

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

Received by
EPA Region 7
Hearing Clerk

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)	
)	Docket No. CWA-07-2021-0054
Thomas Robrahn)	
)	
and)	
)	
Skillman Construction, LLC)	
)	COMPLAINT AND
Respondents)	CONSENT AGREEMENT /
)	FINAL ORDER
Proceedings under Section 309(g) of the)	
Clean Water Act, 33 U.S.C. § 1319(g))	
_____)	

COMPLAINT

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 (“Consolidated Rules”), 40 C.F.R. Part 22.

2. Complainant, the U.S. Environmental Protection Agency Region 7 (“EPA”) and Respondents 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) and (3) of the Consolidated Rules, 40 C.F.R. §§ 22.13(b) and 22.18(b)(2) and (3).

3. This Complaint and Consent Agreement/Final Order serves as notice that the EPA has reason to believe that the Respondents have violated Sections 301 and 404 of the CWA, 33 U.S.C. §§ 1311, 1344.

Parties

4. The authority to take action under Section 309(g) of the CWA, 33 U.S.C. § 1319(g), is vested in the Administrator of the EPA. The Administrator has delegated this authority to the Regional Administrator, EPA Region 7, who in turn has delegated the authority under Section 309(g) to the Director of the Enforcement and Compliance Assurance Division of EPA Region 7 (collectively referred to as the “Complainant”).

5. The Respondents in this case are Mr. Thomas Robrahn and Skillman Construction, LLC (“Respondents”).

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

10. 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.”

EPA’s General Allegations

11. Respondents are “persons,” as defined by Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

12. At all times relevant to this action, Respondents owned, operated, or otherwise controlled property bordering the Neosho River located in Section 26, Township 21 South, Range 15 East, near Burlington in Coffey County, Kansas (hereinafter “the Site”).

13. Beginning in at least 2017, Respondents began placing fill material, including broken concrete rubble and other demolition material, using heavy equipment such as a bulldozer into the Neosho River for bank stabilization purposes.

14. On April 21, 2020, Corps personnel conducted a site investigation and determined a CWA violation had occurred. The Corps observed approximately 400 cubic yards of broken concrete fill material below the ordinary high water mark of the Neosho River. The stream impacts total 240 linear feet.

15. On June 9, 2020, the Kansas City Corps District referred the results of the site investigation to EPA Region 7 for potential enforcement.

16. The section of the Neosho River near Burlington, Kansas and adjacent to the Site has known populations of Neosho Madtom (*Noturus placidus*), a federally-listed threatened species, as sampled and documented by the U.S. Fish and Wildlife Service.

17. Mr. Robrahn has previously obtained Section 404 permit authorizations for bank stabilization projects on the Neosho River, including an after-the-fact permit that was issued by the Corps in 2009 after consultation with the U.S. Fish and Wildlife Service that added required conditions to protect the Neosho Madtom.

18. The Neosho River is a “traditionally navigable water” and, therefore, 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.

19. The fill material discharged by Respondents into the Neosho River is a “pollutant” within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

20. The heavy equipment used to place the fill material into the Neosho River constitutes a “point source” within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

21. The discharge of the fill material into the Neosho River constitutes the “discharge of a pollutant” within the meaning of Section 502(12) of the CWA, 33 U.S.C. § 1362(12).

EPA’s Findings of Violation

22. The facts stated in Paragraphs 1 to 21 above are herein incorporated.

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

24. Respondents’ 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.

Penalty

25. As alleged by EPA above, and pursuant to Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), as adjusted pursuant to 40 C.F.R. § 19.4, for violations that occurred on or after November 2, 2015, where penalties are assessed on or after December 23, 2020, Respondents are liable for civil penalties of up to \$22,584 per day for each day during which the violation continues, up to a maximum of \$282,293.

CONSENT AGREEMENT

26. Respondents and EPA agree to the terms of this Consent Agreement/Final Order.
27. Respondents admit the jurisdictional allegations of this Complaint and Consent Agreement/Final Order and agrees not to contest the EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of this Consent Agreement/Final Order.
28. Respondents neither admit nor deny the factual allegations and legal conclusions asserted by the EPA in this Complaint and Consent Agreement/Final Order.
29. Respondents waive their right to contest any issue of fact or law set forth above, and their rights to appeal this Consent Agreement/Final Order.
30. Respondents and Complainant agree to conciliate the matters set forth in this Consent Agreement/Final Order 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.
31. Respondents consent to receive service of the filed Consent Agreement and Final Order electronically at the following email addresses:
- For Respondent Thomas Robrahn:
Robrahnlawoffice@terraworld.net
- For Respondent Skillman Construction, LLC:
mike@skillmanconst.com
32. The undersigned representatives of Respondents certify that they are fully authorized to enter the terms and conditions of this Consent Agreement/Final Order and to execute and legally bind Respondents to it.
33. Respondents understand and agree that this Consent Agreement/Final Order shall apply to and be binding upon Respondents and Respondents' agents, successors and/or assigns. Respondents shall ensure that all contractors, employees, consultants, firms or other persons or entities acting for Respondents with respect to matters included herein comply with the terms of this Consent Agreement/Final Order.
34. Respondents certify by the signing of this Consent Agreement/Final Order that the Site is scheduled to be in compliance with EPA's November 17, 2020, Administrative Order for Compliance on Consent, Docket No. CWA-07-2020-0175, which will bring the Site into compliance with Section 404 of the CWA, 33 U.S.C. § 1344.

Penalty Payment

35. Respondents agree that, in settlement of the claims alleged in this Consent Agreement/Final Order, Respondents shall pay a civil penalty of **Sixty Thousand Dollars (\$60,000)** to be paid in full no later than 30 days after the effective date of this Consent Agreement/Final Order pursuant to the authority of Section 309(g) of the CWA, 33 U.S.C. § 1319(g).

36. The penalty payment shall identify Respondents by name and docket number “CWA-07-2021-0054,” and shall be by certified or cashier’s check made payable to “Treasurer, United States of America,” and sent to:

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

or by alternate payment method described at <http://www.epa.gov/financial/makepayment>.

37. A copy of the check or other information confirming payment shall simultaneously be emailed to the following:

Regional Hearing Clerk
R7_Hearing_Clerk_Filings@epa.gov; and

Shane McCoin, Attorney
mccoin.shane@epa.gov

38. Respondents agree that no portion of the civil penalty or interest paid by Respondents pursuant to the requirements of this Consent Agreement/Final Order shall be claimed by Respondents as a deduction for federal, state, or local income tax purposes.

39. Interest on any late payment will be assessed at the annual interest rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717. The interest will be assessed on any overdue amount from the due date stated in Paragraph 35 above through the date of payment. Failure to pay the civil penalty when due may result in the commencement of a civil action in Federal District Court to collect said penalty, together with costs or interest.

Effect of Settlement and Reservation of Rights

40. Respondents’ payment of the entire civil penalty pursuant to this Consent Agreement/Final Order resolves all civil and administrative claims pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), for alleged violations identified in this Complaint and Consent

Agreement/Final Order. Complainant reserves the right to take any enforcement action with respect to any other violations of the CWA or any other applicable law.

41. The effect of settlement described above is conditional upon the accuracy of the Respondents' representations to the EPA, as memorialized in this Consent Agreement/Final Order.

42. Nothing contained in this Consent Agreement/Final Order shall alter or otherwise affect Respondents' obligations to comply with all applicable federal, state and local environmental statutes and regulations and applicable permits.

43. Notwithstanding any other provision of this Consent Agreement/Final Order, the EPA reserves the right to enforce the terms of this Consent Agreement/Final Order by initiating a judicial or administrative action pursuant to Section 309 of the CWA, 33 U.S.C. § 1319, and to seek penalties against Respondents or to seek any other remedy allowed by law.

44. With respect to matters not addressed in this Consent Agreement/Final Order, the EPA reserves the right to take any enforcement action pursuant to the CWA and its implementing regulations, or any other available legal authority, including without limitation, the right to seek injunctive relief, penalties and damages.

General Provisions

45. The Parties acknowledge that this Consent Agreement/Final Order is subject to the 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.

46. Pursuant to 40 C.F.R. § 22.31(b), this Consent Agreement/Final Order shall be effective after signature by the authorized regional official and upon filing with the Regional Hearing Clerk, U.S. Environmental Protection Agency, 11201 Renner Boulevard, Lenexa, Kansas 66219. All time periods herein shall be calculated therefrom in calendar days unless otherwise provided in this Consent Agreement/Final Order.

47. The state of Kansas has been provided an opportunity to consult with Complainant regarding this matter in accordance with the requirements of 40 C.F.R. § 22.38(b) and Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1).

48. The headings in this Consent Agreement/Final Order are for convenience of reference only and shall not affect interpretation of this Consent Agreement/Final Order.

49. Respondents and Complainant agree that this Consent Agreement/Final Order may be signed electronically in part and counterpart.

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

Diane Huffman
Acting Director
Enforcement and Compliance Assurance Division

Shane E. C. McCain
Office of Regional Counsel

For Respondent Thomas Robrahn


SIGNATURE

May 13, 2021
DATE

Thomas F. Robrahn
NAME/TITLE

For Respondent Skillman Construction LLC


SIGNATURE

5-18-2021
DATE

Mike A Skillman VP
NAME/TITLE

FINAL ORDER

Pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), and 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 22, the foregoing Consent Agreement resolving this matter is hereby ratified and incorporated by reference into this Final Order.

The Respondents are ORDERED to comply with all of the terms of the Consent Agreement. In accordance with 40 C.F.R. § 22.31(b), the effective date of the foregoing Consent Agreement and this Final Order is the date on which this Final Order is filed with the Regional Hearing Clerk.

IT IS SO ORDERED.

Date

Karina Borromeo
Regional Judicial Officer

Certificate of Service

I certify a true and correct copy of the Complaint and Consent Agreement / Final Order was sent this day in the following manner to the addressees:

Copy by email to representatives for Respondent:

Thomas Robrahn
Robrahnlawoffice@terraworld.net

Skillman Construction, LLC
mike@skillmanconst.com

Rustin Kimmell, Attorney
rustin@kimmell-law.com

For Complainant, U.S. Environmental Protection Agency Region 7:

garcia.delia@epa.gov
Delia Garcia, PhD, Enforcement and Compliance Assurance Division

mccoin.shane@epa.gov
Shane McCain, Office of Regional Counsel

Date

Signature