 40 C.F.R. § 122.22 (b)(2)) and shall include the following statement:

”I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the

person or persons who manage the system, or those persons directly responsible for gathering the information, I certify that the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.”

31. Respondent shall send all submissions requested by this Order to the following addresses:

U. S. Environmental Protection Agency - Region 9
Clean Water Act Compliance Office WTR-7
75 Hawthorne Street
San Francisco, CA 94105
Attention: Ellen Blake

and

Arizona Department of Environmental Quality
Water Quality Division
1110 W. Washington Street
Phoenix, AZ 85007
Attention: Cynthia Campbell

32. Respondent shall direct all phone inquiries concerning this Order to: Ellen Blake, Environmental Scientist, EPA, at (415) 972-3496.
33. This Order shall be binding upon Respondent and its officers, directors, agents, employees, contractors, heirs, successors, and assigns.
34. This Order is not a permit under the CWA, and does not waive or modify Respondent’s obligation and responsibility to ascertain and comply with all applicable federal, state, or local laws, regulations, ordinances, permits, or licenses.
35. This Order is not to be deemed an election by EPA to forgo any remedies available to it under the law, including without limitation, any administrative, civil, or criminal action to seek penalties, fines, or other appropriate relief under the Act. EPA reserves all rights and remedies, legal and equitable, available to enforce any violations cited in this Order and to enforce this Order.
36. Requests for information contained within this Order are not subject to review by the Office of Management and Budget under the Paperwork Reduction Act because it is not a “collection of information” within the meaning of 44 U.S.C. § 3502(3). It is directed to fewer than ten persons and is an exempt investigation under 44 U.S.C. § 3518(c)(1) and 5 C.F.R. § 1320.4(a)(2).

37. Respondent may not withhold from EPA any information on the ground that it is confidential business information. However, EPA has promulgated, under 40 C.F.R. Part 2, Subpart B, regulations to protect confidential business information it receives. If legally supportable, a claim of business confidentiality may be asserted in the manner specified by 40 C.F.R. § 2.203(b) for all or part of the information requested by EPA. EPA will disclose business information covered by such claim only as authorized under 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies the information at the time EPA receives it, EPA may make it available to the public without further notice.
38. Section 309(a), (b), (d) and (g) of the Act, 33 U.S.C. § 1319(a), (b), (d) and (g), provides administrative and/or judicial relief for failure to comply with the CWA. In addition, Section 309(c) of the Act, 33 U.S.C. § 1319(c), provides criminal sanctions for negligent or knowing violations of the CWA and for knowingly making false statements.
39. This Order shall become effective upon the date of receipt by Respondent.

Alexis Strauss
Director, Water Division

Date