

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

IN THE MATTER OF:)
)
) Docket No. CWA-07-2013-0023
DR. DANIEL J. MCGOWAN)
)
) Respondent)
)
) FINDINGS OF VIOLATION,
) ORDER FOR COMPLIANCE
) ON CONSENT
Proceedings under Section 309(a)(3) of the)
Clean Water Act, 33 U.S.C. § 1319(a)(3))
_____)

Preliminary Statement

1. The following Findings of Violation are made and Order for Compliance (“Order”) is issued pursuant to the authority of Section 309(a)(3) of the Clean Water Act (“CWA”), 33 U.S.C. § 1319(a)(3). The authority to take action under Section 309(a)(3) of the CWA, 33 U.S.C. § 1319(a)(3), is vested in the Administrator of the U.S. Environmental Protection Agency (“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.
2. Respondent is Dr. Daniel J. McGowan (“Respondent”).
3. EPA, together with Respondent, enters into this Section 309(a)(3) Order for Compliance on Consent in order to carry out the goals of the CWA, 33 U.S.C. § 1251 *et seq.*, to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”
4. It is the parties’ intent through this agreement to address discharges of pollutants by Respondent into the waters of the United States without a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, in violation of Section 301 of the CWA, 33 U.S.C. § 1311. Specifically, Section 301 of the CWA, 33 U.S.C. § 1311, provides that except as in compliance with certain specified provisions of the CWA, the unauthorized discharge of any pollutant into the waters of the United States by any person is unlawful.
5. By entering into this Order, Respondent (1) consents to and agrees not to contest EPA's authority or jurisdiction to issue or enforce this Order, (2) agrees to undertake all actions

required by the terms and conditions of this Order, and (3) consents to be bound by the requirements set forth herein. Respondent also waives any and all claims for relief and otherwise available rights or remedies to judicial or administrative review which Respondent may have with respect to any issue of fact or law set forth in this Order, including, but not limited to, any right of judicial review of this Order under the Administrative Procedure Act, 5 U.S.C. §§ 701-706.

Statutory and Regulatory Framework

6. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants except in compliance with, *inter alia*, Section 404 of the CWA, 33 U.S.C. § 1344.

7. 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.

8. Section 404 of the CWA, 33 U.S.C. § 1344, specifically requires a person to obtain a permit from the Secretary of the Army acting through the Chief of Engineers, commonly referred to as the United States Army Corps of Engineers (hereinafter “Corps”), for any discharge of “dredged or fill material” into the “navigable waters” of the United States.

9. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines “navigable waters,” in part, as the “waters of the United States,” which are defined at 40 C.F.R. § 232.2 and 33 C.F.R. Part 328, and which include tributaries to, waters of the United States.

10. 40 C.F.R. § 232.2 defines “Discharge of dredged material” as “the addition of dredged material into waters of the United States.”

11. 40 C.F.R. § 232.2 defines “dredged material” as “material that is excavated or dredged from waters of the United States.”

12. 40 C.F.R. § 232.2 defines “Discharge of fill material” as “the addition of fill material into waters of the United States.”

13. 40 C.F.R. § 232.2 defines “fill material” as material that “replaces any portion of the waters of the United States with dry land” or which “changes the bottom elevation of a water of the United States.”

14. Section 309(a) of the CWA, 33 U.S.C. § 1319(a), authorizes the issuance of an order against any person who violates Section 301 of the CWA, 33 U.S.C. § 1311, requiring such person to comply.

Factual Background

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

16. At all times relevant to this action, Respondent owned, operated, or otherwise controlled property in the NE ¼ of Section 32, Township 32 North, Range 22 West, Brown County, Nebraska (hereinafter “the Site”).

17. On December 28, 2011, Respondent and/or persons acting on his behalf authorized and/or directed the release of sediment from the dam located on Respondent’s property into Plum Creek.

18. On January 18, 2012, the Corps Omaha District issued Respondent a Cease and Desist letter ordering Respondent to cease discharges of sediment into Plum Creek.

19. On January 22, 2012, Respondent and/or persons acting on his behalf closed the gates on his dam.

20. On July 18, 2012, Respondent and/or persons acting on his behalf authorized and/or directed the release of sediment from the dam located on Respondent’s property into Plum Creek in violation of the Corps’ January 18, 2012 Cease and Desist letter.

21. On August 24, 2012, Representatives from the Corps, the Middle Niobrara Natural Resources District, the Nebraska Department of Natural Resources, and the Natural Resources Conservation Service conducted a site investigation of Respondent’s property and downstream properties. The agencies confirmed the above-referenced releases of sediment into Plum Creek and estimate that approximately 7.3 miles of stream have been impacted and that approximately 48.6 acres of stream have been “changed, altered, (or) damaged.”

22. Between August 13 and October 5, 2012, the Middle Niobrara Natural Resources District (“NRD”) received written complaints from all five landowners with properties located between Respondent’s dam and the Niobrara River.

23. The sediment discharged by Respondent into Plum Creek is a “pollutant” within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

24. Respondent’s dam is “point source” within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

25. The discharge of sediment into Plum Creek constitutes the “discharge of a pollutant” within the meaning of Section 501(12) of the CWA, 33 U.S.C. § 1362(12).

26. Plum Creek is a “water of the United States” within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7), 40 C.F.R. § 232.2 and 33 C.F.R. Part 328.

27. The sediment discharged by Respondent constitutes “dredged material” and/or “fill material,” and his actions constitute the “discharge of dredged material” and/or the “discharge of fill material” as those terms are defined in 40 C.F.R. §232.2.

28. Respondent's discharge of pollutants from a point source into waters of the United States was performed without a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, and therefore, these discharges violated Section 301 of the CWA, 33 U.S.C. § 1311.

29. Respondent did not obtain a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, prior to the performance of the work described herein, nor did Respondent perform the work described herein under any prior permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344.

A. FINDINGS OF VIOLATION

30. The facts stated in Paragraphs 13 through 29 above are herein incorporated.

31. Respondent's discharge of pollutants from a point source into waters of the United States occurred without a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, and, therefore, these discharges violated Section 301 of the CWA, 33 U.S.C. § 1311.

B. ORDER FOR COMPLIANCE ON CONSENT

Based on the FINDINGS OF FACT and FINDINGS OF VIOLATION set forth above, and pursuant to Section 309(a)(3) of the CWA, 33 U.S.C. § 1319(a)(3), EPA hereby ORDERS, and Respondent hereby AGREES to take, the actions described below:

32. Respondent shall apply for a CWA Section 404 permit within three months of the effective date of this Order.

33. Mitigation: Respondent shall pay \$35,000 to the Middle Niobrara Natural Resources District to create a fund for Plum Creek stream restoration projects to be applied to the area between Respondent's property and the Niobrara River. The funds shall be submitted, managed and distributed in accordance with Attachment A, which is fully incorporated into the terms of this Order. The payment to the Middle Niobrara Natural Resources District shall be made within thirty (30) days of the effective date of this Order.

General Provisions

34. Failure to comply with the terms of this Section 309(a)(3) Compliance Order may result in your liability for statutory civil penalties under Section 309(d) of the Act, 33 U.S.C. § 1319(d), as modified by 40 C.F.R. Part 19. Should EPA commence an action seeking penalties for violations of this Compliance Order, a United States District Court may impose civil penalties if the court determines that you have violated the Act and failed to comply with the terms of the Order.

35. This Order shall not constitute a permit under the CWA. Compliance with the terms of this Order shall not relieve Respondent of his responsibility to obtain any required local, state, and/or federal permits.

36. This Order does not constitute a waiver or a modification of any requirements of the CWA, 33 U.S.C. § 1251 *et seq.*, all of which remain in full force and effect. EPA retains the right to seek any and all remedies available under Sections 309(b), (c), (d) or (g) of the CWA, 33 U.S.C. § 1319(b), (c), (d) or (g), for any violation cited in this Order. EPA reserves the right to enforce the terms of this Order by initiating a judicial or administrative action pursuant to Section 309 of the CWA, 33 U.S.C. § 1319.

Access and Requests for Information

37. Nothing in this Order shall limit EPA's right to obtain access to, and/or to inspect property owned or operated by Respondent and/or to request additional information from Respondent, pursuant to the authority of Section 308 of the CWA, 33 U.S.C. § 1318 and/or any other authority.

Severability

38. If any provision or authority of this Order, or the application of this Order to Respondent, is held by federal judicial authority to be invalid, the application to Respondent of the remainder of this Order shall remain in full force and effect and shall not be affected by such a holding.

Parties Bound

39. This Order shall apply to and be binding upon the Respondent, his agents, successors and assigns. Respondent shall ensure that any directors, officers, employees, contractors, consultants, firms or other persons or entities acting under or for it with respect to matters included herein comply with the terms of this Order.

Effective Date

40. The terms of this Order shall be effective and enforceable on the Effective Date, which is the date this Order is signed by EPA. All time periods herein shall be calculated therefrom unless otherwise provided in this Order.

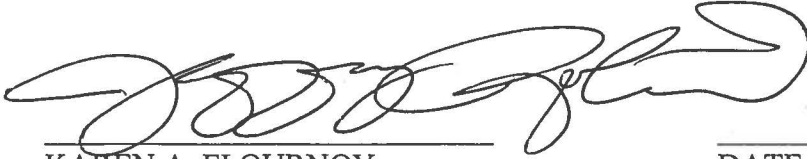
Termination

41. This Order shall remain in effect until a written notice of termination is issued by an authorized representative of EPA.

Signatories

42. The undersigned for each party has the authority to bind each respective Party to the terms and conditions of this Order. The Order may be signed in part and counterpart by each Party.


For the Complainant, United States Environmental Protection Agency, Region 7:



KAREN A. FLOURNOY
Director
Water, Wetlands and Pesticides Division

3/1/17

DATE



CHRIS MUEHLBERGER
Assistant Regional Counsel
Office of Regional Counsel

3.1.17

DATE

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For Respondent:



DR. DANIEL J. MCGOWAN

12/21/16
DATE

CERTIFICATE OF SERVICE

I certify that on the date noted below I mailed the foregoing Findings of Violation and Order for Compliance by certified mail, return receipt requested, to:

Mr. Stephen D. Mossman, Esq.
Mattson, Ricketts, Davies, Stewart & Calkins
134 South 13th Street, Suite 1200
Lincoln, Nebraska 68508

3.2.17

Date



Project Implementation Plan

Plum Creek Stream Restoration and Enhancement Fund

Project Sponsor

Middle Niobrara Natural Resource District
526 E. 1st Street
Valentine, NE. 69201

Contact: Mike Murphy
Telephone: 402-376-3241
E-mail: mjmurphy@qwestoffice.net

Project Partners

Dr. Daniel J. McGowan:
Provide funding.

Middle Niobrara Natural Resources District:
Administer funds to property owners on Plum Creek.

Barry and Sue Harthoorn
Jason Appelt
Jeffrey Scherer
Bobcat Wildlife Management Area
Property owners and accessors to the fund.

Project Area

This project focuses on stream restoration and/or enhancement projects on Plum Creek between the reservoir located on Dr. Daniel J. McGowan's property and the Niobrara River. A project area map is included at the end of this PIP for reference.

Funding

\$35,000

Introduction and Background

On _____, the U.S. Environmental Protection Agency, Region 7 ("EPA") reached a settlement agreement with Dr. Daniel J. McGowan for alleged Clean Water Act violations. Specifically, EPA alleged that Dr. McGowan discharged sediment from his dam and that the accumulation of sediment in Plum Creek resulted in significant damage to the Creek and the five property owners residing on the Creek between Dr. McGowan's reservoir and the Niobrara River.

Project Description

Settlement for the alleged violations includes funding by Dr. McGowan for Plum Creek restoration and enhancements ("the Fund") to be used by the following property owners:

Barry and Sue Harthoorn
Jason Appelt
Jeffrey Scherer
Greg Wilke
Bobcat Wildlife Management Area

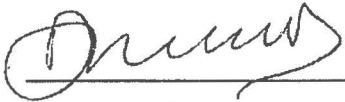
Property owners may access the fund between February 1, 2017 and January 31, 2018 to be used for stream restoration and/or enhancement projects including, but not limited to, sediment removal, erosion control (including plantings), and habitat restoration. Property owners may also access the fund for reimbursement of stream restoration and/or enhancement projects implemented after August 2012.

STIPULATIONS

- A. In order to access the Fund, the above-referenced property owners shall submit to the NRD a description of the project and a projected amount.
- B. For reimbursement for past projects, property owners shall submit to NRD a description of the project and documentation detailing project scope and costs.
- C. It is the responsibility of the Fund recipient that any proposed work is in compliance with all federal, state, and local laws, regulations, and ordinances.
- D. As a board member of the Middle Niobrara Natural Resources District, Greg Wilke will recuse himself from any decisions made by the Board concerning this Stream Restoration and Enhancement Fund.
- E. The NRD may, in its sole discretion, approve or disapprove the project.
- F. Once a project has been approved, the NRD must provide the funds to the property owner within four weeks of approval.
- G. Property owners will be responsible for all management and administration of the projects they receive funding for.
- H. Property owners may only use the funds for the approved project and must complete the project within one year of the date of receipt of funds.
- I. Nothing in this document shall be construed as a prohibition against the use of additional matching and/or private, nonfederal, and/or federal funds used in conjunction with the contribution provided such additional funds are used in accordance with applicable regulation and policy.

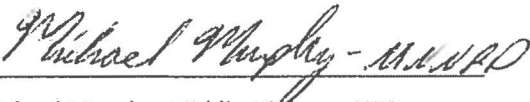
- J. Modification, amendment, or termination of this agreement as necessary shall be accomplished by the signatories in the same manner as the original agreement, and in coordination and concurrence with the EPA.
- K. After January 1, 2018, the Middle Niobrara NRD may use any remaining funds for any watershed improvement project within the NRD's area.

By signing this Project Implementation Plan, I agree to the terms and conditions of the Plan.



Dr. Daniel J. McGowan

2/6/17
Date



Michael Murphy, Middle Niobrara NRD

3/1/2017
Date