



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8

1595 Wynkoop Street
Denver, CO 80202-1129
Phone 800-227-8917
<http://www.epa.gov/region08>

June 11, 2009

Ref: 8ENF-L

CERTIFIED MAIL:
RETURN RECEIPT REQUESTED
#7005-1160-0005-3398-2509

Joseph and Ronald Muth
Doeck, LLC
400 North Rowley Street
Mitchell, South Dakota 57301

Re: Administrative Order on Consent
In the Matter of Doeck, LLC
Docket No. CWA-08-2009-0016

Dear Messrs. Muth:

Enclosed please find the signed Administrative Compliance Order on Consent (Consent Order or Order) in this matter. The Consent Order is now final and you must begin to undertake the steps set forth in the Order according to the time-frames set forth therein.

As previously advised, your agreement to enter into this Consent Order and its issuance does not preclude the initiation of any action authorized under law for failure to comply with the Order, including the assessment of an administrative penalty and the filing of a civil action in the U.S District Court for civil penalties and/or injunctive relief. Failure to comply with the requirements of the Consent Order is a violation of the Order.

If you have any questions regarding the terms of the Consent Order, please do not hesitate to contact me at 303-312-6916, or Kenneth Champagne, Section 404 Enforcement Officer, at 303-312-6608. We appreciate your effort in working cooperatively with EPA to resolve this matter in a timely fashion and look forward to a continued positive working relationship between you and EPA.

Sincerely,

A handwritten signature in cursive script that reads "Sheldon Muller".

Sheldon Muller
Enforcement Attorney
Legal Enforcement Program
Office of Enforcement, Compliance and
Environmental Justice



Printed on Recycled Paper

Enclosure

Administrative Compliance Order on Consent

cc: Kale R. McNaboe, Sperlich Consulting, Inc., w/enclosure
David LaGrone, U.S. Army Corps of Engineers, w/enclosure
Steven E. Naylor, U.S. Army Corps of Engineers, w/enclosure
Tim Tollefsrud, South Dakota DENR, w/enclosure
Tina Artemis, EPA, 8RC, w/enclosure



UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

2009 JUN 11 AM 8:35

IN THE MATTER OF)	ADMINISTRATIVE ORDER
)	ON CONSENT
Doeck, LLC)	
400 North Rowley Street)	
Mitchell, South Dakota 57301)	Docket No. CWA-08-2009-0016
)	
Respondent.)	
_____)	

I. INTRODUCTION

1. This Administrative Order on Consent (Consent Order or Order) is entered into between the United States Environmental Protection Agency (EPA) and Doeck, LLC. The Consent Order requires completion of compliance actions to address the environmental damages caused by alleged illegal discharges of dredged or fill material at the Respondent's property in Pennington County, South Dakota.

II. STATUTORY AUTHORITY

2. This Consent Order is issued pursuant to the authority vested in the Administrator of the EPA by section 309 of the Clean Water Act (CWA), 33 U.S.C. § 1319. This authority has been properly delegated to the Assistant Regional Administrator of the Office of Enforcement, Compliance and Environmental Justice, EPA Region 8. The Consent Order is based on the findings of violation of section 301(a) of the CWA, 33 U.S.C. § 1311(a), which, among other things, prohibits the discharge of pollutants into waters of the United States except as in compliance with section 404 of the CWA, 33 U.S.C. § 1344.

III. PARTIES BOUND

3. This Consent Order shall apply to and be binding upon EPA and the Respondent, its agents, successors, and assigns. The signatories to this Consent Order certify that they are authorized to enter into the terms and conditions of this Consent Order and to execute and legally bind the parties they represent to this Order. No change in the ownership or legal status of Respondent or of the property that is the subject of this Consent Order shall alter Respondent's responsibilities under this Order except as otherwise authorized pursuant to paragraph 40.

IV. STATEMENT OF PARTIES

4. Except as otherwise provided in Paragraph 5 of this Consent Order, the following FINDINGS OF FACT AND OF VIOLATION are made solely by EPA. Except as otherwise provided in Paragraph 5 of this Order, Respondent neither admits nor denies the FINDINGS OF FACT AND OF VIOLATION. To provide for the complete resolution of the alleged violations of the CWA and without acknowledging any further liability, Respondent consents to the issuance of this Consent Order and agrees to abide by all of its terms and conditions and not to challenge the jurisdiction of EPA or the FINDINGS OF FACT AND OF VIOLATION below in any proceeding to enforce this Consent Order.

5. Respondent admits the FINDINGS OF FACT AND OF VIOLATION set forth in Paragraphs 6 and 7 of this Consent Order.

V. FINDINGS OF FACT AND OF VIOLATION

6. Respondent, Doeck, LLC, is a South Dakota limited liability corporation having a principal office address of 400 North Rowley Street, Mitchell, South Dakota 57301. Respondent is currently in good standing with the South Dakota Secretary of State's Office, and its registered

agent is Ronald Muth, having a registered office address of 400 North Rowley Street, Mitchell, South Dakota 57301.

7. At all relevant times, Respondent owned, controlled and/or operated the property located in Section 13, Township 2 North, Range 8 East, Pennington County, South Dakota (the Site). An unnamed tributary of Boxelder Creek and its adjacent wetlands are located at the Site.

8. The unnamed tributary and its adjacent wetlands are tributary to Boxelder Creek, which is tributary to the Cheyenne River. The Cheyenne River is, and was at all relevant times, a navigable, interstate water.

9. Between fall 2005 and spring 2008, Respondent and/or persons acting on its behalf, excavated and filled the unnamed tributary of Boxelder Creek and its adjacent wetlands at the Site during construction of, including but not limited to, residential lots, roads, road crossings, and associated infrastructure, which were part of Phase I and II of the Brookfield Subdivision.

10. On June 27, 2008, the United States Army Corps of Engineers (Corps) conducted an inspection of the Site after receiving a complaint of impacts to the unnamed tributary of Boxelder Creek and its adjacent wetlands. The Corps found, and EPA through issuance of this Consent Order finds, that Respondent and/or persons acting on its behalf discharged dredged or fill material into the unnamed tributary of Boxelder Creek and its adjacent wetlands during construction of the Brookfield Subdivision at the Site.

11. In a letter to Respondent, dated July 17, 2008, the Corps found, and EPA through issuance of this Order finds, that Respondent's activities, as described in paragraphs 9 and 10 of this Consent Order, required prior authorization from the Corps and that the required

authorization had not been sought or granted. Further, the Corps directed Respondent to “cease and desist” any further unauthorized work at the Site.

12. In a letter to the Corps, dated July 24, 2008, Respondent submitted, among other things, site plans for the development, which indicated that 1.31 acres of stream channel and wetlands were impacted during construction of Phase I and II of the Brookfield Subdivision.

13. On August 27, 2008, the Corps referred this case to EPA for enforcement in accordance with the “Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning Federal Enforcement of the Section 404 Program of the Clean Water Act,” dated January 19, 1989.

14. The activities described in paragraphs 9 and 10 of this Consent Order were performed using common earthmoving vehicles and equipment, all of which were operated by Respondent and/or by persons acting on its behalf.

15. Respondent is a “person” within the meaning of section 502(5) of the CWA, 33 U.S.C. § 1362(5).

16. The discharged dredged or fill material referenced above is and was at all relevant times “dredged material” or “fill material” within the meaning of 33 C.F.R. § 323.2(c) or (e), respectively, and “pollutants” within the meaning of section 502(6) of the CWA, 33 U.S.C. § 1362(6).

17. The unnamed tributary of Boxelder Creek and its adjacent wetlands filled and disturbed by Respondent’s unauthorized activities provided various functions and values, including: water quality enhancement; flood attenuation; wildlife habitat for birds, mammals, reptiles, and amphibians; and aesthetics.

18. The vehicles and equipment referenced in paragraph 14 of this Consent Order are and were at all relevant times each a “point source” within the meaning of section 502(14) of the CWA, 33 U.S.C. § 1362(14).

19. The unnamed tributary of Boxelder Creek and its adjacent wetlands referenced above are and were at all relevant times “waters of the United States” within the meaning of 33 C.F.R. § 328.3(a) and therefore “navigable waters” within the meaning of section 502(7) of the CWA, 33 U.S.C. § 1362(7).

20. The placement of dredged or fill material into the unnamed tributary of Boxelder Creek and its adjacent wetlands constitutes the “discharge of pollutants” within the meaning of section 502(12) of the CWA, 33 U.S.C. § 1362(12).

21. Section 301(a) of the CWA, 33 U.S.C. § 1311, prohibits, among other things, the discharge of pollutants by any person into waters of the United States except as in compliance with section 404 of the CWA, 33 U.S.C. § 1344.

22. Section 404 of the CWA, 33 U.S.C. § 1344, sets forth a permitting system authorizing the Secretary of the Army, acting through the Chief of Engineers of the Corps, to issue permits for the discharge of dredged or fill material into navigable waters which are defined as waters of the United States.

23. 33 C.F.R. § 323.3(a) specifies that, unless exempted pursuant to 33 C.F.R. § 323.4, a permit issued by the Corps is required for the discharge of dredged or fill material into waters of the United States.

24. Respondent is not and never has been authorized by a permit issued pursuant to section 404 of the CWA, 33 U.S.C. § 1344, to conduct any of the activities described in paragraphs 9 and 10 of this Consent Order.

25. The activities conducted by Respondent and/or by persons acting on its behalf as described in paragraphs 9 and 10 of this Consent Order violate section 301 of the CWA, 33 U.S.C. § 1311. Each discharge of pollutants from a point source by Respondent into waters of the United States without the required permits issued pursuant to section 404 of the CWA, 33 U.S.C. § 1344, constitutes a violation of section 301(a) of the CWA, 33 U.S.C. § 1311(a). Each day the discharges remain in place without the required permits constitutes an additional day of violation of section 301(a).

26. Compensatory mitigation for the impacts resulting from the illegal discharges of dredged or fill material into waters of the United States at the Site, including the unnamed tributary of Boxelder Creek and its adjacent wetlands, can be achieved as a practical matter through commonly used methods of construction, digging, revegetation, and best management practices.

27. Activities to be carried out under this Order are remedial, not punitive, and are necessary to achieve the CWA's objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," as specified in section 101(a) of the CWA, 33 U.S.C. § 1251(a). The mitigation described in paragraph 26 of this Consent Order is appropriate to compensate for the actual and potential harm to water quality, aquatic habitat, and wildlife habitat caused by Respondent's unpermitted activities.

28. This Order was issued after consultation and coordination with the Corps' Omaha District.

VI. ORDER FOR COMPLIANCE

Based upon the foregoing FINDINGS OF FACT AND OF VIOLATION, and pursuant to the authority vested in the Administrator of the EPA pursuant to sections 308 and 309(a) of the CWA, 33 U.S.C. §§ 1318 and 1319(a), as properly delegated to the Assistant Regional Administrator of the Office of Enforcement, Compliance and Environmental Justice, EPA Region 8, it is hereby ORDERED and AGREED:

29. Respondent shall immediately terminate all unauthorized discharges of dredged or fill material, now and in the future, into waters of the United States, unless specifically authorized by the Corps under a valid permit issued pursuant to section 404 of the CWA, 33 U.S.C. § 1344. This prohibition includes all mechanical land clearing, dredging, filling, grading, leveling, installation of utilities, construction, and any other activities that result in a discharge of dredged or fill material into waters of the United States.

30. Upon EPA approval of the Mitigation Plan (Plan) required by paragraph 32 of this Consent Order, Respondent shall implement the Mitigation Plan in accordance with the terms of the approved Plan, including the implementation schedule contained therein.

31. All mitigation activities shall be conducted in accordance with the EPA-approved Mitigation Plan prepared by a consultant experienced in stream and wetland restoration and mitigation. The consultant also shall directly supervise all work performed pursuant to the EPA-approved Mitigation Plan. A statement of the consultant's qualifications, including professional resume and business references, shall be submitted to EPA within twenty-one (21) calendar days of receipt of this Consent Order.

32. Within sixty (60) calendar days of receipt of this Consent Order, Respondent shall submit to EPA for review, comment, and approval a Mitigation Plan, prepared by the consultant

referenced in paragraph 31 of this Consent Order, providing compensatory mitigation for all waters and wetlands that were impacted as a result of Respondent's unauthorized discharges of dredged or fill material at the Site.

33. The Mitigation Plan shall be prepared in accordance with "U.S. Environmental Protection Agency, Region 8 - Clean Water Act § 404 Enforcement: Removal/Restoration Plans and Habitat Mitigation/Monitoring Proposals," attached hereto as Exhibit A, and with the guidelines referenced in section 404(b)(1) of the CWA, 33 U.S.C. § 1344(b)(1), and set forth in 40 C.F.R. Part 230. In addition, the Mitigation Plan shall include:

- a. A detailed work plan and schedule for completion of all of the work and activities identified by the Mitigation Plan, including the application for any required permits, providing for completion of all aspects of the mitigation work no later than six (6) months after EPA approves the Mitigation Plan;
- b. Locations and delineations of all wetlands and other waters of the United States included in the mitigation project. The delineations shall be performed in accordance with the procedures in the "Corps of Engineers Wetlands Delineation Manual, January 1987 - Final Report," including the procedures for atypical situations, and subsequent interpretive guidance published by the Corps;
- c. Locations of the existing natural features and man-made improvements, including all surface disturbance, fills, channel excavations, road crossings, culverts, structures, and any other work, including a corresponding map (scale 1":100') of these locations;

- d. Grading, planting, and monitoring plans, measurable criteria for success of the mitigation, and provisions for proper disposal of any excess soils or other materials generated during construction and/or mitigation; and
- e. Detailed professional drawings of the mitigation site(s), including plan and profile drawings with control elevations for current conditions and, if different, proposed conditions.

34. EPA will review the Mitigation Plan and approve it, approve it with modifications, or reject it with comments. If EPA rejects the Mitigation Plan, Respondent shall, within thirty (30) calendar days of receipt of EPA's rejection letter, submit a revised plan that corrects the deficiencies identified by EPA.

35. Upon receiving EPA's written approval of the Mitigation Plan, Respondent shall make a timely and complete application for each permit necessary to implement the EPA-approved Plan and for conducting mitigation in accordance with the approved Plan, including the schedule specified therein. After obtaining all necessary permits, Respondent shall commence all mitigation activities in accordance with the approved Plan, including the schedule specified therein, and all granted permits. Respondent shall demonstrate that all necessary permits have been granted by providing complete copies of all such permits, and any amendments thereto, to EPA within seven (7) calendar days of issuance of each permit.

36. This Consent Order is not a permit or an authorization to place or discharge dredged or fill material in waters of the United States. Respondent shall consult with the Corps at the address and telephone number below to determine if any work to be performed pursuant to this Order requires a permit from the Corps under section 404 of the CWA, 33 U.S.C. § 1344. If

any such permit is required, Respondent shall obtain such permit(s) and provide a copy or copies to EPA pursuant to paragraph 35 of this Order prior to initiating any work.

U.S. Army Corps of Engineers
South Dakota Regulatory Office
28563 Powerhouse Road, Room 118
Pierre, SD 57501
Telephone: 605-224-8531
Facsimile: 605-224-5945

37. Respondent shall submit two (2) paper copies of the Mitigation Plan, one (1) electronic copy of the Mitigation Plan, all notifications, and related correspondence to:

Kenneth M. Champagne, 8ENF-W
U.S. Environmental Protection Agency, Region 8
1595 Wynkoop Street
Denver, CO 80202-1129
Telephone: 303-312-6608
Facsimile: 303-312-7518

A paper copy and electronic copy of the Mitigation Plan, all notifications, and related correspondence also shall be provided to:

Sheldon Muller, 8ENF-L
U.S. Environmental Protection Agency, Region 8
1595 Wynkoop Street
Denver, CO 80202-1129
Telephone: 303-312-6916
Facsimile: 303-312-6953

A paper copy and electronic copy of the Mitigation Plan also shall be provided to the Corps at the address noted in paragraph 36 of this Consent Order.

38. In addition to the notification requirements set forth in paragraph 37 of this Consent Order, after issuance of any Corps authorization for the mitigation work, Respondent shall submit all notifications and correspondence to the Corps in accordance with the terms and conditions in the Corps permit.

39. All plans (including, but not limited to, the Mitigation Plan), deliverables, reports, specifications, schedules, or attachments required by this Consent Order are, upon approval by EPA, incorporated into this Consent Order. Any non-compliance with such EPA-approved plans, deliverables, reports, specifications, schedules, or attachments shall be deemed a failure to comply with this Consent Order and subject to EPA enforcement.

40. If Respondent leases, subleases, or transfer control and/or ownership of any property, in whole or in part, where work is to be performed pursuant to the Mitigation Plan before it has fulfilled its obligations under this Consent Order, Respondent shall provide a copy of this Consent Order and the EPA-approved Mitigation Plan to the lessee, sublessee, or transferee not less than thirty (30) calendar days before the lease, sublease, or transfer. A lease, sublease, or transfer of such property interest shall not relieve Respondent of any responsibility in the Consent Order unless EPA, Respondent, and the lessee, sublessee, or transferee agree in writing to allow the lessee, sublessee, or transferee to assume such responsibility. Additionally, at least thirty (30) calendar days before such lease, sublease, or transfer, Respondent shall notify EPA regarding the details of the lease, sublease, or transfer at the addresses specified in paragraph 37 of this Consent Order.

41. Respondent shall allow, or use its best efforts to allow, access by any authorized representatives of EPA, the Corps, the Natural Resources Conservation Service, the U.S. Fish and Wildlife Service, the South Dakota Department of Environment and Natural Resources, and the South Dakota Department of Game, Fish, and Parks, or any of the agencies' contractors, upon proper presentation of credentials, to sites and records relevant to this Consent Order for any of the following purposes:

- a. To inspect and monitor progress of the activities required by this Consent Order;
- b. To inspect and monitor compliance with this Consent Order; and
- c. To verify and evaluate data and other information submitted to EPA.

42. This Consent Order shall in no way limit or otherwise affect EPA's authority, or the authority of any other governmental agency, to enter the Site, conduct inspections, have access to records, issue notices and orders for enforcement, compliance, or abatement purposes, or monitor compliance pursuant to any statute, regulation, permit, or court order.

43. This Consent Order shall be effective upon receipt by Respondent.

44. Respondent understands and acknowledges the following:

- a. Section 309(d) of the CWA, 33 U.S.C. § 1319(d), authorizes civil penalties of up to \$32,500 per day for each violation which occurred before January 12, 2009, and \$37,500 per day for each violation thereafter, of section 301 of the CWA, 33 U.S.C. § 1311, and for each violation of an order issued by the Administrator of EPA under section 309(a) of the CWA, 33 U.S.C. § 1319(a), including this Consent Order;
- b. Section 309(g) of the CWA, 33 U.S.C. § 1319(g), authorizes EPA to impose administrative penalties for violations of the CWA;
- c. Section 309(c) of the CWA, 33 U.S.C. § 1319(c), authorizes fines and imprisonment for willful or negligent violations of the CWA;.
- d. Issuance of this Consent Order shall not be deemed to be an election by the United States to forego any civil or criminal action to seek penalties,

finer, or other appropriate relief under the CWA for violations giving rise to the Consent Order;

- e. Compliance with the terms and conditions of the Consent Order shall not be construed to relieve Respondent of its obligation to comply with any applicable Federal, state, or local law or regulation; and
- f. Failure by Respondent to complete the tasks described herein in the manner and time frame specified pursuant to this Consent Order may subject Respondent to a civil action under section 309 of the CWA, 33 U.S.C. § 1319, for violation of this Consent Order.

45. Each party shall bear its own costs and attorneys fees in connection with this matter.

46. This Consent Order constitutes the final, complete and exclusive agreement and understanding among the parties with respect to the settlement embodied in this Consent Order. The parties acknowledge that there are no representations, agreements, or understandings relating to the settlement of this matter other than those expressly contained in this Consent Order.

FOR UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION 8,

Date: 9 June, 2009 By: Sharon L Kercher
for Eddie A. Sierra
Acting Assistant Regional Administrator
Office of Enforcement, Compliance and
Environmental Justice

In the Matter of Doeck, LLC
Docket No. CWA-08-2009-

FOR DOECK, LLC

Date: 5-8-09 By: Ronald Muth
Ronald Muth

Member
[Insert Company Membership Title Here]

Date: 5-8-09 By: [Signature]
Joseph Muth

Member
[Insert Company Membership Title Here]